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FEDERAL DECISIONS.

CASES ARGUED AND DETERMINED

IN THE

SUPREME, CIRCUIT AND DISTRICT COURTS

OF THE

TO SUBSCRIBERS.

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Volume 20, with 850 to 900 pages, containing I, except Insurance, and all of J, is now in hands of printers. Volume 21, about 900 pages on Land, and volume 22, Landlord and Tenant, Limitations and all other topics in L, with all topics under M, except Maritime Law, in 875 to 900 pages, are both promised on time. Volume 23, to contain Maritime Law and probably all topics under N and O is nearly ready, while volume 24, on Pleading and Practice, is two-thirds edited. Volumes 26 to 30 are all under way, with some of the editorial work already finished on each.

St. Louis, September 1, 1887.

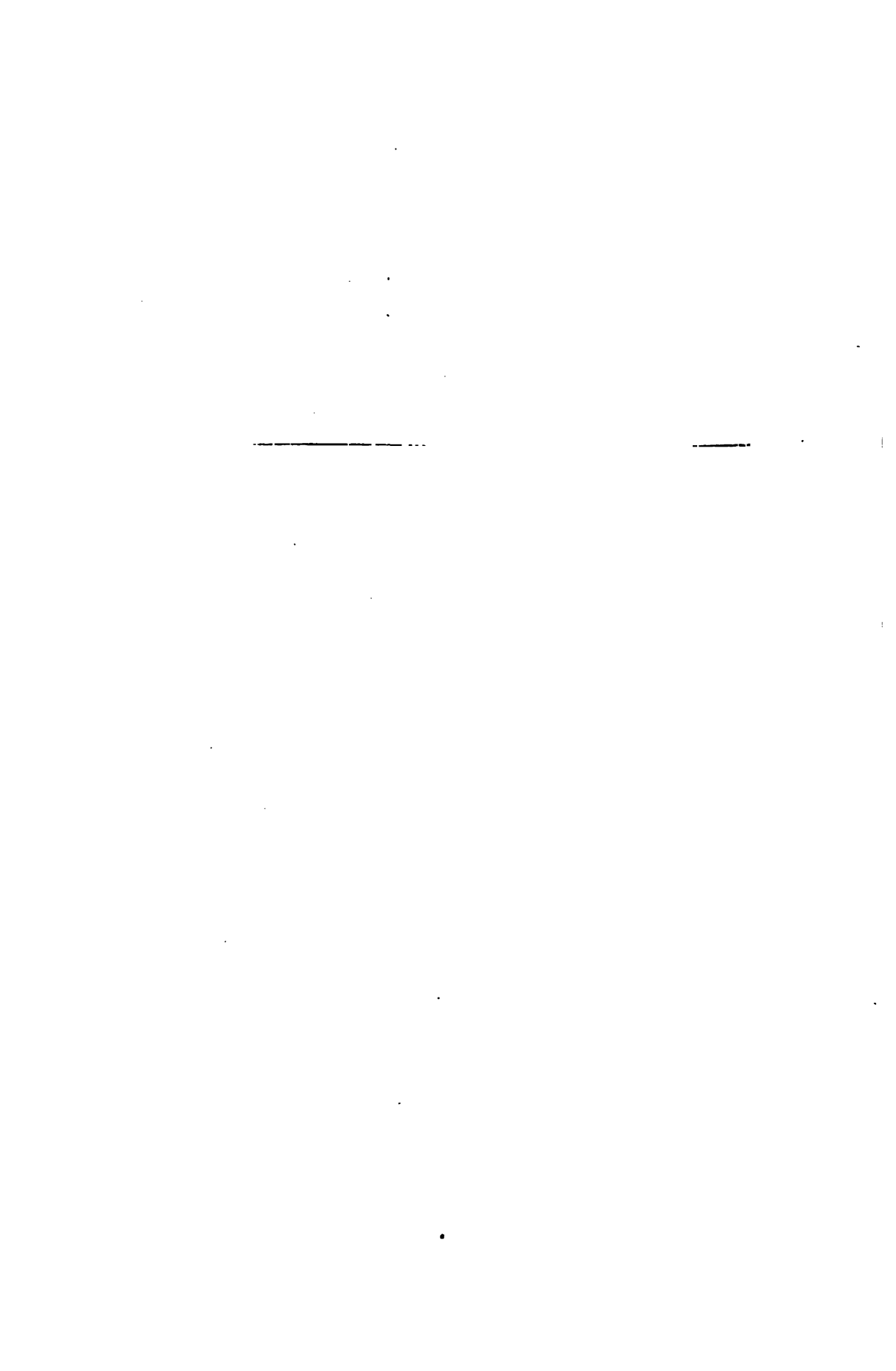
THE GILBERT BOOK CO.

*Author of an Index to the United States Supreme Court reports;
also Indexes to the Reports of Illinois, Ohio, Iowa, Missouri
and Tennessee, a Digest of the Texas Reports, and
local works on Pleading and Practice.*

VOL. XIX.

INSURANCE.

ST. LOUIS, MO.:
THE GILBERT BOOK COMPANY.
1887.



FEDERAL DECISIONS.

CASES ARGUED AND DETERMINED

IN THE

SUPREME, CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

COMPRISING

THE OPINIONS OF THOSE COURTS FROM THE TIME OF THEIR ORGANIZATION TO
THE PRESENT DATE, TOGETHER WITH EXTRACTS FROM THE OPIN-
IONS OF THE COURT OF CLAIMS AND THE ATTORNEYS-
GENERAL, AND THE OPINIONS OF GENERAL
IMPORTANCE OF THE TERRI-
TORIAL COURTS.

ARRANGED BY

WILLIAM G. MYER,

*Author of an Index to the United States Supreme Court Reports;
also Indexes to the Reports of Illinois, Ohio, Iowa, Missouri
and Tennessee, a Digest of the Texas Reports, and
local works on Pleading and Practice.*

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EXPLANATORY.

1. The cases in this work are arranged by subjects, instead of chronologically. They are assigned to the various general heads of the law, and each subject is divided and subdivided, for convenience of arrangement and reference, with head-notes, or table of contents, at the head of each subject, the same as an ordinary digest.

2. At the head of each division of a subject will be found a digest or summary of the points of law in the cases assigned to such division. This SUMMARY is confined exclusively to the statement of the points of law applicable to the particular division under which the case is published, other points of law in the case, if any, being transferred to other subjects, or to other subdivisions of the same subject. Where points in a case are carried to another division of a subject, they are put into the foot-notes, or notes following the cases, and reference is made to the case by section numbers in parenthesis at the end of the section.

3. The cases in full are arranged, generally, according to the order of the sections of the SUMMARY. Where the court states the facts of the case, it is so indicated by the use of the words STATEMENT OF FACTS at the beginning of the opinion. Where it is necessary to state the facts apart from the opinion, the statement is made as brief as possible, and is confined to the facts necessary to enable the reader to understand the points decided. The cases are also divided into convenient paragraphs, with a brief statement at the beginning of each paragraph of the point of law discussed or decided. Reference is here had to the *italic* sections scattered through the opinion. These take the place of the syllabus usually placed at the head of the opinion, and, besides bringing out every point of law actually decided, in some instances call attention to a review of authorities, as well as various points of law which would ordinarily be classed as *dicta*.

4. At the end of a series of cases is a digest of points applicable to the particular subdivision of the subject. This digest matter is obtained from four sources: 1st. Cases assigned originally to the general head, but digested and thrown out in the final arrangement, not to appear in full in any part of the work. 2d. Points taken from cases which will appear in full under some other division of the same subject. 3d. Points taken from cases which are assigned to some other general head. 4th. A digest of cases from state reports, law periodicals, and the opinions of the Court of Claims and the Attorneys-General.

5. Cases that will not appear in full in any part of the work are denoted by a *star* following the name of the case, thus, *DOR v. ROE*.* The tables of cases will also contain a similar designation of rejected cases, so that in consulting them the reader will readily see whether he is referred to a case in full or only a digest.

6. The *italic* matter at the head of the SUMMARY takes the place of the side-heads, or catch-words, usually prefixed to the sections, and is intended as an index to the contents of the SUMMARY. At the end of each section of the SUMMARY the name of the case of which the section is a digest is given, followed by the numbers of the sections into which the case is divided, so that after the reader has read the section of the SUMMARY, and found that it is what he wants, he can at once turn to the case in full.

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Abbott's Admiralty	Abb. Adm.	Lowell	Low.
Abbott's U. S.	Abb.	McAllister.....	McAl.
Albany Law Journal	Alb. L. J.	McCahon	McCahon.
American Law Register...	Am. L. Reg.	McCrary	McC.
Baldwin	Bald.	McLean	McL.
Bee	Bee.	MacArthur	MacArth.
Benedict	Ben.	Marshall	Marsh.
Bissell	Biss.	Martin	Martin (N. C.).
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Bond	Bond.	ter	N. B. R.
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Central Law Journal	Cent. L. J.	Otto	Otto.
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Dallas	Dal.	Taney	Taney.
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Deady	Deady.	Wallace	Wall.
Dillon	Dill.	Wallace's Circuit Court	Wall. C. C.
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Fisher's Patent Cases	Fish. Pat. Cas.	Ware	Ware.
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Gilpin	Gilp.	Wheaton	Wheat.
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Hoffman	Hoff.	Woods.....	Woods.
Holmes	Holmes.	Woodbury & Minot	Woodb. & M.
Howard	How.	Woolworth	Woolw.
Hughes	Hughes.	Wyoming Territory	Wyom. T'y.
Law and Equity Reporter..	Law & Eq. Rep.	Van Ness	Van Ness.
Legal Gazette Reports	Leg. Gaz. R.		

FEDERAL DECISIONS.

INSURANCE.*

- A. GENERAL PRINCIPLES.
- B. MARINE INSURANCE.
- C. FIRE INSURANCE.
- D. LIFE INSURANCE.
- E. ACCIDENT INSURANCE.

A. GENERAL PRINCIPLES.

[For special application of the following, see corresponding heads under MARINE, FIRE, LIFE and ACCIDENT INSURANCE.]

- | | |
|---|--|
| I. CREATION, NATURE, AND REQUISITES OF THE CONTRACT, §§ 1-26. | VIII. ARBITRATION CLAUSE, §§ 109-112. |
| II. CONDITIONS AND FORFEITURES, §§ 27-34. | IX. PLEADING, PRACTICE AND EVIDENCE (including Usage), §§ 113-137. |
| III. WARRANTY, REPRESENTATION AND CONCEALMENT, §§ 35-49. | X. RE-INSURANCE, §§ 138-148. |
| IV. CANCELLATION OF POLICY, §§ 50-73. | XI. AGENTS, §§ 149-170. |
| V. REFORM OF POLICY, §§ 74-88. | XII. MUTUAL COMPANIES, §§ 171-177. |
| VI. PROOFS OF LOSS, §§ 89, 90. | XIII. FOREIGN COMPANIES, §§ 178-211. |
| VII. LIMITATION CLAUSE, §§ 91-108. | XIV. BANKRUPTCY, §§ 212-239. |
| | XV. INTEREST AND DAMAGES, §§ 240, 241. |

I. CREATION, NATURE, AND REQUISITES OF THE CONTRACT.

§ 1. In general.—No precise form of words is required for a contract of insurance; if the words used express it, with the intention of the parties, that is enough. *Scriba v. Insurance Co.*,* 2 Wash., 107.

§ 2. The contract must have a subject-matter to act upon; thus, to make insurance upon a cargo, there must have been such a cargo. The risk, too, must have begun. *Ibid.*

§ 3. A person went to the office of an insurance company and requested of a person at a desk, whom he could not afterwards identify, that the policy on a vessel at sea be renewed. He was then told that the secretary had gone home, and that the matter would be attended to the first thing in the morning. *Held*, that this is not sufficient evidence of a completed contract (i. e., of an agreement assented to by both parties at any one time) to be submitted to a jury. *Insurance Co. v. Lyman*,* 15 Wall., 671.

§ 3a. If one merchant is in the habit of effecting insurances for his correspondent, and is directed to make an insurance, and neglects to do so, he is himself answerable for the losses, as insurer, and is entitled to a premium. *Morris v. Summerl*,* 2 Wash., 203.

§ 4. An offer of insurance by mail, and an answer of acceptance, mailed in due course, make a complete contract. *Tayloe v. Merchants' Ins. Co.*, 9 How., 390.

§ 5. The contract is complete, and the company becomes liable, from the date of mailing; and knowledge of acceptance is not necessary. *Ibid.*

§ 6. Verbal insurance.—An insurance policy is not required by the statute of frauds or by the law merchant to be in writing. *Commercial Ins. Co. v. Union Ins. Co.*, 2 Curt., 524; *S. C.*, 19 How., 321. See §§ 128, 129, 1140-1142.

§ 7. Unrestricted authority to negotiate a contract of insurance by issuing a policy includes authority to make a valid preliminary contract for issuing one. *Humphrey v. Hartford Ins. Co.*,* 15 Blatch., 504.

* Edited by MELVILLE M. BIGELOW, Esq., of Boston, Mass.

§ 8. The local agent of an insurance company has power to bind his principal by a verbal contract of insurance, to be renewed from time to time during the assured's ownership of the property. *Baubie v. Aetna Ins. Co.*, * 2 Dill., 156; *Taylor v. Germania Ins. Co.*, * id., 282.

§ 9. A local agent of an underwriter can bind his principal by a verbal agreement that the premium may be paid on the first day of the month following; and if such day be Sunday, and the property was burned on that day, tender of the premium on the following day would be good. *Taylor v. Germania Ins. Co.*, * 2 Dill., 282, citing *Hammond v. American Life Ins. Co.*, 10 Gray, 806.

§ 10. The charter of the defendant does not disable it to insure verbally. *Hening v. United States Ins. Co.*, * 2 Dill., 26.

§ 11. Though the charter of an insurance company require that policies shall be signed and sealed, a preliminary parol contract may be made by an agent of the company binding the company to issue such a policy. *Insurance Co. v. Colt*, * 20 Wall., 560.

§ 12. Where an insurance agent fills up a policy in pursuance of an agreement to issue, he holds the same in trust for the assured; and the assured may sue upon it. *Ibid.*

§ 13. A court of equity having jurisdiction can decree a specific performance of the contract of insurance where no policy has been issued. *Union Ins. Co. v. Commercial Ins. Co.*, * 2 Curt., 524; S. C., 19 How., 321; *Herbert v. Mutual Ins. Co.*, 12 Fed. R., 807.

§ 14. A parol agreement to insure is binding on the insurer if all the particulars of the agreement are understood, and this notwithstanding a state statute providing that valid policies of insurance must be signed by the president of the insurance company, and countersigned by the secretary. The statute has no application to agreements to make insurance, but applies only to the formal execution of the policies. *Union Ins. Co. v. Commercial Ins. Co.*, * 2 Curt., 524; S. C., 19 How., 321; *Constant v. Insurance Co.*, * 8 Wall. Jr., 313; S. C., 1 Am. L. Reg., N. S., 116.

§ 15. A promise by a merchant's factor that he would write to his principal to get insurance does not bind the principal to insure. *Randolph v. Ware*, 8 Cr., 503.

§ 16. Special case stated.—On Saturday, December 24, an agent of the plaintiff presented an application for re-insurance, offering the defendant three per cent. for a policy for six months from that day, at noon. The defendant (by its president) said that it would take the risk at three and one-half per cent., which the agent said he had no authority to pay. Sunday being Christmas, Monday the 26th was generally observed as a holiday, and general business was suspended at the defendant's office; but defendant's president went there for a short time, and while there the applicant's agent called again, and (having received authority) again presented the same application, which he had taken away, said he was willing to pay three and one-half per cent., and made a correction accordingly in his application. The president assented, "but informed the agent," as the answer of the defendant alleged, "that no business was done at the office on that day; that on the next day he would attend to it," and thereupon the president took from the agent and retained the application. The property insured was destroyed on the night of the same day. *Held*, that taking the answer of the defendant most strongly against defendant, it amounted to an admission that the parties had contracted for a policy to be afterwards issued. *Held*, also, that it was not material that neither the plaintiff's agent nor the defendant's president signed the application, in view of evidence that such a thing was unusual in the large practice of the plaintiff's agent. *Union Ins. Co. v. Commercial Ins. Co.*, * 2 Curt., 524; S. C., 19 How., 321.

§ 17. Powers of agents.—Though the agents of an insurance company are instructed not to deliver policies until payment of premium, or the sum due will be charged to them, the company will be bound by the delivery of a policy by an agent upon credit. *Miller v. Life Ins. Co.*, 12 Wall., 302.

§ 18. Payment of premium may be made by check upon request of an agent, who has authority to fix the mode of payment. *Taylor v. Merchants' Fire Ins. Co.*, 9 How., 390.

§ 19. Where an agent is supplied with policies signed in blank by the president and secretary of an insurance company, with authority to make contracts of insurance, and he does so in a particular case, and receives the premium and issues a policy, the company are bound; nor is the case affected by the fact that the application for insurance contains a memorandum that the insurance is to take effect when the general agent of the company approves of it, provided no notice is given to the assured before loss of any disapproval by the general agent, though the application is in fact disapproved by him and returned to the subagent. *Insurance Co. v. Webster*, * 6 Wall., 129. See *infra*, XI.

§ 20. Words of the contract.—It is not material whether the written words of a policy of insurance are inserted in the body of the instrument, or written on its face or on the margin of it; but they must be there in fact, and must have been written before the execution of it, or by mutual consent after the execution, and before the commencement of the risk. They then form parts of the contract; it having been determined, from the usages of insurances, that the

parties contracted in reference to them, and that the signature and acceptance of the policy was proof that they had done so. *Brittan v. Barnaby*, 21 How., 536.

§ 21. *Contract of settlement.*—An unsigned note delivered by the secretary of an insurance company to persons negotiating for insurance, and saying in substance that “the directors are willing to accede to Messrs. Head & Amory’s proposition, namely, to settle the policy on merchandise at twenty-five per cent.,” etc., *held* not to be such an acceptance of H. & A.’s proposition as to form an absolute agreement obligatory on the insurance company. *Head v. Providence Ins. Co.*, 2 Cr., 137.

§ 22. *Payment of premium.*—If a policy of insurance provide that it shall be void in the event of the non-payment of premium when due, without giving notice of its termination, it is self-forfeiting upon a failure to pay the premium or any obligation given for it, and this without the necessity of returning such premium or obligation. But where a draft of a third person in such a case is given, payable at a future day, for premium, it is the duty of the insurance company, if it has not transferred the draft, to present it for acceptance, and upon its dishonor to give notice to the drawer, unless such steps are duly excused, and if such steps are excused, then to present the draft at maturity for payment and take the proper steps, in case of dishonor, to fix the liability of the drawer. And it seems that if such steps are not taken, the amount of such draft unpaid cannot be deducted from the sum due on the policy, as unpaid premium. *Pendleton v. Knickerbocker Ins. Co.*, * 5 Fed. R., 238. See S. C., 7 Fed. R., 169.

Further as to payment of premium see Title I, under Marine, Life, and Fire Insurance, respectively; also II, *infra*.

§ 22a. Where the assured was prevented from paying his premiums by the intervention of the late civil war, but as soon as the war closed offered to pay up all back premiums, which offer the company refused, *held*, that this was a repudiation of the contract on the part of the company, and that a right of action then accrued, although the policy was payable only on the death of the assured, and that the plaintiff was entitled to recover the damages actually sustained. *Hancock v. N. Y. Life Ins. Co.*, * 13 Am. L. Reg. (N. S.), 103.

23. *Cash premium not required.*—An insurance company authorized by its charter to issue policies as other (non-mutual) companies do can take notes for premiums. *Cary v. Nagel*, 2 Biss., 244.

24. *Indorsement on a policy* that all receipts for premiums must be signed by the president and actuary of the company merely cautions the assured not to pay an agent without getting such receipt. *Insurance Co. v. Davis*, * 95 U. S., 425.

§ 25. *Insurable interest.*—The burden of proof with regard to insurable interest, in an action by an underwriter to recover back insurance money paid to the assured, is upon the underwriter. *Hooper v. Robinson*, 98 U. S., 528 (§§ 287-92). As to insurable interest, see further Title I, under Marine, Fire and Life Insurance, respectively; also § 71.

§ 26. *Lex loci.*—A policy of insurance by a Wisconsin company, which by its terms requires countersignature and delivery, in order to become a valid obligation, is governed by the law of the state in which it is countersigned and delivered. If the Wisconsin company for any reason could not do business in that state the policy is null and void. *Northwestern Ins. Co. v. Elliott*, 7 Saw., 30. An insurance company having its principal office in New York had agents in Baltimore, who received and transmitted applications for insurance and notes for premiums, and through whom the company paid losses and delivered policies. *Held*, that a policy executed by the company in New York, and delivered through its agents to parties in Baltimore, was a New York contract, to be construed under the laws of New York. *Wright v. Ins. Companies*, * 6 Am. L. Reg. (O. S.), 485.

II. CONDITIONS AND FORFEITURES.

[See Title I, under Fire and Life Insurance respectively, especially under the latter; also II, under Marine Insurance.]

§ 27. *Performance of conditions precedent* in policies of insurance may be waived. *In re Firemen’s Ins. Co.*, 3 Biss., 464.

§ 28. *Construction.*—Conditions are to be strictly construed. *Catlin v. Springfield Ins. Co.*, 1 Sumn., 434 (§§ 1435-42).

§ 29. The law does not favor forfeitures, and provisions for forfeitures in contracts must be strictly construed. Provisions for forfeitures are inserted for the benefit of the company, and are to be strictly construed. They may be waived by the company, and courts will find a waiver on slight evidence. *Young v. Mutual Life Ins. Co.*, 2 Saw., 330 (§§ 567-69). See *American Basket Co. v. Farmville Ins. Co.*, * 3 Hughes, 251.

§ 30. Conditions and warranties in policies, especially if numerous and in fine print, should

be strictly construed against the underwriter. *Stout v. Commercial Assur. Co.*, 12 Fed. R., 554 (§§ 1296-98).

§ 31. Consideration of the subject of conditions and promissory warranties, and the construction to be placed upon them, when open to construction. *James v. Lycoming Ins. Co.*, 4 Cliff., 272 (§§ 1332-40).

§ 32. Conditions in small type.—The conditions of a policy of insurance, printed in small type upon the back of it, are not parts of the contract to bind the assured unless they were distinctly called to his attention when the policy was granted. *Bassell v. American Ins. Co.*, * 2 Hughes, 581.

§ 33. Intention to waive a provision of law must be clear.—All laws in existence are necessarily referred to in all contracts made under such laws, and no contract can change the law. However, where no principle of public policy is concerned, a party is at liberty to waive a statutory provision intended for his benefit. But the intention to waive must be clear. So, where a party accepted a life insurance policy which contained stipulations that it should be void if containing any misrepresentations, and a state statute made such misrepresentations unavailing to avoid the policy unless directly contributing to the contingency on which the policy was to become due and payable, *held*, that to hold that the statutory provision was waived by the parties would be to defeat the very end the legislature had in view. *White v. Connecticut Ins. Co.*, * 4 Dill., 183.

§ 34. Waiver of a stipulation can only be made with knowledge of the facts; if the assured has already deceased and the fact is not known to the underwriter's agent in the transaction, there is no waiver. *Bennecke v. Insurance Co.*, * 105 U. S., 335.

III. WARRANTY, REPRESENTATION AND CONCEALMENT.

§ 35. Warranty a condition.—Every warranty in a policy of insurance, whether express or implied, is a condition precedent. *Craig v. United States Ins. Co.*, * Pet. C. C., 410.

§ 36. Same — Construction.—When a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction, rendering it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding contract, the court should lean against that construction which imposes upon the assured the obligations of a warranty. *National Bank v. Insurance Co.*, * 95 U. S., 673.

§ 37. Statements in any respect untrue.—A policy provided that if any of the statements of the applicant were in any respect untrue, the contract should be void. *Held*, that there could be no inquiry whether the statements in question were known by the applicant to be untrue, or whether they were material, but that the burden of proof was upon the underwriter in such case. *Holabird v. Atlantic Ins. Co.*, 2 Dill., 167 (§§ 1544-45).

§ 38. A policy provided that if the answers of the applicant were in any respect false, the contract should be invalid. In answer to certain questions, the applicant said "the above is as near correct as I remember." *Held*, that he had only stipulated for the integrity and approximate accuracy of his answers, and that the policy was not avoided unless the answers or some of them were untrue in any respect materially affecting the risk, and the assured knew of their incorrectness. *Aetna Ins. Co. v. France*, 94 U. S., 561 (§§ 1550-52).

§ 39. Application — Representation.—A party making application for life insurance is bound by the statements made in his application, if he knows or has an opportunity to know what such statements are. *Lee v. Guardian Life Ins. Co.*, * 2 Cent. L. J., 495.

§ 40. Every one who signs an application for insurance is presumed to know what he signed, and is held thereto, unless he can show that he answered truthfully and the answers were not written down as he answered, and that he signed it believing the answers to have been properly written down. *Fletcher v. New York Life Ins. Co.*, * 8 McC., 606.

§ 41. A provision in a policy that false representations in the application shall avoid the policy makes the application a part of the contract, and is binding on the insured. *Lee v. Guardian Life Ins. Co.*, * 2 Cent. L. J., 495.

§ 42. Materiality.—To avoid a policy a misrepresentation must have been material. *Clason v. Smith*, * 3 Wash., 156; *Hodgson v. Marine Ins. Co.*, * 5 Cr., 100; *Livingston v. Maryland Ins. Co.*, * 6 Cr., 274 (§§ 391-94).

§ 43. If representations are materially untrue, the policy is not binding whether the loss was due to that fact or not. *Nicoll v. American Ins. Co.*, * 3 Woodb. & M., 529.

§ 44. The test of materiality is whether the fact bears upon the risk and the rate of premium. *Ibid.*

§ 45. To constitute a representation there should be an affirmation or denial of some fact, or an allegation which would plainly lead the mind to the same conclusion. *Livingston v. Maryland Ins. Co.*, 7 Cr., 506 (§§ 395-408).

§ 46. Expression of opinion by the assured, or an expectation implying some ground therefor, cannot amount to a representation. *Ibid.*

§ 47. Statements not in the contract of insurance are representations, not warranties. *Nicoll v. American Ins. Co.*, * 8 Woodb. & M., 529.

§ 48. Materiality.—A warranty must be complied with in the smallest particular, material or immaterial; while it is enough for a representation that it is true in all material respects. *Ibid.*

§ 49. Two sets of representations.—If a policy of insurance is returned and delivered after two sets of applications and representations have been made, at different times, the last set is to be deemed the one upon which the policy is issued. *Ibid.*

IV. CANCELLATION OF POLICY.

SUMMARY — What amounts to cancellation, §§ 50-53.—Notice to broker who obtained policy, §§ 53, 54.—Cancellation in equity, § 55.

§ 50. R., acting as agent of the plaintiff, procured insurance through C., defendant's agent, upon a hotel, the policy allowing cancellation of the contract by agreement of parties. R. was notified by C. of a desire of defendant to reduce the amount of the risk, C. proposing to put the risk removed in the L. company. R. declined to have the risk divided, but said the policy might be canceled and the whole risk put in the L. company, inclosing the policy for the purpose. C., on receiving the policy, wrote "canceled" upon it, but did not place the risk in any other company or notify R. what he had done. Two days later the hotel was burned. *Held*, that the policy was in force. *Poor v. Hudson Ins. Co.*, §§ 56-59.

§ 51. A policy provided that the insurance might be ended by the underwriter "at any time, on giving notice to that effect, and refunding a ratable proportion of the premiums." *Held*, that mere notice of the termination of the risk was not enough. *Ibid.*

§ 52. Counsel for defendant requested an instruction that the letter of C., so far as containing a proposal to cancel or reduce defendant's policy, was written as defendant's agent, but that the proposal in the same letter to re-insure in the L. company was made by him as agent of that company, and that the letter of R. was an acceptance of the proposal to cancel, without including the one to re-insure. This request was declined. *Held* correct. *Ibid.*

§ 53. The plaintiffs instructed N., an insurance broker, to effect insurance for them on lumber. N. employed A., also an insurance broker, to effect the insurance, which he did. The policy issued through A. contained the following language: "This insurance may be terminated at any time . . . at the option of the company on giving notice to that effect. . . . Any person other than the assured, who may have procured this insurance, . . . shall be deemed to be the agent of the assured named in this policy and not of the company under any circumstances whatever, or in any transaction relating to this insurance." *Held*, that notice to A. by the company of the termination of the risk was good. This ruling confirmed by evidence of custom for the underwriter in such cases to notify the broker who procured the insurance; evidence of such custom being admissible for the purpose of throwing light upon the intention of the parties in the use of the quoted language. *Grace v. American Ins. Co.*, §§ 60-63.

§ 54. Evidence of such custom having been received, the plaintiffs offered to show that when notice is so given to the broker, the understanding is that it shall not take effect until the lapse of reasonable time. *Held*, not admissible. *Ibid.*

§ 55. Equity will cancel a policy of life insurance issued by a mutual company on the life of a person living, when it has become invalid by breach of condition, and this too though the company itself has the power, and has exercised the same, of canceling the policy in the particular case. *Connecticut Life Ins. Co. v. Home Ins. Co.*, §§ 64-66.

[NOTES.—See §§ 67-78.]

POOR v. HUDSON INSURANCE COMPANY.

(Circuit Court for New Hampshire: 2 Federal Reporter, 432-440. 1880.)

Opinion by CLARK, J.

STATEMENT OF FACTS.—This was an action on a policy of insurance issued by the defendants upon the Oceanic Hotel, at Star Island, one of the Isles of Shoals, against fire. The policy was dated July 25, 1875, for \$2,500, and the hotel was burned November 11th, following, at 3 o'clock in the morning.

The insurance was procured by Reed Bros., of Boston, as agents for Mr. Poor, through Mr. Craig, of Portsmouth, as agent of the company. At the trial of the cause before a jury two principal questions arose—*First*, whether the policy, which was for one year, had been canceled by agreement of parties before the loss occurred; and *second*, whether the hotel was occupied at the time of the fire, as stipulated in the policy.

Some time before the loss happened the defendant company became dissatisfied with the risk, and instructed Mr. Craig, their agent, to procure a diminution of it in part or in its entirety. Thereupon Mr. Craig wrote to Reed Bros., at Boston, stating the wishes of the Hudson company, and proposing to reduce the risk one-half or in the whole, and stating further that he could place the risk in the Lancashire company, or he would return the premium. Reed Bros. returned answer that they did not wish the risk divided, half in the Hudson company and half in the Lancashire company, but that the policy might be canceled, and the whole risk put in the Lancashire, and the unexpired or return premium used for re-insurance, and they inclosed the policy to Craig for that purpose.

Upon receiving the policy, November 9, 1875, Craig immediately wrote "canceled" upon it. But he did not place the risk in the Lancashire company or any other. He made up the return premium and placed it with the policy, thus marked "canceled," in the safe, intending to go to Boston the next morning, the 10th. But he did not go, and the next morning, the 11th, the fire occurred, with the policy and premium still in Craig's safe. He gave no notice to Reed Bros., or Mr. Poor, that he had not re-insured the property. The next day, the 11th, after the fire, Craig sent the return premium to Reed Bros., at Boston, by express, but they declined to receive it. Of this proceeding or negotiation for cancellation of the policy, Poor had no knowledge, nor had he given any authority for it other than that the Reed Bros. were agents to procure the insurance for him.

§ 56. *Cancellation agreed for upon condition not performed.*

Upon this evidence the court ruled that there was no contract for cancellation of the policy completed which could bind the parties; that, waiving the question of authority in Reed Bros. to make a contract for cancellation, they had consented to it only with the understanding that Craig should procure a re-insurance in the Lancashire company, and failing to do this, the Hudson company could not insist that the policy was canceled and leave Poor to bear the loss, especially as they had not given him notice that they had not re-insured or returned him the premium. To this ruling the defendant excepted. But it was, we still think, correct.

The first proposition of the Hudson company was to cancel the policy in whole or in part; to place the risk in the Lancashire company or return the premium, as the plaintiff might elect. He assented that the policy might be canceled for the whole, and the property re-insured by them in the Lancashire company. The two were coupled together, and there is no evidence that the plaintiff agreed that the policy should be canceled without a re-insurance, and as the Hudson company did not re-insure they cannot insist upon the cancellation. There was no agreement of parties. 1 Parsons on Contracts, 6.

There was a stipulation in the policy that the defendant company might terminate the insurance "at any time, on giving notice to that effect, and refunding a ratable portion of the premiums;" and the defendant's counsel

insist that Craig, in writing to Reed Bros., had this provision in his mind, and acted in reference to it. This may be so. But before he could have the benefit of that stipulation, even if acting upon it, he should have conformed to it, and given notice, and returned the required part of the premium. This he did not do.

The counsel for the defendant requested the court to instruct the jury that the letter of Craig contained a proposition to cancel or reduce the Hudson policy, and that this was made by him as the agent of that company; but that the proposition to re-insure in the Lancashire company was made by him (in the letter) as the agent of the Lancashire company, and that the letter of Reed Bros. was an acceptance of the proposition of the Hudson Insurance Company to cancel the policy, without including the other, to re-insure. The court declined so to instruct, and properly. It was a question of fact and not of law whether Craig acted as the agent of one company or the other, or both; and if Craig was the agent of the Lancashire company in offering to procure a re-insurance, it can make no difference, because Reed Bros., in accepting the proposition to cancel the Hudson company's policy, coupled with a re-insurance of the property in the Lancashire company, which was not done by Craig, whether as agent of one company or the other.

§ 57. *What constitutes occupation "by a family" a question of fact.*

In support of the second ground of defense, that the hotel had not been occupied as agreed in the policy it should be, to wit, that a family should live in it throughout the year, there was evidence tending to show that the house was occupied as a hotel in the summer, but not at other seasons; that the defendant's agent, at the time of the insurance, knew the manner of its occupation; that the plaintiff, with his wife and sons, were at the hotel in the summer, managing the hotel, and had in their family a large number of employees and servants; that part of the family ate at the Oceanic and part at the Atlantic, a house used as a part of the hotel arrangement; but the plaintiff, with his wife and sons, left the hotel at the close of the hotel season, but left there a large number of their employees, at work about the premises and in charge of the property, under the direction and management of the plaintiff; that all of these employees ate at the Atlantic House, and most of them slept there; but that two of them roomed and slept in the Oceanic, having their clothing there, and working outside and about the house, going in and out several times a day; that they had been in the employ of the plaintiff for months, and one of them was a porter in the hotel — the Oceanic — and that both were in the building at the time of the fire, and escaped through the window; that the plaintiff was often at the island and "stopped" at the Oceanic; that he was there the day before the fire; that Craig, the agent of the defendant, knew how the hotel was occupied and was satisfied, and that another agent of the defendant knew of it, and was satisfied that the employees should eat at the Atlantic House.

Upon this evidence the defendant's counsel requested the court to instruct the jury:

"*First.* That the occupation of the premises insured, by two hired men in the plaintiff's employ, who slept in the house and took their meals elsewhere, being employed during the day elsewhere, was not such an occupation of the premises as complied with the warranty that a family should live in the house.

"*Second.* That if the jury should find Poor and wife and children had

left the Oceanic and were living at his residence at Somerville, and that the only occupation of the hotel was by two laborers sleeping in it, taking their meals elsewhere, and spending their days elsewhere in labor or matters outside of the house, such occupation would not be a compliance with this warranty.

"*Third.* That under such circumstances the two laborers would not be a part of Poor's family.

"*Fourth.* That under such circumstances the two laborers would be a part of the family living at the Atlantic House; the foreman in charge of the island living at the Atlantic House, and furnishing at that house the meals to all persons in the employ of the plaintiff, including the two laborers who slept in the Oceanic House.

"*Fifth.* That upon all the evidence the jury would not be warranted in finding that the warranty had been complied with."

The court declined to instruct the jury specifically as requested, but did charge them that the warranty in the policy "that a family should live in the house throughout the year" was a contract which must be substantially complied with in its terms to enable the plaintiff to recover; that it was not sufficient that there were watchmen in the house, or that it was equally safe by some other means, but that the defendant had the right to insist that it should be occupied as agreed; that the words "family" and "live" were used in the policy in their ordinary signification, as a collection of persons dwelling together in a house under one head; that no definite, particular number of persons was necessary to constitute a family, but it should be a family as ordinarily constituted, and living in the ordinary way; that a knowledge on the part of the defendants that the house was occupied in any other manner could not affect the contract, unless assented to by the defendants, or they acted in such a way as to leave the plaintiff to believe that they did assent to it.

To these instructions the defendants take no exception; but they do except that the specific rulings desired by them were not made. But upon mature reflection we are satisfied that they have no legal cause for complaint; the jury were sufficiently instructed in the law applicable to the case. Whether a house is or is not occupied by a family is a question of fact, and should be decided by the jury, and not by the court; and whether a given number of persons constitute a family is oftentimes, perhaps always, to be decided in the manner in which they live, which is, as before stated, a question of fact.

The most comprehensive definition of a family is, a number of persons who live in one house and under one management or head. There is no specific number required to constitute a family; but they must live together in one house and under one head. Nor is it necessary they should eat in the house where they live. There are many families, it is well known, who live in one place and eat outside of it. Nor was it necessary that they should be employed in the house or about it; nor was it material that they were hired. The precise question is, were they living there together, under one head or management? This is one of fact and not of law.

The evidence tended to show that these two men lived at the Oceanic; that they were in the employ of the plaintiff, and under his direction, control and management. He owned the house in which they abode — not as tenants, but as servants or employees. It could not be decisive of the question, as matter of law, that the wife and sons of the plaintiff lived at Somerville, and that he passed most of his time there. He was often at the Shoals, and stayed at the

Oceanic when there. Many persons have residences in town, and at the sea-side or mountains, or in the country, at the same time, and may be said to live in both places; they have their servants and employees at both places.

The court could not instruct the jury, as requested, that the two laborers would not be a part of the plaintiff's family, under these circumstances; the evidence rather tended to show the contrary—that they were a part of his family; he so testified. Nor could the court instruct the jury, upon all the evidence, that they would not be warranted in finding that the warranty had been complied with, as there was evidence tending to show that the defendants' agent, who contracted the insurance, knew how the house was occupied, and was satisfied with it, and this evidence might be weighed by the jury in determining whether the defendants knew how the house was occupied and assented to as a compliance with the contract, or waived a more strict compliance.

The defendants are mistaken in supposing there was no evidence to go to the jury in regard to a waiver. There was evidence that Craig said that he knew how the house was occupied, was satisfied with that occupancy, and considered it safer than a family. The defendant says, in the brief of his counsel, "what was really left to the jury was the meaning of the terms used," and "the legal effect of the instruction of the court was to advise the jury as to the legal effect of the acts in the contract, leaving them to construe the laws."

In this there is a mistake. The court did not leave to the jury "the meaning of the terms used." It instructed the jury as to the meaning of the words, and the counsel say, in their brief, the explanation given of the word "family" was correct and satisfactory. Nor did the court leave the laws to the jury. It instructed that the provision in the policy that a family should live in the house was a contract binding on the plaintiff, and must be performed by him, or waived by the defendants, before he could recover. The court instructed the jury what a family was. With that instruction the defendant was satisfied. The court left it to the jury to find *the fact* whether such a family was living in the house at the time of the fire. That duty belonged to them.

§ 58. *Knowledge by underwriter of prior occupancy of premises may serve to interpret a clause that the premises are to be occupied by a family.*

At the trial the court admitted evidence that, at the time the insurance was effected, the plaintiff's agent told the defendant's agent how the house had been occupied the previous winter. To this evidence the defendant's counsel objected, on the ground that whatever was said at the time of the contract was merged in the contract, and could not be received to control, enlarge, or restrict the contract. Such is undoubtedly the law; but the court did not admit the evidence for such purpose, but as tending to show the previous occupation and condition of the property, as aiding to arrive at the intention of the parties, and the true interpretation of the contract. For this purpose we think the evidence was competent.

§ 59. *Evidence of waiver.*

The defendant also objected that the plaintiff's witnesses were permitted to testify that Craig, since the fire, had said that he knew how the house was occupied, and was satisfied with that occupancy, and considered it safer than a family. But, as he does not notice the objection in his brief, it may be that he does not, after reflection, rely much upon it. However that may be, the evidence was competent upon either of two grounds—*First*, as tending to

show a substantial compliance with the contract by the plaintiff; and, *second*, a waiver by defendant of a more strict compliance. Judgment on the verdict.

GRACE v. AMERICAN CENTRAL INSURANCE COMPANY.

(Circuit Court for New York: 16 Blatchford, 483-488. 1879.)

Opinion by BENEDICT, J.

STATEMENT OF FACTS.—This case comes before the court upon a motion for a new trial. The action is brought upon a policy of insurance, to recover for the destruction, by fire, of certain lumber belonging to the plaintiffs. A trial was had before the court and a jury, when a verdict was rendered for the defendant. The plaintiffs now move for a new trial, upon exceptions to certain rulings of the court made at the trial.

The evidence shows that the plaintiffs had instructed one Noyes, an insurance broker in New York, to procure for them insurance, to a large amount, upon a quantity of lumber. Noyes employed F. H. Anthony, also an insurance broker, to effect insurance in Brooklyn; and, accordingly, Anthony procured several policies in the name of the plaintiffs. Among them was the policy in suit, which, when procured, was passed to the possession of the plaintiffs. This policy contained the following clause: "8. This insurance may be terminated at any time at the request of the assured, in which case the company shall retain only the customary short rates for the time the policy has been in force. The insurance may also be terminated at any time at the option of the company, on giving notice to that effect, and refunding a ratable proportion of the premium, for the unexpired term of the policy. It is a part of the contract, that any person other than the assured, who may have procured this insurance to be taken by this company, shall be deemed to be the agent of the assured named in this policy, and not of this company, under any circumstances whatever, or in any transaction relating to this insurance." A few days after the delivery of this policy, the defendant notified Anthony of its election to terminate the policy at that time. Anthony accepted the notice, and promised to return the policy. On the following night a fire occurred, by which the property insured was destroyed. At the time of the fire, the plaintiffs had no knowledge of what had taken place between the defendant and Anthony, in regard to terminating the insurance. Upon these facts the plaintiffs requested the court to instruct the jury to find a verdict for the plaintiffs, for the amount of the policy, \$5,447.37. The request was refused, and the plaintiffs excepted. This exception presents, for determination, the main question in dispute between these parties, viz.: whether the notice of termination of the insurance given by the defendant to the broker, Anthony, and accepted by the latter in behalf of the plaintiffs, had the legal effect to terminate the insurance. If such was the effect of that notice, the ruling in question was right. If such was not its effect, a verdict for the plaintiffs for \$5,447.37 should have been directed, as requested by the plaintiffs.

§ 60. *Notice of termination of policy. Agency of the person procuring the policy.*

Upon this question my opinion is, that the insurance was terminated by the notice of termination given to the broker, Anthony, and that the ruling excepted to was right. The contention on the part of the plaintiffs is, that Anthony was not the agent of the plaintiffs for the purpose of accepting notice

of termination of the insurance, and therefore the notice given to Anthony could not affect the plaintiffs' rights under the policy. The contention on the part of the defendant is, that the effect of the eighth clause of the policy, above set forth, was to enable the insurer to terminate the insurance at any time, by giving notice to the person who procured the insurance to be taken; and that Anthony was such person. The determination of this question depends upon the effect to be given to the eighth clause of the policy, above set forth. In considering this clause, it will be observed that the apparent object of the clause is to provide a method of terminating the insurance. No other subject is specifically mentioned in it. It contains a specific provision for a termination of the insurance by the insured, which is followed by a specific provision for a termination of the insurance on the part of the insurer, by giving notice to that effect; and then follows the provision, that, in case the insurance has been procured by a person other than the insured, such person shall be deemed to be the agent of the assured, "in any transaction relating to this insurance." That terminating the risk is a transaction relating to the insurance cannot be denied; and, inasmuch as the method of conducting such a transaction is the subject to which the prior portion of the clause is devoted, the natural inference is, that the subsequent general phrase, "any transaction relating to this insurance," was intended to cover the transaction provided for in the former part of the clause, viz., a termination of the risk by means of a notice to that effect. No language is to be found in any part of the policy indicating an intention to give a limited effect to the phrase, "any transaction relating to this insurance;" and, in the absence of language indicating such an intention, it is difficult to find ground on which to deny to the words used their natural significance and scope. The position taken by the plaintiffs is, that the words, "relating to the procurement of," must be supplied, and the phrase construed as if it read, "any transaction relating to the procurement of this insurance." The only ground upon which such a material addition is based is, that, without some such limit, results clearly never intended would follow from the phrase, such as, permitting the broker to cancel the policy, or, under clause 11, bind the insured in the matter of repairs by the insurer. I think reason can be found for denying to the clause in question any effect in the cases suggested and for limiting the effect of the phrase, "any transaction relating to this insurance," to the subject-matter of the clause of which it forms a part; but, however this may be, still the fact that the language, if given its ordinary significance, will work hardships under some circumstances, is no good reason for adding words of limitation not used by the parties. Provisions in policies which are intended to, and do, render the contract of little value to the insured, are common enough. If it had been the intention of the parties that the phrase under consideration should be limited to acts relating to the procurement of the insurance, it would have been easy to say so; and no reason has been assigned for an omission to disclose such an intention by the language employed. In truth, an intention to refer to acts done subsequent to the procurement of the policy is affirmatively indicated by the words, "who may have procured this insurance." My conclusion, drawn from the language employed in the policy, is, that these parties intended to agree that, in case of an election by the defendant to terminate the risk, such termination might be effected by notice given to the broker who procured the insurance to be taken.

§ 61. *Competency of evidence of custom of notifying broker of termination of risk.*

This conclusion is strengthened by the evidence introduced by the defendant showing a universal custom, in cases where the insurer intends to terminate a risk, to give the notice of termination to the broker who procured the risk. The admission of this evidence was objected to by the plaintiffs; but the evidence was competent, not, indeed, to make thereby a contract for the parties, or to alter the contract that was made, or to show authority in Anthony, but to show the circumstances under which the contract was made, for the purpose of throwing light upon the intention of the parties in using the language which they employed. For this purpose, the evidence in regard to custom was competent. The fact that the language employed in clause 8, as I have understood it, tends to render the policy a contract in harmony with the usage of the trade goes to confirm the correctness of that understanding. But it is said that the court erred in not submitting to the jury the question whether the existence of such a usage had been proved. The evidence in relation to the custom was positive and wholly uncontradicted. It permitted but one conclusion, namely, that the custom contended for did exist. There was nothing, therefore, for the jury to pass on, and the court had a right to treat the custom as a fact proved, and to construe the contract in the light of that fact.

§ 62. — *evidence of understanding as to time when such notice takes effect.*

Evidence of the practice in regard to giving notice of termination of the risk having been admitted, the plaintiffs offered to show that when, in accordance with that practice, notice is given to the broker, the understanding is that the notice does not take effect until a reasonable time has elapsed. This offer was rejected, and the correctness of that ruling is also called in question upon this motion. The reason for the rejection of the plaintiff's offer was that it was an attempt, by evidence of usage, to change the contract which the parties had made. The agreement in the policy is that the insurance is to be terminated when notice to that effect is given. The policy does not provide for any lapse of time after the giving of the notice, during which the insurer is to be bound. On the contrary, the contract states that the insurance terminates on giving the notice. The evidence offered by the plaintiffs was, therefore, immaterial, and the plaintiffs take nothing by their exception to the exclusion of their offer.

§ 63. *Evidence considered in regard to the person who procured the insurance.*

There remains the question whether the evidence shows Anthony to be the person who procured the insurance to be taken, within the meaning of the eighth clause of the policy. As to this, there is no room for doubt. The only person known to the defendant, as the person procuring the insurance, was Anthony. The principals never met. Anthony procured the insurance, the policy was sent to him, and his name was indorsed upon it as the agent procuring it. The plaintiffs received the policy so procured, and are now suing upon it. It is true the plaintiffs did not employ Anthony directly, but he employed Noyes, who, in turn, employed Anthony; and the plaintiffs, by accepting the policy procured by Anthony, ratified the employment of Anthony. They have adopted as their own the act of Anthony in entering into a contract in their behalf, one provision of which contract is that notice of

termination of the insurance given to Anthony should be equivalent to notice given to them.

My conclusion, therefore, is that none of the exceptions taken at the trial afford ground for setting aside the verdict, and that judgment must be entered for the defendant.

CONNECTICUT LIFE INSURANCE COMPANY v. HOME INSURANCE COMPANY.

(Circuit Court for Connecticut: 17 Blatchford, 142-148. 1879.)

Opinion by SHIPMAN, J.

STATEMENT OF FACTS.— This is a bill in equity, which alleges, in substance, as follows: On June 20, 1870, the plaintiff, a Connecticut corporation, duly authorized to issue policies of insurance upon lives, issued to Henry H. Bigelow, and to the defendant, a New York corporation, a policy of insurance, whereby the plaintiff insured the life of said Bigelow, in the sum of \$6,000, for the benefit of the defendant, upon the payment of a premium of \$180.54, and upon the agreement of the insured to pay a like sum on or before June 20th, in every year, during the continuance of the policy. By said policy it was agreed, that, if the assured should become so far intemperate as to impair his health or induce delirium tremens, the policy should become null and void. The premium payments were made by the insured, or by the defendant, until and including the payment maturing June 20, 1876. About August 28, 1876, the plaintiff was first apprised that the insured had become so far intemperate as to impair his health. On said day said policy became null and void by said intemperance, and thereupon, on August 29, 1876, the plaintiff canceled said policy, and notified the defendant of said forfeiture and cancellation, and offered to pay, in cash, the surrender value of said policy, upon its surrender. Afterwards, the defendant, who is the true owner of the policy, and has acted as the exclusive owner thereof, on or about the — day of —, 1877, refused to recognize said cancellation, and declared that it should treat the contract as valid and outstanding against the plaintiff. The plaintiff offered to reinstate the policy, provided it should appear, upon a fair medical examination, that the health of the insured had not been impaired by intemperance since the date of the policy. The defendant refused to assent to such examination, and has the policy in its possession, and refuses to surrender the same, and has, ever since said cancellation, tendered to the plaintiff, on June 20th in each year, the amount of the annual premium, which tender has always been refused. The defendant holds the contract as, in fact, a valid obligation of the plaintiff, and apparently valuable to any person to whom it may be negotiated. The plaintiff is a mutual company, and, by its charter, each policy-holder is entitled to a voice in the election and management of the company. It is important, to the proper management of the company, and to a just distribution of its surplus, that the real holders of its policies be known absolutely. All the defenses depend upon facts which do not appear upon the face of the instrument. There are, at present, within reach of legal process, a sufficient number of competent and credible witnesses to fully prove the avoidance of the policy, but the plaintiff fears that these witnesses, by death or other causes, may become unavailable for the purpose of resisting a suit upon the policy, at some future time, at the instance of the defendant. The plaintiff offers to pay the full surrender value of the policy at the time of its avoidance. The bill prays that the policy may be declared null, and that the

defendant be ordered to surrender it to the plaintiff for cancellation, upon payment of its surrender value, or for other relief. To this bill the defendant has demurred generally. The ground of the demurrer is the alleged want of power in a court of equity to cancel the policy at the instance of the insurance company; and it is insisted (1st) that, while a court of equity has power to cancel instruments which are void by reason of fraud in their inception, it has no jurisdiction to cancel instruments which have ceased to be binding since their execution; (2d) that while, at the instance of the assured, a court of equity may compel an insurance company to reinstate a canceled contract, equity will not interfere to enforce a forfeiture.

§ 64. *When equity will not compel cancellation.*

(1) Upon the first proposition, it is true that a court of equity has not, or will not exercise, jurisdiction to cancel a contract, merely because it has become void or inoperative by reason of some fact which has taken place since its execution. Such an exercise of power would give a court of equity concurrent jurisdiction with courts of law over all contracts which one contracting party may allege to have been broken by the other. *Thornton v. Knight*, 16 Simons, 509. But, while relief from the consequences of fraud is peculiarly the province of a court of equity, it has not refused to cancel contracts which have been performed, or which have become inoperative, when the special circumstances of the case rendered it unjust or oppressive that the contract should be an outstanding claim against the plaintiff. The reasonable rule is, that a court of equity will exercise its power of setting aside contracts for defects not apparent on their face, although such defects arose after the execution of the contracts, in cases where the special circumstances render it inequitable or unjust, or a hardship, to compel the plaintiff to await a suit at law at the instance of the other party. *Hamilton v. Cummings*, 1 Johns. Ch., 517; *Hoare v. Bremridge*, Law R., 8 Ch. App., 22; *Chipman v. Hartford*, 21 Conn., 488; *Ferguson v. Fisk*, 28 Conn., 501. Chancellor Kent was inclined to think, in *Hamilton v. Cummings*, that a court of equity had jurisdiction to set aside a bond or other instrument, whether the instrument was void for matter appearing on its face, or from the proofs, "and that these assumed distinctions were not well founded." He says: "Perhaps all the cases may be reconciled on the general principle that the exercise of this power is to be regulated by sound discretion, as the circumstances of the individual case may dictate; and that the resort to equity, to be sustained, must be expedient, either because the instrument is liable to abuse from its negotiable nature, or because the defense, not arising on its face, may be difficult, or uncertain at law, or from some other special circumstances peculiar to the case, and rendering a resort here highly proper, and clear of all suspicion of any design to promote expense and litigation. If, however, the defect appears on the bond itself, the interference of this court will depend on a question of expediency, and not on a question of jurisdiction." (a)

§ 65. *Equity will not enforce forfeiture or divest an estate for breach of condition subsequent.*

(2) It is true that courts of equity will not aid to enforce a forfeiture, or to divest an estate for breach of covenant or condition subsequent, unless, perhaps, under extraordinary circumstances. *Horsburg v. Baker*, 1 Pet., 232; *Livingston v. Tompkins*, 4 Johns. Ch., 415; 2 Story's Eq. Juris., sec. 1319. When an

(a) See 1 Story, *Equity*, pp. 28-31, note, 18th ed.

estate has been forfeited, or when a pecuniary penalty has been incurred, by reason of the happening of a condition subsequent, or of the breach of a covenant, there is usually an immediate remedy at law to regain possession of the estate or to recover the penalty. There being such a remedy, equity will not interfere. "The great principle is, that equity will not assist in the recovery of a penalty or forfeiture, when the plaintiff may proceed at law to recover it." *Livingston v. Tompkins*, 4 Johns. Ch., 432.

§ 66. *Equity will cancel policy on life of living person when he has violated covenants.*

In this case there is no estate to be regained, there is no sum in damages to be recovered. The insured is still living, and a cancellation of the contract is the only result which is to be attained. The plaintiff has now no remedy at law, and, unless it can resort to a court of equity, it must wait and become a defendant at the future suit of the holder of the policy. When such a suit will be commenced is a matter of uncertainty. The rule is not applicable to the cancellation of a policy of insurance upon the life of a living person.

The expediency of interference by a court of equity is apparent from the following considerations: The cancellation of the policies of delinquent policy-holders is a duty which a life insurance company owes to its other policy-holders. All the insured have an interest that the covenants of each insured person as to health and the payment of premium shall be performed, and that the lives of the insured and the prosperity of the company shall not be impaired by any act which the insured person has agreed shall not be committed. The company insures the policy-holders at a rate based upon the estimated average mortality of ordinary healthy persons at the ages of the insured respectively, and the insured agree, among other things, that they will not impair their health by the immoderate use of intoxicating liquors. If the insured are permitted, with the knowledge of the company, to indulge in practices which notoriously invite disease, the system of insurance and the safety of the investment of other policy-holders are endangered. Each insured person has an interest in the continuance of the life of every other insured person. In *N. Y. Life Ins. Co. v. Statham*, 3 Otto, 24 (§§ 1577-81, *infra*), Mr. Justice Bradley says: "The insured parties are associates in a great scheme. The associated relation exists whether the company be a mutual one or not. Each is interested in the engagements of all; for, out of the co-existence of many risks arises the law of average, which underlies the whole business."

But, it is said, the corporation possesses, by contract, the power of declaring that policies have been canceled for the cause of intemperance. The plaintiff has already exercised this power, and has protected itself and its policy-holders. It is not necessary that the policy should be judicially declared to be canceled, and there is no exigency which requires this court to aid or assist in the cancellation.

It is important both to the company and to the insured that the company should be able to know, in the life-time of the insured, whether it has made an error in the cancellation of his policy, and whether it is still bound to receive the premium, and whether he has a right to share in the dividends, or profits, or surplus. The insured is annually tendering his premium, and the company is annually refusing to accept the tender. The postponement till the death of the insured of knowledge whether or not the company is under obligation to receive the tender is inequitable and unjust to both parties, because it is a postponement for an uncertain time, a postponement to the

pecuniary damage of one party, and a postponement to a time when the ascertainment of the truth of the facts upon which the action of the company was based may have become doubtful by lapse of time and the death or removal of witnesses. It is important that neither party should be left in doubt, during a series of years, as to his or its pecuniary rights in the policy. These special circumstances seem to me to be sufficient to justify the plaintiff in its resort to a court of equity. The demurrer is overruled, without costs, with leave to answer over.

§ 67. *Defense at law.*—A court of equity will not interfere to aid a defendant who has a good defense at law, when the legal remedy is as perfect and complete as the remedy in equity. So a life insurance company, in case of alleged fraudulent representations in the application for the policy, will not be allowed to proceed directly against the holder of the policy in equity, but will be left to its remedy at law. *Insurance Co. v. Bailey*, 18 Wall., 616. As to *Insurance Co. v. Bailey*, see 1 Story's Eq., p. 28, note, 13th ed.

§ 68. After a loss has occurred under a policy of fire insurance, equity, though it has the jurisdiction, ought not to entertain a bill to cancel the policy and enjoin a suit on it on the ground of fraud in procuring it, where such defense may be set up in a suit on the policy; and especially where the policy limits the time of suing to twelve months from the loss. In such a case the right to an injunction is dependent upon the right to a cancellation. *Home Insurance Co. v. Stanchfield*, 1 Dill., 424; 2 Abb., 1.

§ 69. *Unknown defense at law.*—A fraudulent overvaluation and misrepresentation of the value of the subject-matter of insurance will avoid a policy of insurance; and, if unknown at the time of the suit and judgment on the same, is a proper ground for equitable interference. *Ocean Insurance Co. v. Fields*, 2 Story, 59.

§ 70. *Mistake a legal defense.*—To avoid a contract of insurance on the ground of mutual mistake, it is not necessary to go into equity. *Wilson v. Queen Ins. Co.*, * 5 Fed. R., 674.

§ 71. *Want of insurable interest.*—Cancellation ordered of a marine policy by one having no interest therein or authority to act for any party in interest; the act being by mistake and afterwards repudiated by the parties in interest. *Marsh v. Northwestern Ins. Co.*, * 8 Biss., 351.

§ 72. *Whether certain negotiations amounted to a rescission of a policy.*—The owner of a ship and cargo, which was blockaded in a foreign port by hostile cruisers, inquired of the insurer if they would cancel the policy if the consent of the foreign government could be obtained. The insurance company, after some further negotiations, replied that they would cancel the policy on the merchandise, and requested the insured to forward the policy for cancellation. The note thus assenting was entirely without a signature. Before it was received by the insured he had notice that the ship had sailed and had been captured, and therefore insisted on his policy. *Held*, that the negotiations in this case were preparatory to an agreement, but were not the agreement itself, and that as the assent of the company was not conveyed in a form in which the company could act under its charter, there was no rescission of the policy, and that the company was liable. *Head v. Providence Ins. Co.*, 2 Cr., 127.

§ 73. *Contract by insurance company—Requirements of charter—Varying or cancelling of policy.*—Where the charter of an insurance company provided, in effect, that an instrument, in order to bind the company, should be signed by the president or some other officer according to the ordinances, by-laws and regulations of the board of directors, it was held that a contract varying a policy of insurance was as much an instrument as the original policy, and could therefore only be executed as prescribed by law, and that the same rule applied to cancelling the policy. To enable the company to contract it must follow the mode of contracting prescribed, or its act will no more create a contract than if the company had never been incorporated. *Ibid*.

V. REFORM OF POLICY.

§ 74. *Reform with specific performance.*—A policy of insurance made out by mistake in terms different from those agreed upon may be reformed and then enforced as reformed by the same bill in equity. *Brugger v. State Ins. Co.*, 5 Saw., 304 (§§ 1267-70).

§ 75. *Mistake as to interest—Partnership.*—A partner who had effected insurance on a cargo belonging to himself and his copartner, the policy covering his interest only, sought, after the loss, to have the policy reformed in equity so as to cover the interest of both, alleging that previous to the date of the policy it was usual to insert in marine policies a clause to the effect that the insurance was for the benefit of all concerned, and that the respondent had

made a change in this usage without making it known to the agents employed to effect the insurance, and that the complainant did not know of this omission until after the loss. The evidence showed that the complainant intended to insure the interest of both. But the relief was refused because it was not clear that the complainant had laid before the company information sufficient to apprise them of the intention to insure the interest of both partners, and to require that they should suggest to the agent the departure of their policy from the ancient form. *Graves v. Boston Marine Ins. Co.*, * 2 Cr., 419.

§ 76. **Interest—Agency.**—When a complete contract for an insurance policy is made by a known agent, and nothing is said respecting any declaration of interest, the contract is to insure the property of his principal, and the agent has the implied power to declare the interest and have it inserted in the policy, or to have the policy so drawn as to insure him as agent, leaving the declaration of interest to be made afterwards in case of loss. And if the agent makes a mistake in declaring the interest, equity and good conscience require that the mistake be corrected and the policy reformed. But equity will not relieve where the agent declares the interest in the wrong person, not by mistake, but for a fraudulent purpose. *Oliver v. Mutual Ins. Co.*, * 2 Curt., 277.

§ 77. **Mistake of law.**—Where a party, having an existing valid contract for insurance, fails through mistake to obtain such a policy as his contract entitles him to, he is entitled to the aid of equity to reform the policy, although the mistake be one of law. *Oliver v. Mutual Ins. Co.*, * 2 Curt., 277; *Hearn v. Equitable Ins. Co.*, * 4 Cliff., 192.

§ 78. **The power of courts of equity to correct mistakes in policies of insurance goes even to the extent of changing the most material clauses therein which are the subjects of special agreement; but this power is to be exercised with great caution, and only in cases where the proof is entirely satisfactory.** *Hearn v. Equitable Ins. Co.*, * 4 Cliff., 192, 580; *Hearn v. New England Ins. Co.*, 4 Cliff., 200.

§ 79. **Mistake of time.**—A court of equity may amend and reform an insurance policy and enjoin the prosecution of a suit at law upon it, where, by a mistake of the parties, it has been issued for a longer time than was intended. *North American Ins. Co. v. Whipple*, 2 Bias., 418.

§ 80. — **after loss.**—A policy of insurance may be reformed and canceled for mistake even after a loss has occurred. *Ibid.*

§ 81. **Order for insurance.**—Where, by fraud or mistake, the terms of an order for insurance are departed from in the policy, so that the two are materially variant, equity will treat the order as containing the contract of the parties. As, for example, where the risk stated in the policy is *from* such a place, instead of *at* and *from*; or where the policy contains a warranty not authorized by the order. In such cases the variance itself would, without contradictory proof, be evidence of the mistake. But the order can only be resorted to so far as it varies from the policy. *Delaware Ins. Co. v. Hogan*, 2 Wash., 4.

§ 82. **The inquiry to be made.**—If a policy of insurance when drawn does not correctly express a concluded agreement previously made and to be expressed by the policy, equity will reform the instrument. The inquiry should be, not how the parties intended the contract to operate, but what they intended it to be. *Oliver v. Mutual Ins. Co.*, * 2 Curt., 277.

§ 83. **Special case stated.**—Insurance was effected on five hogsheads of sugar on board the Brothers, and on ten hogsheads on board the Sisters. In describing them a mistake was made, but the intention to insure the quantity of sugar, according to the letter of instructions, was declared to the insurance broker. The property was on board. In an action upon the policy, *held*, that the mistake was immaterial. *Ruan v. Gardner*, * 1 Wash., 145.

§ 84. **Quære**, if the assured had had other sugars on board, and the claim had been for a partial loss. *Ibid.*

§ 85. **Modification of contract.**—Where, under mistake of fact, parties modify a contract of insurance by what is intended for an indulgence to the assured, the mistake shall not operate against either party. *Scriba v. Insurance Co.*, * 2 Wash., 107.

§ 86. **Evidence required.**—Equity may, on the ground of mistake, reform a policy of insurance; but the power will only be exercised with great caution, and upon entirely satisfactory proof. *Hearn v. New England Ins. Co.*, * 4 Cliff., 200; *S. C.*, * 20 Wall., 488; *Hearn v. Equitable Ins. Co.*, * 4 Cliff., 192; *S. C.*, 20 Wall., 488; *Andrews v. Essex Ins. Co.*, 3 Mason, 6.

§ 87. **Equity will not reform the terms of a policy of insurance for alleged mistake except upon evidence beyond reasonable doubt in respect of the intention; and where such evidence is wanting, and the terms of the contract are clear and definite, equity will not hear evidence of usage to vary such terms.** *Hearne v. Marine Ins. Co.*, * 20 Wall., 488, affirming *S. C.*, 4 Cliff., 200.

§ 88. **Evidence of the knowledge of the underwriters of the intention of the assured at the time of making the policy ought to be very clear to justify a reformation of the policy.** *Graves v. Boston Ins. Co.*, * 2 Cr., 419.

VI. PROOFS OF LOSS.

§ 89. Positive refusal to pay a loss waives the requirement of proofs of loss. *Talloe v. Merchants' Ins. Co.*, 9 How., 390; *Pendleton v. Knickerbocker Life Ins. Co.*,* 5 Fed. R., 238. See *Fire Insurance*, XI, *post*.

§ 90. Promptness of objection.—Objections to proofs of loss should be made upon their presentation, or within a reasonable time thereafter, or they will be considered to be waived. *In re Republic Ins. Co.*,* 5 Ch. Leg. N., 385; 8 N. B. R., 197.

VII. LIMITATION CLAUSE.

SUMMARY—*Validity of clause*, § 91.—*Suit begun within time and dismissed, and new suit after time*, § 92.—*Not like statute of limitations*, § 93.—*War*, § 94.—*When time begins to run*, § 95.

§ 91. A clause in an insurance policy requiring the bringing of suit, if at all, within twelve months from the time of loss, is valid. *Riddlesbarger v. Hartford Ins. Co.*, §§ 96, 97.

§ 92. A policy of insurance contained a provision requiring the bringing of any suit within twelve months after loss. The assured sued within such time, but subsequently dismissed his action. A statute of the state allowed a party who suffered a nonsuit to bring a new action for the same cause within a year. The assured, within a year after the nonsuit, but not within a year after the loss, brought a new suit upon the policy. *Held*, that he was not entitled to recover. *Ibid*. See § 105.

§ 93. A limitation of time in regard to suit upon a policy, by agreement of parties, is not of the nature of a statute of limitations. *Semmes v. Hartford Ins. Co.*, §§ 98, 99.

§ 94. A condition in an insurance policy provided that no action should be sustained unless begun within twelve months after loss. The existence of war at the time of the loss in this case, and for several years afterwards, prevented the assured from suing upon the policy. *Held*, that the condition mentioned became thereby removed and that the termination of the war did not restore it. *Ibid*.

§ 95. A policy provided that the insurance should not be payable until sixty days after due notice and proof of loss. Proof of loss was furnished March 18, but further sworn statements, given upon request of the underwriter's adjuster, were furnished March 22. Suit was brought May 16. *Held*, not premature. *Huchberger v. Home Ins. Co.*, §§ 100-102.

[NOTES.—See §§ 103-108.]

RIDDLESBARGER v. HARTFORD INSURANCE COMPANY.

(7 Wallace, 386-392. 1868.)

ERROR to U. S. Circuit Court, District of Missouri.

STATEMENT OF FACTS.—Action upon a fire insurance policy, requiring suit to be brought, if at all, within twelve months after loss. Suit was originally brought within the time limited, but this suit was dismissed by the plaintiff. Within twelve months from such dismissal, but not within twelve months from the time of the loss, the present suit was begun. The statutes of Missouri provide that if a plaintiff suffer a nonsuit he may begin a new suit within one year thereafter. The question arose upon a demurrer to a replication whether the limitation of the policy barred the action.

Opinion by MR. JUSTICE FIELD.

By the demurrer to the replication two questions are presented for our determination: *First*, whether the condition against the maintenance of any action to recover a claim upon the policy, unless commenced within twelve months after the loss, is valid; and *second*, whether, if valid, the condition was complied with in the present case under the statute of limitations of Missouri.

§ 96. *The limitation of the policy does not contravene the statute of limitations of Missouri, and it is valid.*

The objection to the condition is founded upon the notion that the limitation it prescribes contravenes the policy of the statute of limitations. This notion arises from a misconception of the nature and object of statutes of this character. They do not confer any right of action. They are enacted to restrict the period within which the right, otherwise unlimited, might be asserted. They are founded upon the general experience of mankind, that claims which are valid are not usually allowed to remain neglected. The lapse of years without any attempt to enforce a demand creates, therefore, a presumption against its original validity, or that it has ceased to subsist. This presumption is made by these statutes a positive bar; and they thus become statutes of repose, protecting parties from the prosecution of stale claims, when, by loss of evidence from death of some witnesses, and the imperfect recollection of others, or the destruction of documents, it might be impossible to establish the truth. The policy of these statutes is to encourage promptitude in the prosecution of remedies. They prescribe what is supposed to be a reasonable period for this purpose, but there is nothing in their language or object which inhibits parties from stipulating for a shorter period within which to assert their respective claims. It is clearly for the interest of insurance companies that the extent of losses sustained by them should be speedily ascertained, and it is equally for the interest of the assured that the loss should be speedily adjusted and paid. The conditions in policies requiring notice of the loss to be given, and proofs of the amount to be furnished the insurers within certain prescribed periods, must be strictly complied with to enable the assured to recover. And it is not perceived that the condition under consideration stands upon any different footing. The contract of insurance is a voluntary one, and the insurers have a right to designate the terms upon which they will be responsible for losses. And it is not an unreasonable term that in case of a controversy upon a loss resort shall be had by the assured to the proper tribunal, whilst the transaction is recent, and the proofs respecting it are accessible.

A stipulation in a policy to refer all disputes to arbitration stands upon a different footing. That is held invalid because it is an attempt to oust the courts of jurisdiction by excluding the assured from all resort to them for his remedy. That is a very different matter from prescribing a period within which such resort shall be had. The condition in the policy in this case does not interfere with the authority of the courts; it simply exacts promptitude on the part of the assured in the prosecution of his legal remedies, in case a loss is sustained respecting which a controversy arises between the parties.

§ 97. *Statute of limitations of Missouri as to nonsuit construed.*

The statute of Missouri, which allows a party who "suffers a nonsuit" in an action to bring a new action for the same cause within one year afterwards, does not affect the rights of the parties in this case. In the first place, the statute only applies to cases of involuntary nonsuit, not to cases where the plaintiff of his own motion dismisses the action. It was only intended to cover cases of accidental miscarriage, as from defect in the proofs, or in the parties or pleadings, and like particulars. In the second place, the rights of the parties flow from the contract. That relieves them from the general limitations of the statute, and, as a consequence, from its exceptions also.

The action mentioned, which must be commenced within the twelve months,

is the one which is prosecuted to judgment. The failure of a previous action from any cause cannot alter the case. The contract declares that an action shall not be sustained, unless *such* action, not some previous action, shall be commenced within the period designated. It makes no provision for any exception in the event of the failure of an action commenced, and the court cannot insert one without changing the contract.

The questions presented in this case, though new to this court, are not new to the country. The validity of the limitation stipulated in conditions similar to the one in the case at bar has been elaborately considered in the highest courts of several of the states (*Peoria Ins. Co. v. Whitehill*, 25 Ill., 466; *Williams v. Mut. Ins. Co.*, 20 Vt., 222; *Wilson v. Aetna Ins. Co.*, 27 id., 99; *N. W. Ins. Co. v. Phoenix Oil Co.*, 31 Penn. St., 449; *Brown v. Savannah Ins. Co.*, 24 Ga., 101; *Portage Ins. Co. v. West*, 6 Ohio St., 602; *Amesbury v. Bowditch Ins. Co.*, 6 Gray, 603; *Fullam v. New York Ins. Co.*, 7 Gray, 61; *Carter v. Humboldt*, 12 Ia., 287; *Stout v. City Ins. Co.*, id., 371; *Ripley v. Aetna Ins. Co.*, 29 Barb., 552; *Gooden v. Amoskeag Co.*, 20 N. H., 73; *Brown v. Roger Williams Co.*, 5 R. I., 394; *Brown v. Roger Williams Co.*, 7 id., 301; *Ames v. New York Ins. Co.*, 4 Kern., 253), and has been sustained in all of them, except in the supreme court of Indiana (*Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind., 443), which followed an adverse decision of Mr. Justice McLean in the circuit court for the district of that state. *French v. Lafayette Ins. Co.*, 5 McL., 461. Its validity has also been sustained by Mr. Justice Nelson in the circuit court for the district of Connecticut. *Cray v. Hartford Ins. Co.*, 1 Blatch., 280.

We have no doubt of its validity. The commencement, therefore, of the present action within the period designated was a condition essential to the plaintiff's recovery; and this condition was not affected by the fact that the action which was dismissed had been commenced within that period.

Judgment affirmed.

SEMMESE v. HARTFORD INSURANCE COMPANY.

(13 Wallace, 158-162. 1871.)

ERROR to U. S. Circuit Court, District of Connecticut.

STATEMENT OF FACTS.—Semmes sued the defendant company for a loss which occurred January 5, 1860. The suit was brought in 1866. The policy limited the period for bringing suits to twelve months after the occurrence of the loss. The assured lived in the south, beyond the Union lines, and the existence of the rebellion prevented him from suing within the time limited. The defendant relied upon the limitation and had judgment.

§ 98. *A limitation prescribed by contract is not to be construed like one prescribed by statute.*

Opinion by MR. JUSTICE MILLER.

It is not necessary, in the view which we take of the matter, to inquire whether the circuit court was correct in the principle by which it fixed the date, either of the commencement or cessation of the disability to sue growing out of the events of the war. For we are of opinion that the period of twelve months which the contract allowed the plaintiff for bringing his suit does not open and expand itself so as to receive within it three or four years of legal disability created by the war and then close together at each end of that period so as to complete itself, as though the war had never occurred.

It is true that, in regard to the limitation imposed by statute, this court has held that the time may be so computed, but there the law imposes the limitation and the law imposes the disability. It is nothing, therefore, but a necessary legal logic that the one period should be taken from the other. If the law did not, by a necessary implication, take this time out of that prescribed by the statute, one of two things would happen: either the plaintiff would lose his right of suit by a judicial construction of law which deprived him of the right to sue yet permitted the statute to run until it became a complete bar, or else, holding the statute under the circumstances to be no bar, the defendant would be left, after the war was over, without the protection of any limitation whatever. It was therefore necessary to adopt the time provided by the statute as limiting the right to sue, and deduct from that time the period of disability.

§ 99. *Limitation of right to sue by contract extinguished by disability which deprives the party of power to bring an action within the time limited.*

Such is not the case as regards this contract. The defendant has made its own special and hard provision on that subject. It is not said, as in a statute, that a plaintiff shall have twelve months from the time *his cause of action accrued* to commence suit, but twelve months from the time of *loss*; yet by another condition the loss is not payable until sixty days after it shall have been ascertained and proved. The condition is that no suit or action shall be sustainable unless commenced within the *time of twelve months next after the loss shall occur*, and in case such action shall be commenced after the expiration of twelve months *next after such loss*, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim. Now, this contract relates to the twelve months next succeeding the occurrence of the loss, and the court has no right, as in the case of a statute, to construe it into a number of days equal to twelve months, to be made up of the days in a period of five years in which the plaintiff could lawfully have commenced his suit. So also if the plaintiff shows any reason which in law rebuts the presumption which, on the failure to sue within twelve months, is, by the contract, made conclusive against the validity of the claim, that presumption is not revived again by the contract. It would seem that when once rebutted fully, nothing but a presumption of law or presumption of fact could again revive it. There is nothing in the contract which does it, and we know of no such presumptions of law. Nor does the same evil consequence follow from removing absolutely the bar of the contract that would from removing absolutely the bar of the statute, for when the bar of the contract is removed there still remains the bar of the statute, and though the plaintiff may show by his disability to sue a sufficient answer to the twelve months provided by the contract, he must still bring his suit within the reasonable time fixed by the legislative authority, that is, by the statute of limitations.

We have no doubt that the disability to sue imposed on the plaintiff by the war relieves him from the consequences of failing to bring suit within twelve months after the loss, because it rendered a compliance with that condition impossible and removes the presumption which that contract says shall be conclusive against the validity of the plaintiff's claim. That part of the contract, therefore, presents no bar to the plaintiff's right to recover.

As the circuit court founded its judgment on the proposition that it did, that judgment must be reversed and the case remanded for a new trial.

HUCHBERGER v. HOME INSURANCE COMPANY.

(Circuit Court for Illinois: 5 Bissell, 106-109. 1869.)

Charge by BLODGETT, J.

STATEMENT OF FACTS.—This suit is brought upon one of several policies of insurance amounting in the whole to \$46,000, one of which was issued by defendant on the stock of dry goods in plaintiffs' store, at No. 173 Lake street, in this city. There is no question as to the issue and validity of the policy, nor is there any question as to the fact that, on the evening of March 2, 1867, a fire occurred in that store, which subsequently destroyed the stock of goods then in the store, the portion saved being only worth a little over \$6,000; nor is it denied that the plaintiffs furnished the proper agent of the defendant, in due time, the proofs of loss required by the policy; but it is insisted that the plaintiffs did not comply with the conditions of the policy, which are precedent to the right of action. The policy requires the insured forthwith to give notice in writing, to the company, of the loss sustained, and, as soon as convenient thereafter, furnish proof of loss, etc., and that the insured, if required, shall submit to a further examination on oath, etc. It is claimed that no notice of the loss was given within the meaning of this clause of the policy. It is also claimed that the loss, by the terms of the policy, does not become payable until sixty days after due notice and proof of loss, and that, inasmuch as the plaintiffs furnished to the agent of the defendant their formal proof of loss on the 13th of March, and afterward submitted to a further examination on oath, at the request of the adjuster of the defendant, in regard to the details of their business, the proofs of loss within the meaning of the policy were not completed until this examination was reduced to writing and sworn to, which was on the 22d of March; and as this suit was brought on the 16th of May, the sixty days had not elapsed, and that this suit was therefore prematurely brought.

It is true that the notice of loss, as required by the policy, should have been given and proved, unless you are satisfied from the evidence that it has been waived.

§ 100. *The sixty-day provision begins to run from time the original proof of loss is furnished.*

As to the time when the right of action accrued, I am of opinion that the sixty days began to run from the furnishing of the proofs of loss, and not from the further affidavit; that the further examination is an act on the part of the insurer, and has no reference to the period when the time begins to run, for if their position is correct, the insurance company could extend indefinitely the time of payment. They might keep calling for further proof from time to time, and insist as long as they chose that they were not satisfied in regard to the facts of the loss.

§ 101. *Intentional fraud in laying claim for greater loss than sustained vitiates the policy.*

But the chief defense set up to avoid the liability arising upon the admitted facts, to which I have referred, is, that plaintiffs fraudulently presented and insisted upon a claim against the defendant for a much greater loss than they actually had sustained; and the real question in this case is whether the claim of loss made out by the plaintiffs and demanded from the defendant was for an amount which plaintiffs knew was greater than the loss actually sustained.

If plaintiffs, knowingly and with intent to defraud the defendant and other insurance companies who had insured their stock of goods, made up a false and exaggerated statement of the amount and value of their stock of goods in the store at the time of the fire, and destroyed or damaged, they thereby forfeit all claim against the insurers. In cases of this kind, the plaintiff must come into court with clean hands. The insured is presumed to know better than any one else the value of his property and the amount of his loss, and is bound to make his statement of loss honestly, without any attempt to obtain more than his actual damage; and this rule of law that thus defeats all claims unless honestly made is intended to protect insurance companies from frauds which might otherwise be perpetrated on them. It is a rule which can do an honest man no harm.

I do not mean by this that a person who has sustained a loss for which an insurance company is liable is obliged to state the exact amount of his loss in dollars and cents, with arithmetical accuracy, for that, from a variety of circumstances, is frequently impracticable; but he must disclose the whole truth, and nothing but the truth, as nearly as he can come at it at the time by reasonable effort on his part. If the evidence in this case, taken altogether, satisfies your minds that the plaintiffs did, knowingly and fraudulently, present a claim for a loss greater than they had sustained by the fire in question, then they cannot recover in this action.

This is really the only law directly involved in this case, but there are some rules of evidence applicable to the case, to which it is proper I should call your attention. The burden of proof to make out the defense insisted upon is upon the defendant.

§ 102. *Fraud need not be proved by direct evidence.*

The law does not allow you to presume fraud without proof, and it must be such proof as admits of no other fair construction. I do not mean by this that the defendant is bound to establish fraud by positive and direct evidence, because that is frequently impossible; but the evidence of fraud must be either direct and positive, or the circumstances must be so strong, convincing and preponderating, as to admit of no other rational conclusion. The defense interposed, if sustained, stamps the defendants as swindlers and dishonest men. You should, therefore, be cautious in your consideration of evidence tending to lead you to so serious a conclusion. Yet, if the evidence adduced is so convincing in its character as to satisfy your minds that the plaintiffs intended to perpetrate a fraud on the insurers, you then need not hesitate to pronounce that conclusion by your verdict. It is as essential to the ends of justice that the guilty should be punished as that the innocent should be acquitted.

If you should conclude that, in making up their accounts of their loss, plaintiffs acted in good faith, and made, as nearly as they could under the circumstances, a truthful statement, without any intent to defraud defendant, you will find for the plaintiffs, and ascertain their damages by adding interest from May 16, to the amount of the policy. (Judgment for plaintiff.)

§ 103. Validity of the clause.—A condition of a policy of insurance, that no action shall be sustained thereon unless brought within twelve months after the cause of action shall have accrued, is valid; and the condition goes to the right as well as to the remedy. *Cray v. Hartford Fire Ins. Co.*,* 1 Blatch., 280; *Davidson v. Phoenix Ins. Co.*,* 4 Saw., 594; *Home Ins. Co. v. Stanchfield*, 1 Dill., 424; 2 Abb., 1.

§ 104. A clause in a policy of insurance providing that any difference or dispute in relation to any loss sustained, or alleged to be sustained, shall be referred to and determined by ref-

erees, to be chosen mutually by the assured and the directors of the company, and that no holder of a policy shall be entitled to maintain any action thereon against the company until he shall have made the offer so to refer, *held* void. *Trott v. City Ins. Co.*,* 1 Cliff., 489.

§ 105. Nonsuit followed by another action.—A condition in an insurance policy that suit shall be brought within a year from the time of loss is valid. Bringing a suit within a year, suffering a nonsuit thereon, and then bringing a new suit after a year, is not performance of the condition; and this though the beneficiaries of the policy are infants. *O'Laughlin v. Union Ins. Co.*,* 3 McC., 543. See § 92.

§ 106. When suit is not brought within a year, in such case, the fact need not be specially pleaded. *Ibid.*

§ 107. Special case stated.—A policy of insurance against fire, upon a stock of goods, allowed the insurance company sixty days in which to pay the insurance, after notice and proof of loss, and the company had the right, by the policy, to require that the loss should be verified by the books of account of the insured, or other proper vouchers. The goods were destroyed by fire March 2. The assured furnished, March 13, to the company (having given immediate notice of the fire) a particular account of their loss, verified by their own oath, with the proper certificate of the notary. The books of account, however, were in the possession of the company, and this, too, without the knowledge of the insured, who consequently could not comply with the requirements of the policy as to such books and vouchers. Supposing their books destroyed, the insured, March 23, made additional affidavits. In an action on the policy, the company set up, as a defense, that the suit, being instituted May 16, was begun too soon. *Held*, that the affidavits of March 23 were voluntary statements, and proper evidence for consideration in deciding the merits of the case, but that the making of them was not a condition precedent to the plaintiffs' right to recover, and that plaintiffs had a right to sue after sixty days from March 13, unless the company in the interval paid them. *Huchberger v. Providence Ins. Co.*,* 1 Ch. Leg. N., 353.

VIII. ARBITRATION CLAUSE.

§ 108. Clause held valid.—A policy of insurance contained the following provisions: "If any difference shall arise with respect to the amount of any claim . . . such difference shall be submitted to arbitrators." "It is further . . . agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery until after an award shall have been obtained, fixing the amount of such claim in the manner above provided." *Held*, valid. *Gauche v. London Ins. Co.*, 10 Fed. R., 847 (§§ 1429-34).

§ 109. Construction.—A policy of insurance provided for arbitration to determine the amount of loss in case of differences touching the same, "upon the written request of either party." Another clause provided that no suit should be sustainable until after an award by the arbitrators. *Held*, that the two provisions were to be construed together, and that thus construed they meant that the defense to a suit on the policy, that the assured had failed or refused to arbitrate, could not be made in a case whether neither party had made a written request to arbitrate. *Wallace v. German Am. Ins. Co.*,* 2 Fed. R., 658.

§ 110. Condition precedent—Reference to officer of underwriter.—A policy of life insurance stipulated for the payment of the insurance, if in the opinion of the surgeon-in-chief of the company the assured did not die of intemperance. *Held*, in a suit on the policy, that the production of the opinion of the surgeon, or an excuse for its non-production, was a condition precedent to the right to maintain the suit. *Campbell v. American Popular Life Ins. Co.*,* 1 MacArth., 246, 471.

§ 111. Such agreement is valid, and is not in contravention of public policy. *Ibid.*

§ 112. But the production of the opinion of the surgeon will be excused by the averment in the declaration that he was interested as a stockholder in the company, and that the fact of such interest was concealed from the plaintiff. *Ibid.*, 471.

IX. PLEADING, PRACTICE AND EVIDENCE (INCLUDING USAGE).

§ 113. Assumpsit will not lie on a sealed policy of insurance. *Marine Ins. Co. v. Young*, 1 Cr., 332.

§ 114. In an action of covenant on a policy under seal, all special matters of defense must be pleaded. Under the plea of covenants performed the defendant cannot give evidence which goes to vacate the policy. *Marine Ins. Co. v. Hodgson*, 6 Cr., 203.

§ 115. Where the "proposals, answers and declarations" made by the applicant are warranties, and a part of the contract itself, they must, in an action on the policy, be set out in the complaint. *Bidwell v. Connecticut Life Ins. Co.*, 3 Saw., 261.

§ 116. Pleading—Equity—Parol contract.—If an answer in chancery admits that a proposal for insurance was made and accepted, but adds that no contract was made, the court will not intend that this denial includes any new matter of fact, but will treat it as only containing the respondent's view of the legal consequences of the facts admitted. *Union Ins. Co. v. Commercial Ins. Co.*,* 2 Curt., 521; 18 Law Rep. (8 N. S.), 610.

§ 116a. Amendment.—Where the petition on an insurance policy shows a forfeiture by reason of non-payment of premiums during the war, the court, in sustaining a demurrer, will give leave to amend, to enable plaintiff to claim the equitable value of the policy. *Owen v. N. Y. L. Ins. Co.*,* 1 Hughes, 325.

§ 117. Parties.—Where a statute of the state, applicable by express adoption to the practice in the federal court sitting therein, requires that actions shall be brought by "the real party in interest," an order on an insurance company, given by the assured to a creditor of his, after the loss, directing the company to pay such creditor the whole amount due under the policy, makes the person receiving such order an assignee of the cause of action, and entitles him, under the statute above mentioned, to sue on the policy for the loss in his own name. *Spratley v. Insurance Co.*,* 1 Dill., 392; distinguishing *Thompson v. Railroad Cos.*, 6 Wall., 134.

§ 118. A debtor obtained insurance in favor of her creditor, the loss being payable to the creditor "as his interest might appear." There was nothing to show that the debt at the time of the loss was equal in amount to the sum insured. *Held*, that the creditor could not sue upon the policy. (On authority of *Hartford Ins. Co. v. Davenport*, 37 Mich., 613.) *Thatch v. Metropole Ins. Co.*,* 8 McC., 387.

§ 119. It seems that if two persons contract for the benefit of a third, to whom a sum certain is to be paid, such third person may in his own name sue the person promising on a breach of the contract. *Ibid*.

§ 120. Variance.—A declaration on a policy of insurance averred that the contract was made in consideration of the payment of the premiums. It was objected to the introduction of the policy in evidence that it purported to have been issued, also, in consideration of representations and declarations by the assured. *Held*, that the declaration was sufficient. *Jacobs v. National Life Ins. Co.*,* 1 MacArth., 632.

§ 121. The application for insurance is no part of the plaintiff's cause of action, and need not be set forth in the declaration. If the representations are false, the burden is on the defendant to prove it. *Ibid*.

§ 122. General issue.—In an action on a life insurance policy the defendant may show under the general issue that representations made by the assured were false. *Jacobs v. National Life Ins. Co.*,* 1 MacArth., 484.

§ 123. Evidence—Copy of policy.—A copy of a policy of insurance, proved to have been compared with the original register on the books of the insurance company, and notice given to produce the original, cannot be read in evidence. The register in the hands of the company should be exhibited after proving the existence of the original policy. *United States v. The Paul Shearman, Pet. C. C.*, 98.

§ 124. A letter written by the agent of an applicant for re-insurance to his principal, directly after the negotiations in regard to the re-insurance had closed, and stating the result of such negotiations, is admissible in evidence in favor of such principal in an action against the re-insurer on the alleged contract for re-insurance. *Union Ins. Co. v. Commercial Ins. Co.*,* 2 Curt., 524; S. C., 19 How., 321 (§§ 537-39).

§ 125. In an action upon a valued policy on a cargo the defendants will not be permitted to give evidence of actual cost. *Gardner v. Columbian Ins. Co.*,* 2 Cr. C. C., 473.

§ 126. Construction.—Where all the terms of a policy of insurance are made by an insurance company in its own language, and the policy is signed by the president of the company and not by the assured, the language, if it requires construction, must be taken most strongly against the company, excluding the admission of evidence of usage in regard to terms of plain import. *Insurance Co. v. Wright*,* 1 Wall., 456.

§ 127. A contract varying a policy of insurance can only be made by executing an instrument of equal dignity with the insurance policy. *Head v. Providence Ins. Co.*, 2 Cr., 127.

§ 128. Order for insurance.—The clear and definite stipulations of a policy are not to be controlled in an action by the memorandum or order for insurance, when the policy does not plainly appear to be at variance with the agreement. *Hogan v. Delaware Ins. Co.*,* 1 Wash., 419; *Insurance Co. v. Lyman*,* 15 Wall., 670.

§ 129. Though a verbal contract of insurance is good, and may be proved like other verbal contracts, yet where the contract in question was made in writing it cannot be varied by evi-

dence of a parol contract made in other terms before the issuing of the policy. *Insurance Co. v. Lyman*,* 15 Wall., 664.

§ 180. Usage.— If the terms of a policy are clear and precise, no evidence of usage is admissible to explain, alter or impair their meaning, *Hearn v. New England Ins. Co.*, 3 Cliff., 818 (§§ 874-79); *Union Ins. Co. v. Commercial Ins. Co.*,* 2 Curt., 529; S. C., 19 How., 321.

§ 181. Evidence of the general insertion of a particular clause in policies of insurance issued at a particular place is not evidence of a usage with regard to the fact in an action upon a policy there issued and not containing the clause. *Hearn v. Equitable Ins. Co.*,* 3 Cliff., 328.

§ 182. A custom cannot be shown that when insurance is made on goods with a particular mark, those goods *so marked* must be on board ship. *Ruan v. Gardner*,* 1 Wash., 145.

§ 183. The usage of trade may be proved by parol, though such usage is a law or edict of the government of the country. *Livingston v. Maryland Ins. Co.*, 7 Cranch, 506 (§§ 395-406).

§ 184. In the absence of fraud or mistake, an oral promise of the insured, made before the contract was executed, and not inserted therein, that upon the happening of a certain event the policy should be avoided, cannot be shown in an action upon the policy. Nor would a custom of insurance companies treating such event as avoiding the policy be entertained if inconsistent with the terms of the policy. *Candee v. Citizens' Ins. Co.*,* 4 Fed. R., 148.

§ 185. The admissions of one of several underwriters upon the same policy cannot be given in evidence against another underwriter; nor the admissions of a committee of the company not authorized by the articles of association to make admissions. *Lambert v. Smith*, 1 Cr. C. C., 361.

§ 186. Nor can evidence be given by the plaintiff, in an action on a policy, what another insurance company, or other underwriters on the same policy, have paid upon the same risk. *Ibid.*

§ 187. Evidence that the general agent of an underwriter expressed an opinion, after examining a claim of loss, that it should be paid, is inadmissible. *Insurance Co. v. Mahone*,* 21 Wall., 152.

X. RE-INSURANCE.

SUMMARY — Nature of contract of, § 188.

§ 188. Re-insurance is a contract of indemnity between the insurer and the re-insured. In the computation of the amount to be paid by the re-insurer, the insolvency of the insurer cannot be taken into account (when not stipulated). Therefore, *held*, that a condition in a policy of re-insurance that "in case of loss the company shall pay *pro rata* at and in the same time and manner as the reinsured," does not mean that the sum to be paid will be affected by the fact that the original underwriter has become insolvent and unable to pay in full. *Cashau v. Northwestern Ins. Co.*, §§ 189-40.

[NOTES.— See §§ 141-148.]

CASHAU v. NORTHWESTERN INSURANCE COMPANY.

(Circuit Court for Wisconsin: 5 Bissell, 476-479. 1878.)

STATEMENT OF FACTS.— Action by the assignee of the Fulton Fire Ins. Co. to recover the amount of a loss which had been paid by the Fulton Company, but which said risk of \$5,000 had been re-insured in October, 1870, by defendant.

The conditions of the policy issued by the latter were, "that the loss should be paid immediately after due notice and proof of the same, and in no event shall this company be liable for a greater sum than such portion hereby insured bears to the whole sum insured by the company re-insured. And in case of loss this company shall pay *pro rata* and in the same time and manner as the company re-insured. And all persons claiming under this policy shall put the property in the best order and give immediate notice and render a particular account thereof in writing, under oath, stating the time, origin and circumstances of the fire."

In October, 1871, the goods insured were destroyed by fire, and the Fulton Fire Ins. Co. thereby became insolvent. Proof of loss was made on Novem-

ber 9th, and adjusted at \$4,689.66, and served on the receiver of the Fulton Co.; the latter then wrote to the defendant and inclosed proofs of loss, the receipt of which was acknowledged. On December 29th notice of service of proofs on the Fulton Co., and that the defendant is held liable, was served on the president of the latter and receipt acknowledged by its secretary.

The Fulton Co. paid the original insured twenty per cent. of the loss. The jury found a verdict for plaintiff for \$4,689.66, with interest, whereupon defendant moved for a new trial.

Opinion by MILLER, J.

The motion for a new trial is founded upon three points:

1. The notice and proof were not given in time, and are not such as the defendant's policy calls for.
2. They do not purport to be originals, but are copies.
3. The defendant is not liable to pay the whole amount adjusted, but only *a pro rata*.

§ 139. *Immediate notice of loss means notice within reasonable time.*

The receiver of the Fulton Company gave the defendant the copies of the notice and proofs which he had received from the agent in Chicago. The secretary of the defendant company acknowledges the receipt of the copies without making objections as to the time or manner of the service, and not making demand for the originals. I think that, under the delay necessarily arising out of and connected with the insolvency of the Fulton Company, the service of copies of notice and proofs of the loss—particularly in the absence of objections on the part of the defendant—should be adjudged to have been given in time, and to be a substantial compliance with the condition of the defendant's policy. *Bowery Ins. Co. v. New York Ins. Co.*, 17 Wend., 357; *O'Niel v. Buffalo Fire Ins. Co.*, 3 Comst., 122. Due good faith requires that objections to proof, etc., be pointed out. *Etna Ins. Co. v. Tyler*, 16 Wend., 385; *Flanders on Fire Insurance*, 563, 564, 565, 566, and cases there cited. The word *immediate* must mean a reasonable time under the circumstances.

§ 140. *Nature of contract of re-insurance.*

The contract of re-insurance is one of indemnity between the insurer and the re-insurer. It has no connection with the insured, except in the nature of a surety in equity. The re-insurer may discharge its liability by paying the amount of the policy to the insured, as owner of the property insured, or to the re-insured. The financial condition of the re-insured is not to be taken into account in the computation of the amount to be paid on the policy of re-insurance. The insolvency of the original insurer is no defense, in whole or in part, to a suit against the re-insurer. It is claimed on the part of the defendant that the condition in its policy is an exception to this position of the law. The amount of percentage paid by the receiver of the Fulton Company to the original insured has no relation to or connection with the defendant's liability under the policy of re-insurance. The condition in that policy, that "in case of loss the company shall pay *pro rata* at and in the same time and manner as the re-insured," cannot mean that in case of the insolvency of the Fulton Company the defendant shall only be obliged to pay the *pro rata* of the dividends of the assets of said company, upon the claim of the first insured. It cannot have such application. The condition means that the defendant shall pay at and in the same time and manner as the re-insured company shall pay or be bound to pay according to its policy, and that the defendant shall have all the advantages of the time and manner of payment specified in the policy of the

Fulton Company—otherwise the defendant's policy would not be the contract of indemnity intended, and endless litigation might ensue. *New York Ins. Co. v. Protection Ins. Co.*, 1 Story, 458; *Carrington v. Commercial Ins. Co.*, 1 Bosw., 152; *Flanders on Fire Insurance*, 32, 33 and notes; *In re Republic Ins. Co.*, 8 Bankr. Reg., 197.

The motion for a new trial is overruled.

§ 141. **Defenses by re-insurer.**—Re-insurers may make the same defense, and take the same objections, the original insurers might. *New York Ins. Co. v. Protection Ins. Co.*,* 1 Story, 458.

§ 142. By a clause in a policy of re-insurance, "loss, if any, payable at the same time and *pro rata* with the insured," the re-insurer becomes entitled to the same rights and benefits which the original insurer has in order to make his liability only co-extensive with that of the latter. *Ex parte Norwood*, 3 Biss., 504.

§ 143. **What may be recovered against re-insurer.**—The party re-insured is entitled to recover full indemnity for the loss sustained by him, and also for the costs and expenses which he has reasonably and necessarily incurred in order to protect himself, and to entitle him to recover over against the re-insurers; especially where the re-insurers have notice that a suit has been begun and that they will be looked to for costs and expenses, and make no objection. *New York Ins. Co. v. Protection Ins. Co.*,* 1 Story, 458.

§ 144. But the costs and expenses must be incurred in good faith, and not wantonly and unnecessarily, in a plain case to which there is no reasonable defense. *Ibid.*

§ 145. *Quære*, whether notice to the re-insurers, of suit begun, is necessary. *Ibid.*

§ 146. **Special case stated.**—An underwriter insured one of two charters of a ship, and obtained re-insurance from another underwriter also having knowledge of the two charters. In an action against the re-insurer, *held*, that as there were two charters, both known to the defendant, that underwriter ought, in the absence of controlling evidence, to have understood that the application for re-insurance related to the charter which the plaintiff had already insured. *Ocean Ins. Co. v. Sun Ins. Co.*,* 15 Blatch., 249.

§ 147. Judgment rendered against the first insurer in such a case, the re-insurer being notified to defend and proceeding to do so, is conclusive upon the re-insurer of the sufficiency of the proofs of loss, and of the original plaintiff's insurable interest. *Ibid.*

§ 147a. **Construction.**—A policy of re-insurance provided that the loss should be payable at the same time and *pro rata* with the insured. *Held*, that the intention was to make the re-insuring company's liability co-extensive only with the liability of the original company. *In re Republic Ins. Co.*,* 5 Ch. Leg. N., 385; 8 N. B. R., 197.

§ 148. A company insured certain of its policies in another company, and, on becoming insolvent, the second company bought some of the policies at a discount. *Held*, the buying up of the policies was not against public policy; that, in an action by the assignee in bankruptcy of the first company for the amount of the re-insurance, the second company might set off the policies so purchased at their face value. *Hovey v. Home Ins. Co.*,* 13 Am. L. Reg. (N. S.), 511.

XI. AGENTS.

§ 149. **Special instructions limiting the authority of a general agent of an insurance company**, the powers of which agent would otherwise be co-extensive with the business intrusted to him, must be communicated to the party with whom he deals, or the principal will be bound to the same extent as though such special instructions were not given. *Insurance Co. v. McCain*, 6 Otto, 84.

§ 150. **When one acts for underwriter.**—If the agent of the underwriter write out for the applicant answers to the questions put in his own way, the act is that of the underwriter and not that of the applicant. *Insurance Co. v. Wilkinson*,* 13 Wall., 222; 2 Dill., 570; *Insurance Co. v. Mahone*,* 21 Wall., 152; *New Jersey Ins. Co. v. Baker*,* 94 U. S., 610; *Brugger v. State Ins. Co.*, 5 Saw., 804 (§§ 1267-70); *Nicoll v. American Ins. Co.*,* 3 Woodb. & M., 529; *Metropolitan Ins. Co. v. Harper*,* 3 Hughes, 260. And this though the written answers were read over to the applicant and signed by him. *Insurance Co. v. Mahone*, *supra*. See *New Jersey Ins. Co. v. Baker*, *supra*.

§ 151. An insurance agent in the employ of an underwriter, who receives for the underwriter applications for insurance, and issues policies, is agent of the underwriter in his preparing the answers of an applicant. *Insurance Co. v. Wilkinson*,* 13 Wall., 222; 2 Dill., 570.

§ 151a. A., wishing insurance on certain property, instructed B., an insurance broker, to procure it for him. B. employed C., also an insurance broker, who procured the policy in suit on A.'s property, which was accepted by the latter. The policy provided that it might be terminated by either party, and that the person procuring the insurance should be the agent of the assured, and not of the company, for all purposes. In a few days the company notified C. that it terminated the policy, and the next day, and before A. had knowledge of the rescission of the policy, the property was destroyed. In an action by A. against the company, it was held that A., by his acceptance of the policy, made C. his agent for procuring it, and that, by the terms of policy, notice to C. of the termination of the policy was sufficient to charge A. with knowledge thereof. *Grace v. American Central Fire Ins. Co.*, 16 Blatch., 485 (§§ 60-63).

§ 151b. A policy of insurance permitted \$3,000 concurrent insurance, but contained a clause declaring it to be void if there was any other insurance on the property, unless with knowledge of the company and with their consent therein in writing. The policy declared that it should be valid only when countersigned by the agent of the company, and also a clause that the person procuring the insurance was to be deemed the agent of the insured, and not of the company. The policy was signed in the office of the company, and was forwarded to the local agent of the company, and by him countersigned and delivered to the insured. At the time of such delivery the agent knew that there was, in fact, \$6,000 of additional insurance on the property. In an action on the policy it was held that the delivery of the policy by the agent, with knowledge of the additional insurance, was a waiver by the company of the clause of the policy declaring it void in case of the want of the written assent of the company thereto. *Putnam v. Commonwealth Ins. Co.*, 18 Blatch., 371; S. C., 4 Fed. R., 758 (§§ 1874-78).

§ 151c. An agent who effects insurance on goods shipped by sea may, without formal warrant of attorney, abandon to the insurer. If legal, the abandonment makes the agent of the insured the underwriters. *Chesapeake Ins. Co. v. Stark*, * 6 Cr., 272.

§ 151d. Knowledge of an agent of the loss of property before effecting an insurance must, in order to avoid the policy, be that of an agent concerned in obtaining the insurance. *Patton v. Janney*, * 2 Cr. C. C., 71.

§ 151e. Where a contract to insure a vessel is made with one well known to be an agent, and nothing is said concerning a declaration of interest, the contract is for the benefit of the principal, and the power specially to declare the interest is reserved to the agent, and should he make a mistake in the execution of his power equity will correct it. *Oliver v. Mut. Commercial Marine Ins. Co.*, * 2 Curt., 298.

§ 151f. It seems that where the agent wrongfully declares the interest in a policy of marine insurance, through fraudulent intent, equity will not relieve the principal. *Ibid.*

§ 151g. If the agent of an insurance company, being as well acquainted with the premises to be insured as the applicant, makes the survey, and takes the whole authority of making the representations on a view of the premises, the insured is not liable either for the concealments or the misrepresentations of the survey. If, under such circumstances, the agent intentionally or unintentionally makes any concealment or misrepresentation in the application, acting upon his own survey and his own knowledge, the company will not be permitted to defeat the policy on such grounds. It is no hardship to the company that it is presumed to have the notice of its agent. *Roth v. The City Insurance Co.*, * 6 McL., 337.

§ 151h. When an agent effects marine insurance and the policy is payable to him "on account of whom it may concern," the policy binds the company if the agent has authority to effect the insurance, or if his act in effecting it is subsequently ratified by his principal; and this is so, even if the persons intended to be insured are unknown both to the underwriter and the broker procuring the policy. *Hooper v. Robinson*, 8 Otto, 536 (§§ 287-92).

§ 152. Special case stated.—A., the agent of several insurance companies, was in the habit of sending to B., the agent of another insurance company, applications not accepted by the companies for which A. was acting; and if the application was accepted by B.'s company, B. sent A. a policy, and A. collected the premium and retained a commission. In one of these transactions a mistake was made in a policy made by B.'s company; and on a bill to correct the mistake, held, that A. was the agent of the company issuing the policy. *Sias v. Roger Williams Ins. Co.*, 8 Fed. R., 183.

§ 153. One not in employ of underwriter may become underwriter's agent.—B. obtained insurance on his property through S., who was not in the employ of the underwriter. Held, that S. thereby became agent of the underwriter, notwithstanding a clause in the policy that any one, other than the assured, who procured the insurance should be considered "the agent of the assured, and not of the company." *Bassell v. American Ins. Co.*, * 2 Hughes, 531.

§ 154. Presumption.—One who signs an application for insurance written by the underwriter's agent is presumed to know its contents, and is to be held to its statements unless he can show that he answered the questions truthfully, and signed the application believing, where that varies from his alleged answers, that the answers made by him were correctly

written down in the application. *Fletcher v. New York Ins. Co.*,* 3 McC., 603. See S. C., 11 Fed. R., 377; 12 Fed. R., 557.

§ 155. **Payment of premium.**—The receipt by a life insurance company of a statement of a person acting as its agent, that a premium had been paid, and its silence until after the death of the insured as to an adoption of his act, operates as an estoppel upon such company from objection to the payment of the premium to such agent for them. *Insurance Co. v. McCain*, 6 Otto, 84; 10 Ch. Leg. N., 347.

§ 156. An agent of a mutual insurance company, who takes premium notes and issues policies, is not an agent for a special or temporary purpose, but for the ordinary and principal business of the company. (Case of *Payson v. Withers*, 5 Biss., 269, distinguished.) *Lamb v. Lamb*, 6 Biss., 420.

§ 156a. An insurance company is liable on its policy, where the agent writing the policy accepted the responsibility of an insurance broker to whom the assured had paid money for insurance, in lieu of money from the insured. *Bennett v. Maryland Fire Ins. Co.*, 14 Blatch., 428 (§§ 1117-21).

§ 156b. It seems that the power of an insurance agent to receive premiums is terminated when the insured and insurers become public enemies by the breaking out of war. *Tait v. New York Life Ins. Co.*, 1 Flip., 292.

§ 157. **Notice of limitation of agent's powers.**—Blank applications furnished to a solicitor of insurance indicate and limit his authority, and acts in excess of such authority are not binding on the company. *Lee v. Guardian Life Ins. Co.*,* 2 Cent. L. J., 495.

§ 158. His acts in excess of his authority will not estop the company where the policy when presented to the assured expressly brings to his attention the terms upon which it is issued. *Ibid.*

§ 159. If a fraud on the company is attempted by the agent, participation by the assured, either wilfully or through gross negligence, will avoid the policy. *Ibid.*

§ 160. **Compensation of agent.**—An express contract with an insurance agent as to his compensation cannot be varied by evidence of a general custom. *Stagg v. Insurance Co.*, 10 Wall. 589.

§ 161. Where the compensation of an insurance agent is stated in a circular received by him, on which he acts for several years, and until he is discharged, and by which his compensation is adjusted and received, he is, in the absence of fraud or unfairness or illegality, estopped to deny that such circular constituted the contract. The production of a circular of previous date does not show that there was another contract. *Ibid.*

§ 162. **Same — Renewals.**—In an action to recover a percentage on renewals of life insurance policies procured by him, it was held that if plaintiff had an absolute right to a percentage on the renewals during the lives of the insured, his contract was entire; but if he was entitled to his commission only, as the policies were renewed from year to year, his contract was divisible, and that the jury should determine the question. *Ensworth v. N. Y. Life Ins. Co.*, 1 Flip., 92.

§ 163. **Usage of life insurance companies admissible in evidence.** *Ibid.*

§ 164. Defendant, in engaging the plaintiff's services as agent, wrote to him: "Your status is this: you are working up a business for yourself, and are to be paid the highest commissions we pay to any agent." Held, in an action for commissions or the like, on renewal premiums taken after he ceased to be the defendant's agent, that he could not show by insurance men that the words "working up a business for yourself" had, apart from the connection, a peculiar meaning entitling him to the commissions demanded, or that there was a usage among other companies where he was employed to pay commissions on renewals as demanded. *Partidge v. Life Ins. Co.*,* 1 Dill., 139.

§ 165. In the absence of agreement concerning the period of time for which an agent is employed by an underwriter, the service may be terminated at will by the latter, and this, too, though in complying with a local law from year to year, the underwriter designates the person as its agent. *Davis v. Niagara Ins. Co.*,* 12 Fed. R., 281.

§ 166. Certain evidence held not to amount to an agreement by the underwriter to employ the agent for a year. *Ibid.*

§ 167. Upon a change of agents by an underwriter the assured is entitled to notice thereof, and reasonable time to find the new agent. *Seamans v. Northwestern Ins. Co.*,* 1 McC., 508.

§ 167a. A master of a ship is not an agent for the purpose of insuring the ship, and where after a loss the owner procures insurance on the ship, but at the time of procuring such insurance has no knowledge of the loss, but acted with entire good faith in procuring the insurance, he is not precluded from a recovery, nor is the policy void by the omission of the master to communicate intelligence of the loss, although such omission was wilful, and with a fraudulent design to enable the owner to make insurance after the loss, the owner not being conusant

of any such act, or design, at the time of procuring such insurance. *Ruggles v. General Interest Ins. Co.*, * 4 Mason, 78; *S. C., General Ins. Co. v. Ruggles*, 12 Wheat., 410 (§§ 870-73).

§ 167b. **Cancellation of policy.**—The agent of an insurance company with special power to cancel a policy cannot delegate such power to another, but he may employ another to deliver such notice after he has given it. *Runkle v. Citizens' Ins. Co.*, 6 Fed. R., 149 (§§ 1224-26).

§ 167c. An insurance company, dissatisfied with a risk, wrote to their agent to obtain a modification of it. He wrote to the agent of the insured offering to reduce the risk in whole or in part, or to procure insurance in another company or to return the premium. The agent of the insured replied that he wished insurance for the same amount in the company named, and forwarded the policy to the insurance agent. The latter marked the policy "canceled," but delayed a short time to write the policy in the new company, in which time the property was destroyed. In an action on the policy it was held that the company was liable, the agent having no right to cancel the policy until a new one had been issued as he promised. *Poor v. Hudson Ins. Co.*, 2 Fed. R., 434 (§§ 58-59).

§ 168. **Revocation of agency.**—An insurance company cannot hold a person out as its agent, and then disavow responsibility for his acts. After it has appointed an agent in a particular business, parties dealing with him in that business have a right to rely on the continuance of his authority, until in some way informed of its revocation. So where the renewal premium on a life insurance policy was paid to a former agent of an insurance company, without notice of the revocation of his authority, and the company, with notice thereof, failed to notify the insured of the agent's lack of authority, the company is liable. *Insurance Co. v. McCain*, 6 Otto, 86; 10 Ch. Leg. N., 347. Notice of loss given by the insured to the agent of an insurance company, without notice of the revocation of his agency, is a good notice, and binds the insurance company. *Bennett v. Maryland Fire Ins. Co.*, 14 Blatch., 424 (§§ 1117-21).

§ 169. A collateral agreement not involving the execution of a policy is not within the authority of an officer of an insurance company. *Constant v. Insurance Co.*, * 8 Wall. Jr., 313; 10 Am. L. Reg., 120.

§ 170. **Special contract.**—A direction by the secretary of an insurance company to its agent to tender policies, and if they are not satisfactory to cancel them; stating "we feel ourselves bound" not to pay the losses if other insurers of the same property should be insolvent, but "for a satisfactory adjustment," and adding "we deem the companies good, and if any parties can settle with them, we can," is not a guaranty of the solvency of such other insurers. *Ibid.*

XII. MUTUAL COMPANIES.

SUMMARY—*Division of risks*, § 171.

§ 171. Unless authorized by statute or by contract, a mutual insurance company cannot divide its risks into classes according to the degree of hazard and assess alone the premium notes of the particular class to which a loss belongs. *Fitzpatrick v. Troy Ins. Co.*, § 172.

[NOTES.—See §§ 173-177.]

FITZPATRICK v. TROY INSURANCE COMPANY.

(Circuit Court for Wisconsin: 5 Bissell, 48-50. 1857.)

Opinion by MILLER, J.

STATEMENT OF FACTS.—The plaintiffs recovered a judgment against the defendant upon a policy against fire on a store of goods. Upon the return of an execution unsatisfied, a creditor's bill was filed, with a rule for an injunction and for the appointment of a receiver. By the consent of the parties a receiver was appointed, who has filed his bond with sureties and has entered upon the discharge of the duties of his appointment. The receiver returned into court a schedule and inventory of the premium notes and assets of the company; and he has petitioned the court, setting forth that the company was organized with two departments, the farmers' department and the merchants', and that by the charter and by-laws the accounts and policies in each department were to be entirely separate and distinct from each other; and praying instructions as to the manner of making assessments upon the notes in each department for the liquidation of the debts of the company. Section 4 of

article 2 of the by-laws is, "that the accounts of each department shall be kept entirely separate and distinct, and no premium note shall be assessed for the payment of any loss except in the class to which it belongs;" and in pursuance of article 9 of the charter, these by-laws are annexed to the policy and are made by reference a part of the contract in form.

These plaintiffs paid a cash premium without giving a note, and did not, therefore, insure on the mutual principle. They have a right to claim of the company the amount of their judgment. They have not, by a note or in any other manner, classed their policy under either department as specified in the by-laws.

§ 172. *No authority given to divide losses into classes.*

The charter was granted and the company was organized under and by virtue of an act entitled "An act to provide for the incorporation of insurance companies," passed by the legislature of Wisconsin, and approved February 9, 1850. I do not find in that act any authority for the division of the company into two departments, or its business into classes. The fifth section requires agreements or notes for insurance before the organization of the company, which the corporators certified to under oath, upon submitting their application for the charter. That certificate does not classify the premium notes so received. These notes are required as capital of the company. They are "*payable when called for, according to the charter and by-laws of the company, to pay losses and expenses.*" But this provision does not authorize a classification of the notes. It is not contemplated by the act that there should be the classification as made by the charter and by-laws of this company. One charter, or the incorporation of one company upon each application, was intended. This charter and the by-laws virtually make two companies of separate and distinct interests and liabilities. The law of this state appears to be the same as that of the state of New York. The only decision in that state referred to is the case of *Thomas v. Achilles*, 16 Barb., 491, in which the court ruled that "a mutual insurance company, organized under the general insurance act, has no right to divide its risks into two classes according to the degree of hazard, and to assess the premium notes only for the payment of losses happening in the class to which such notes belong. The assured has a right to look to the entire capital of the company—that is, the whole amount of premium notes taken—for his indemnity, in case of loss, instead of being limited to the capital of that class of risks in which his policy has been placed. And in case an assessment is made, he has a right to claim that *all* the premium notes held by the company should be embraced therein." I adopt this decision as ruling the case and shall instruct the receiver accordingly.

§ 173. *Membership in.*—It is not necessary, to make a person a member of a mutual insurance company under a charter like the one in suit, that he should have given a premium note; one who has paid a cash premium may thereby become a member. The theory of a mutual insurance company is, that the premiums paid by each member constitute a common fund, devoted to the payment of any losses that may happen. Cash premiums may as well represent the insured in the common fund as a premium note. *Union Ins. Co. v. Hoge*,* 21 How., 35.

§ 174. *Cash premiums.*—Under the act of the legislature of New York, of April 10, 1849, mutual insurance companies incorporated under the act were authorized to issue policies for a cash premium, as well as for premium notes, and the cash premium represents the insured in the common fund, as well as the premium note does. *Union Ins. Co. v. Hoge*,* 17 How. Pr., 127.

§ 175. By an amendment to its charter, a mutual insurance company was authorized "to make any and all insurance . . . for a specific rate of premium to be paid in cash, in the same manner that insurance companies other than mutual insurance companies are accustomed to do." *Held*, that the taking of a note for premium due was within the power of the company. *Carey v. Nagel*, 8 Am. L. T. R., 181; 2 Abb., 156.

§ 176. Assessments.—Where, under the charter of a mutual fire insurance company, it was the duty of the directors on being notified of a loss to assess upon the signers of deposit notes, liable thereto, a sum sufficient to meet the same, *held*, that if the validity of the claim is denied and litigated, the necessity of an assessment is not superseded but merely suspended, and if policies expire which were running when the loss occurred, which was duly notified, the directors have no right to surrender the deposit notes thereof without providing for the contingency of the validity of the litigated claims. And if a judgment is eventually recovered, the omission by the directors to make, if necessary, a special assessment for the payment, will render them personally liable for such an amount towards the judgment as an assessment seasonably made and enforced with due diligence would have procured. *Jordan v. Union Fire Ins. Co.*,* 21 Law Rep., 88.

§ 177. Special trust fund.—The defendant was a corporation under the laws of Missouri for the purpose of carrying on the business of mutual life assurance. Under authority of its constitution a department of the corporation was established for the same purpose in Alabama, and it was provided that "the net assets of the business of said department shall be invested within the state of Alabama, . . . said assets being the whole of the premiums, less the amount necessary to be held at the present office, St. Louis, Missouri, as a contingent fund to pay the expenses and losses from year to year, as the same become due and payable." *Held*, that the receipts of the business in Alabama did not constitute a special trust fund for the exclusive benefit of policy-holders of the corporation in that state. *Davis v. Life Ass'n of America*,* 11 Fed. R., 781.

XIII. FOREIGN COMPANIES.

SUMMARY — *Conflict of laws*, § 178.

§ 178. A. applied to B. for insurance in a foreign company. The application was forwarded to the company by B., and the company issued a policy from its home office. *Held*, a contract made where the policy was issued, and not affected by a law of the state of A. and B., forbidding the making of insurance contracts except upon the performance of certain acts by the agents of foreign companies, and that A. was liable upon a premium note given in such a case, though the terms of the local law had not been complied with by B. *Lamb v. Bowser*, §§ 179-84.

[NOTES.—See §§ 185-211.]

LAMB v. BOWSER.

(Circuit Court for Indiana: 7 Bissell, 815-821. 1876.)

STATEMENT OF FACTS.—Proceeding by the assignee of an insurance company to recover the premium due on a policy of insurance issued to defendant, who set up in answer that he had applied for insurance to the agent of the insurance company in Indiana, who had received his application and forwarded it to Freeport, Illinois, where the company had an office and in which state it was incorporated, whereupon a policy had been issued to him, all of which had been done by said company and its agent without first having complied with the act of the Indiana legislature with respect to foreign corporations doing business in the state.

These allegations were admitted by plaintiff, who also stated that the agent had only power to receive the application of defendant and forward it to his principal, whereupon the latter issued the policy and directed it to defendant in Noble county, and deposited it in the mail at Freeport, post-paid.

To this reply the defendant demurred.

§ 179. *Act of the legislature of Indiana with respect to foreign corporations transacting business in Indiana, construed.*

Opinion by GRESHAM, J.

The first section of the act relied on by the defendant provides that agents of foreign corporations before entering on the duties of their agency in this state shall deposit in the clerk's office of the county where they propose doing business, the power of attorney or other authority by virtue of which they act as agents. The second section provides that said agents shall procure from such corporation, and file with the clerk of the circuit court of the county where they propose doing business, before commencing the duties thereof, a duly authenticated order or resolution of the board of directors or managers of such corporation, authorizing citizens or residents of this state, having a claim or demand against such corporation arising out of any transaction in this state with such agents, to maintain an action in respect to the same in any court of this state, and authorizing service of process in such action on such agent to be valid service on such corporation.

The third section provides that service on such agents shall have the same effect as service on the corporation. The fourth section provides that such foreign corporations shall not enforce in any courts of this state any contracts made by their agents, or persons assuming to act as their agents, before compliance by such agents, or persons acting as such, with the provisions of sections 1 and 2 of this act.

The fifth section provides that any persons who shall receive or transmit money or anything else of value to or for the use of such corporation, or who shall in any manner make or cause to be made any contract or transact any business for or on account of any such foreign corporation, shall be deemed an agent of such corporation and subject to the provisions of said act. The seventh section provides that any persons acting as agents of foreign corporations neglecting or refusing to comply with the provisions of said act as to agents shall be fined in any sum not less than \$50.

When the company accepted the application and premium note at Freeport, and deposited the policy of insurance in the postoffice addressed to the defendant, post-paid, the contract was complete and the note became the binding obligation of the defendant. Then, and not before, the minds of the parties met. Up to that time neither party was bound. Before that time the defendant might have withdrawn his application and demanded the return of his note. The mailing of the policy at Freeport was a delivery to the defendant. The instant that delivery was thus made the risk of the company as insurer commenced. *Hyde v. Goodnow*, 3 Comst., 266.

The Winnesheik Insurance Company, being a foreign corporation, could act in this state only by agents; and agents of such corporations being expressly prohibited by the statute from making any contracts or transacting any ordinary business in this state except as therein provided, it would seem that the company, as well as the agent, acted in violation of law in establishing the agency in Noble county, and in taking and forwarding the application and premium note. *Union Central Life Ins. Co. v. Thomas*, 46 Ind., 44; *Etna Ins. Co. v. Harvey*, 11 Wis., 394.

§ 180. *Invalidity of agent's act not sufficient to invalidate insurance.*

And for thus violating the law of the state the agent might have been prosecuted and punished. But it does not follow that, because the company and its agents thus violated the law of Indiana, the contract entered into

in Illinois was illegal and void. The case stands just as if the defendant had procured his insurance on personal application to the company at Freeport.

§ 181. *Power of legislature over contracts made out of the state.*

But the defendant insists that, even if this is to be regarded as an Illinois contract, it was entered into in violation of the Indiana statute, and cannot, therefore, be enforced in this state. In answer to this it might be sufficient to say that it is not competent for the legislature of Indiana to declare that the citizens of this state shall not be allowed to make such contracts as they please, out of the state, for the insurance of their property, whether it be within or without the state. It by no means follows that, because corporations have no existence beyond the boundaries of the sovereignty or state which creates them, and Indiana has said that foreign corporations shall be admitted to do business in this state only on certain terms which were not complied with by the Winnesheik Insurance Company, the contract in this case, made in Illinois, is void.

§ 182. *Intention of legislature.*

Clearly it was not the intention of the legislature to apply this statute to contracts entered into with corporations out of the state. The title of the act reads: "An act respecting foreign corporations and their agents in this state." In the first section, in speaking of what shall be required of agents, we find this language: "Before entering upon the duties of their agency in this state." The second section provides that the appointment or power of attorney of such agents shall authorize the citizens or residents of this state having a claim or demand on such corporation arising out of any transaction in this state with such agents to sue, etc. Section 4 provides that "such foreign corporations shall not enforce in the courts of this state any contracts made by their agents before a compliance made by such agents with the provisions of sections 1 and 2 of this act."

§ 183. *Lex loci contractus.*

It is further insisted by the defendant that no country or state is bound to enforce contracts which are contrary to the policy of its own laws, and that even if the contract was finally consummated in Illinois, it was not until the statute of Indiana had been violated, and that what was done in Illinois was in evasion if not in violation of the statute. This contract was valid in Illinois where it was made. The rule is that a contract which is good where made is good everywhere, and a contract which is void by the law of the place where it was made, or of the place where it is to be performed, is void everywhere. (a) *Hyde v. Goodnow*, 3 Comyn, 266. As already shown, the defendant's contract with the company was not in violation of the statute. Its enforcement here would contravene no declared policy of the state, and certainly it was not immoral in itself.

§ 184. *Comity.*

The law of comity, which has always been recognized to the fullest extent among the states of our Union, makes it the duty of courts to enforce such contracts. There is nothing in the legislation of Indiana indicating that this law of comity is not to have full sway in the courts of this state. By that law a corporation created by one sovereign or state is permitted to make contracts

(a) But the contract, though perhaps made in Illinois, was performable in Indiana; it would seem, therefore, that it was an Indiana contract. Story, *Conflict of Laws*, § 290, and note (a), 8th ed.—EDITOR.

in another and to sue in its courts. Indiana has said, as she had a right to say, that before foreign corporations shall be allowed to carry on business in this state, by their agents, they shall submit to certain conditions, and that failure to submit shall make void all contracts of their agents made in this state. Further than this, the legislature has not undertaken to go.

The case of *Reynolds v. Geary*, 26 Conn., 179, which seemed to be chiefly relied on by the defendant's counsel in support of this branch of their argument, was an action brought on a note given by the defendant to the plaintiff for spirituous liquors sold by the plaintiff to the defendant. The note was given in the city of New York, and the sale was made there with knowledge on the part of the plaintiff that the liquors were to be sold by defendant in Connecticut, contrary to the laws of that state, and with intent on the part of the plaintiff to enable the defendant to violate the laws.

The statute which was thus violated declared that "no action of any kind shall be maintained in any court of this state, for spirituous and intoxicating liquors sold in any other state or country contrary to the laws of said state or country, or with intent to enable any person to violate any provisions of this act." The court held that mere knowledge of the plaintiff that the liquors were bought for sale in Connecticut would not have made the note void, but that the intent on the part of the plaintiff that, with his assistance, the defendant should violate the statutes, made the plaintiff *particeps criminis*.

I am not able to see that this case affords the defendant any support. The sale of spirituous liquors in New York with intent on the part of the seller to enable the purchaser to violate the law brought the contract within the letter of the act. It is not necessary to enlarge upon the character of this Connecticut statute as a police regulation for the protection of the public health and morals. The distinction in that respect between it and the kind of legislation relied on by the defense is obvious. Demurrer overruled.

§ 185. *Constitutional law.*—The provision in the constitution of the United States, that "The citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states," does not apply to corporations; and the state of Maryland has a right to exclude a corporation from transacting insurance business in the state except upon certain conditions. *Warren Mfg. Co. v. Aetna Ins. Co.*, 2 Paine, 501.

§ 186. A state law imposing a greater tax on a non-resident than on a resident insurance company is not a violation of a constitutional provision that taxation shall be uniform. It is mere confusion of ideas to put foreign corporations on the same footing with corporations created by the laws of the state because of the simple fact that both are corporations. It is equally unsound to claim for them the personal and constitutional rights of citizens of the several states throughout the Union. *Insurance Co. v. New Orleans*, 1 Woods, 88.

§ 187. It is not against the public policy of the state of Illinois for insurance companies created by the laws of other states to invest their assets upon mortgages on real estate in Illinois. *Hards v. Con. Life Ins. Co.*, 8 Biss., 236.

§ 188. *Service of process—Compliance with local law.*—The statutes of Illinois required all foreign insurance companies to furnish to the auditor of state certain sworn statements, to authorize its agents, in writing, to accept service of process, to take out a license from the auditor, and to pay certain fees, upon which conditions the transaction of its business was to be allowed from year to year. The city of Chicago exacted as the condition of transacting business within its limits certain additional fees, and authorized the recovery thereof, by the city, by suit against the company's agent. *Held*, that these enactments were not unconstitutional. *Ducat v. Chicago*, 10 Wall., 411.

§ 189. A non-resident insurance company is not authorized to transact business in Oregon until compliance with the law of that state providing for the due appointment of a resident attorney, upon whom service of process may be made, in all proceedings brought against it within that state. *Northwestern Life Ins. Co. v. Elliott*, 7 Saw., 17.

§ 190. *Same—Special case stated.*—Citizens of the state of Arkansas brought suit in the United States circuit court for Arkansas, against the defendant, a corporation created by the

state of Illinois, on a policy issued on property located in Arkansas. A statute of Arkansas provided that no insurance company, not of the state, should do business in the state until it filed with the auditor of the state a written stipulation, agreeing that process served upon the auditor, or an agent specified by the company, should bind the company. Summons was served as required by the act. *Held*, that the court had no jurisdiction; that the defendant was not an inhabitant of or found in the district, within the meaning of the act of March 8, 1875. *Stillwell v. Empire Fire Ins. Co.*, * 4 Cent. L. J., 468.

§ 191. A condition imposed by the statute of Ohio with reference to foreign insurance corporations, that the agent who shall reside in Ohio and enter into contracts of insurance there in behalf of the foreign corporation should also be deemed its agent to receive service of process in suits founded on such contracts, is not unreasonable and not in conflict with any principle of public law; nor is it objectionable as being an attempt improperly to extend the jurisdiction of the state of Ohio beyond its own limits to a person (corporation) in another state. *La Fayette Ins. Co. v. French*, 18 How., 404.

§ 192. Where a policy of insurance is issued by a foreign company in contravention of the laws of the state making it a criminal offense to transact business without first conforming to certain requirements, in a suit by the company against a carrier, after having paid a loss under the policy, the carrier is not permitted to set up the invalidity of the policy. *The Manistee*, 6 Ch. Leg. N., 126; 7 Biss., 85.

§ 193. If a state pass a law imposing conditions on the transaction of insurance business within its boundaries, a corporation which, after the passage of such law, continues to underwrite policies in such state, is presumed to do so upon the terms and conditions of the law; and as to all causes of action thereafter arising would subject itself to prosecution in the mode pointed out by the act. *Warren Mfg. Co. v. Aetna Ins. Co.*, 3 Paine, 517.

§ 194. An insurance corporation, organized in one state, but which has not complied with the statutes of another state in reference to the transaction of business therein, may still sue in the federal court in such latter state. *Northwestern Ins. Co. v. Elliott*, 7 Saw., 24.

§ 195. Where a state statute provides that no foreign insurance company shall do business within the state unless it agrees that service of process upon its designated agent in the state shall be considered service on the company, an agreement to that effect applies as well to the process of the federal courts within the state as to that of the state courts. *Knott v. Southern Ins. Co.*, 2 Woods, 480.

§ 196. A statute of the state of Indiana, prohibiting foreign insurance and other corporations from doing business in that state until they had first conformed to certain regulations made by such statute, does not prohibit the soliciting in Indiana of subscriptions to the capital stock of a foreign insurance company. *Payson v. Withers*, 5 Biss., 269.

§ 197. A foreign insurance company, having an agent and place of business in Ohio, is amenable to process in that state, under a statute of the Ohio legislature providing that "where the principal office of such insurer is located out of this state, in all suits instituted by virtue of this act the service of process upon the agent of such insurer for the time being, in the county in which such contract shall be made, shall be as effectual as though the same was made upon the principal;" and under another statute declaring that the summons may be served on the president or other chief officer, or any clerk, secretary, treasurer, director or agent of such foreign corporation. *French v. Lafayette Ins. Co.*, 5 McL., 461.

§ 198. A foreign insurance company was doing business in Pennsylvania under authority of that state, and under a stipulated agreement that any legal process affecting the company, served on the insurance commissioner, or the party designated by him, or the agent specified by the company to receive service of process, should have the same effect as if served personally on the company within the state. The term "process" was stated in this agreement to include any writ of summons, etc., issued in any proceeding brought in any court of the commonwealth having jurisdiction of the subject-matter. *Held*, that service of process on the agent of the corporation within the state according to the agreement, in a suit by a citizen of the state, gave the circuit court jurisdiction of the parties, notwithstanding the act of congress providing that no suit shall be brought by any original process against any person who shall not be an inhabitant of or found within the district at the time of serving the writ. *Ex parte Schollenberger*, 6 Otto, 869.

§ 199. Same — Validity of contract. — Mutual insurance companies are clearly embraced within the statute of Indiana relating to agents of foreign corporations doing business in that state: and it is a good defense to a premium note to such a company, that it was taken by an agent of such company, as such agent, in consideration of a policy issued to the drawer by such agent, as agent, and that the contract of insurance was entered into, and note given, in the state of Indiana, without such company or agent having complied with said law. Nor does the order of assessment of the court, in bankruptcy, preclude this defense. It is to be heard when action is brought upon the note. *Lamb v. Lamb*, 6 Biss., 420.

§ 200. If a premium note be made in Indiana by the agent of a foreign insurance corporation, and a policy be issued there, neither the agent nor the corporation having complied with the statute of Indiana regulating the transaction of business in Indiana by foreign insurance companies, *held*, that such note and policy are invalid, which fact would be a good defense to an action upon the note. *Lamb v. Bowser*, 7 Biss., 372; *Lamb v. Lamb*, 6 Biss., 421.

§ 201. But where the policy and note are not made with the agent of the insurance company, but directly with the company itself, the agent being merely the instrument to receive the application for the insurance and the note, and forward them to the company, both the note and policy are valid contracts and not within the prohibition of the statute of Indiana regulating the transaction of business by foreign insurance companies in that state. *Ibid.*

§ 202. If a policy issued by a company be binding, the premium note given therefor must also be held binding, the obligation of the two contracts being reciprocal. *Ibid.*

§ 203. The insurance act of Arkansas declaring that it shall be "unlawful" for insurance companies to do business in the state without complying with its provisions, and subjecting them to penalties for failure, does not invalidate their policies or operate to the prejudice of the policy-holder. Against a policy-holder an insurance company cannot say that it has not complied with the act. *Ehrman v. Teutonia Ins. Co.*, * 1 McC., 123; *The Manistee*, * 5 Biss., 381.

§ 204. Same — Agent must pay over money collected. — An agent of a foreign insurance company who has collected insurance money for the company must pay over the same to the company, though the requirements of the local law concerning the transaction of business have not been complied with; and if a bond with sureties has been given by the agent to the company for the faithful performance of his duties, which is good when given, it will not be avoided towards the agent or towards his sureties by the subsequent failure of the agent to comply with the terms of the local law. *United States Ins. Co. v. Adams*, * 7 Biss., 80.

§ 205. Same — Pleading. — Where a statute requires the filing of certain papers by a foreign insurance company in the clerk's office of the circuit court of the county where an agency for the company is established, a plea to an action upon a bond with sureties, given by the local agent for the faithful performance of his duties, which plea avers the failure to file such papers, should also aver that the agency was established in some particular county, or that moneys payable according to the bond to the company were received there. *Ibid.*

§ 206. Same. — An insurance company doing business in a state other than that of its domicile may be sued there independently of any statute expressly authorizing service of process. *Moch v. Va. Ins. Co.*, 4 Hughes, 61.

§ 207. In Louisiana every agent who does business for a non-resident insurance company, either in taking risks, or receiving premiums, or transacting any business, must first have been appointed and empowered respecting process as provided by statute. *Ibid.*

§ 208. As against the company, its agents will be presumed, in that state, to have been so empowered; nor will the company be heard to deny that it has, in respect to them, complied with the requirements of the statute. *Ibid.*

§ 209. Transfer of causes. — A stipulation not to transfer causes from the courts of a state to the courts of the United States is void; and a statute of Wisconsin requiring such an agreement, as a condition of the transaction of business within that state by any fire insurance company, association, or partnership, is repugnant to the constitution of the United States and the laws in pursuance thereof, and is illegal and void. *Doyle v. Continental Ins. Co.*, 4 Otto, 585. (*Reaffirming Insurance Co. v. Morse*, 20 Wall., 445.)

§ 210. Powers of state. — A state may impose upon a foreign insurance company, as a condition of coming into, or doing business within, its territory, any conditions not repugnant to the constitution or the laws of the United States. *Ibid.*

§ 211. A state may revoke its permission to a foreign insurance company to transact business in such state; and its intention, or the reason by which it is influenced, in such revocation, cannot be inquired into. *Ibid.*

§ 211a. The depositing of bonds and keeping an agent within the state, by a foreign insurance company, so as to enable it to do business within the state, does not make such company a resident, so as to prevent its removing its causes to the federal courts, a decision by the supreme court of the state to the contrary notwithstanding. *Owen v. N. Y. L. Ins. Co.*, * 1 Hughes, 324.

XIV. BANKRUPTCY.

§ 212. A policy of insurance will pass to the assignee by an assignment for the benefit of creditors, so as to entitle the assignee to receive the amount from the underwriters in case of loss. Actual delivery of the policy need not accompany the assignment. *Spring v. South Carolina Ins. Co.*, * 8 Wheat., 268.

§ 213. What creditors entitled to receive.—Premiums on a policy of insurance, made in favor of a creditor, being paid up to date of bankruptcy of the insured, the creditor becomes entitled to the cash value of the policy at date of bankruptcy. *In re Newland*, 6 Ben., 342.

§ 214. Suits in state and federal courts—Custody of assets.—Proceedings were begun in a state court of Missouri, under a statute, for the dissolution of an insurance company and the appointment of a receiver. After the beginning of the proceedings, and before the decree of dissolution, a suit was begun and a judgment obtained against the company in the federal court. On a motion in the federal court for an execution and an order on the receiver, *held*, that the decree of dissolution placed in custody of the state court all assets of the company, as of the day of petition filed, and the judgment in the federal court was, like any other demand, subject to be allowed on presentation in the state court. *Levi v. Columbia Life Ins. Co.*, 1 McC., 34.

§ 215. Superintendent of insurance—Removal of cause.—A Missouri statute provided that upon the rendition of a final judgment dissolving an insurance company or declaring it insolvent, all the assets of such company should vest in fee simple and absolutely in the superintendent of the insurance department of the state, etc., who should hold and dispose of the same for the use and benefit of the creditors and policy-holders of such company and such other persons as might be interested in such assets. *Held*, that a charter granted a life insurance company while this statute was in force was governed by it. That a suit having been previously instituted in a court of Louisiana by citizens of that state against an insolvent company, the superintendent of the insurance department, on being admitted a party thereto, was entitled, by reason of his citizenship, to remove it to the United States circuit court. *Relfe v. Rundle*, 18 Otto, 222.

§ 216. Policy-holders in a mutual life insurance corporation created by the state of Missouri, who signed the constitution of the corporation, thereby assented to all of the provisions of the statutes of the state of Missouri, where the corporation was created, including that provision which vests all its property in the superintendent and gives him authority to wind up its affairs. And where a receiver in Louisiana has been appointed at the instance of Louisiana policy-holders in such corporation, and has taken possession of its assets in that state, he will be directed to turn over such assets to the officer designated by the Missouri law to collect them and settle its affairs. *Rundel v. Life Association*, 10 Fed. R., 720.

§ 217. The liability of an insolvent insurance company upon its policies unexpired can only be terminated by a return of the unearned premiums, and the court may assess stockholders to secure a fund to make such return. *In re Republic Ins. Co.*, 8 Biss., 457.

§ 218. Preference.—The payment of insurance on a house and furniture in pursuance of a covenant in a lease cannot be an objection to the discharge of the lessee in bankruptcy, on the ground of a fraudulent preference. *In re Rosenfeld*,* 8 Am. L. Reg. (N. S.), 44.

§ 219. Business corporations.—Insurance corporations are within the bankrupt law as "business or commercial" corporations, to which the provisions of the bankrupt act apply. *In re Independent Ins. Co.*, 1 Holmes, 108; *In re Hercules Life Assur. Soc.*, 6 Ben., 35; 5 Am. L. T., 400; *In re Merchants' Ins. Co.*, 8 Biss., 162.

§ 220. A petition in bankruptcy against a corporation must allege that it is either "a moneyed, business or commercial corporation." *In re Oregon Bulletin Co.*, 8 Saw., 614.

§ 221. Notice to policy-holders.—Where the policy-holders of an insurance corporation are entitled to participate in the management of the corporation and to share in its assets, they are, under section 5122, Revised Statutes, entitled to be heard and obeyed before an adjudication of bankruptcy under a voluntary petition can be obtained. An adjudication made without giving them notice will be set aside. *In re Atlantic Ins. Co.*, 9 Ben., 270.

§ 222. Assessment on premium notes.—An order of assessment made by a bankruptcy court upon the premium notes belonging to a bankrupt insurance company has the same effect as an assessment made by the company, except that the makers of the premium notes will not be allowed to dispute the correctness of the amount of the assessment as made by the court. Such an order does not preclude defenses to the notes. The defenses can and ought to be heard when actions are brought upon the notes. *Lamb v. Lamb*, 6 Biss., 420.

§ 223. Case not within section 20.—A debtor of a bankrupt insurance company upon notes given for stock subscribed, which notes were considered as evidencing a loan by the company to the debtor, his stock being considered as fully paid up, cannot set off, as against this debt, a claim against the company for loss on its policies, purchased by him after he had knowledge of the insolvency of the company. The case does not come within section 20 of the bankruptcy act. *Sawyer v. Hoag*, 8 Biss., 298.

§ 224. Claim for loss on policy of insurance.—A person insured may set off against his indebtedness for money borrowed of an insurance company, whose estate is being administered in bankruptcy, a claim for loss on a policy. When the insured has complied with the conditions of the policy after the loss, and furnished his proofs, and the specified time has

elapsed, the claim becomes a subsisting debt against the company, and the indebtedness is mutual within the meaning of section 20 of the bankruptcy act. Although the insured has obtained part of the means which the company possessed with which to meet its liabilities in case of loss, and by permitting a set-off it enables the insured to receive a payment in full of his claim, and thus to obtain a preference, it is a preference growing out of the relations of the parties as they stood at the time the company became insolvent. A bill in equity will lie to establish the set-off against the bankrupt company if the debt to the company is not due. *Drake v. Rollo*, 8 Biss., 278.

§ 225. *Re-insurance of risks.*—The C. Ins. Co. re-insured certain of its risks in the G. Ins. Co., on which losses afterwards occurred. The C. Co. made an assignment under a state law, and later, on the petition of the G. Co., was adjudged a bankrupt. Before the petition was filed, but after the losses, the G. Co. purchased a number of claims for losses against the C. Co., some of which it had re-insured. *Held*, that those claims or parts of claims, which had been re-insured by the G. Co., could be set off against the claim of the C. Co. against it for re-insurance, but that the balance of the claims could be proved as any other claim against the estate of the C. Co. in bankruptcy. *In re Cleveland Ins. Co.*, 22 Fed. R., 200.

§ 226. *Covenant by mortgagor to insure.*—If a mortgagor binds himself by the mortgage contract to keep the premises insured for the benefit of the mortgagee, and to cause the policies to be taken out and assigned to the trustee in the mortgage, and he does not cause all the policies to be assigned or made payable to the trustee, and a loss occurs, a court of bankruptcy, in the event of the bankruptcy of the mortgagor, will enforce the equitable lien of the mortgagee upon the proceeds of the policies, as against the assignee as the representative of the general creditors. It is not material that the trustee did not select the insurance companies according to the right given him in the contract. The contract operates to assign in equity to the trustee the benefit of any insurance effected by the mortgagor upon the property. *In re Sands Ale Brewing Co.*, 3 Biss., 175.

§ 227. *Assignee may recover on premium note.*—The assignee in bankruptcy of an insurance company may recover the amount of a note given for the premium on a policy of insurance. *Carey v. Nagle*,* 2 Abb., 156.

§ 228. *Surrender of policy of insurance.*—Where a stock insurance company, with full authority, covenants that upon a surrender of the policy it will repay a certain proportion of the premium, the amount due on the surrender of the policy may be proved as a claim against the assets of the company in bankruptcy though the surrender is not made till the company is insolvent. *In re Independent Ins. Co.*, 2 Low., 187.

§ 229. *Proofs of loss under insurance policy.*—Where no proofs of loss have been furnished either to the insurance company or its assignee in bankruptcy, but the assured has proved his loss as a debt against the estate in bankruptcy under the rule of the bankruptcy court, the claim ought not to be allowed unless the evidence in support of the debt in bankruptcy clearly shows a waiver by the company of the preliminary proofs required by the terms of the policy. *In re Firemen's Ins. Co.*, 3 Biss., 462.

§ 230. As no suit can be maintained against the bankrupt after the adjudication without the leave of the bankruptcy court, proof of debt in bankruptcy must be deemed to be equivalent to the commencement of a suit, within the spirit and meaning of the usual clause in fire insurance policies barring a suit against the company unless it is brought within one year after the loss accrued; and if the company is in bankruptcy, a failure to make such proof, or bring a suit, within twelve months from the time the loss accrued, bars the claim as effectually as would a failure to sue if the company were not in bankruptcy. *Ibid.*

§ 231. The terms and conditions of an insurance policy remain binding upon the assured to the same extent after the bankruptcy of the company as before; and the policy-holder must recover, if at all, by the terms of his contract. *Ibid.*

§ 232. The assignee in bankruptcy of an insurance company cannot waive the performance of the conditions in an insurance policy by the insured, although the company may have had a right to waive such conditions before the bankruptcy. *Ibid.*

§ 233. Even where proofs of loss have been furnished and losses adjusted before the adjudication in bankruptcy of an insurance company, especially if such adjustment was made after the intervention of actual insolvency, it is the right and duty of the assignee in bankruptcy to examine and revise such proofs and adjustments, and call for further proof if the claim is not clearly made out, or there is any evidence of a lack of entire good faith in the adjustment. *Ibid.*

§ 234. *Loss adjusted by insurance company.*—If a loss has been duly and regularly adjusted in good faith before the insurance company was adjudicated a bankrupt, the claim may be proven like any other debt, without regard to the one-year limitation in the policy. An adjustment by the company is a waiver of the one-year clause. But this principle does not apply to the assignee. When the assured has furnished his proofs of loss to the assignee, but has

failed to follow them up by proofs of his claim in bankruptcy, within twelve months from the time of loss, his claim is barred by the year clause. *Ibid.*

§ 235. Insurance for benefit of another.—A bankrupt had, two years before filing his petition, procured a policy of insurance on his own life in favor of his mother-in-law, to secure a debt due her, and had paid the premiums up to the date of his bankruptcy. It was held that the creditor was entitled to have her debt allowed, less the cash surrender value of the policy; that it would not be proper, even if the creditor should desire it, to compel the assignee to assume the payment of the premiums on the policy for the future; and that the creditor ought not to be compelled to prove for nothing and look to the policy alone. *In re Newland*, 6 Ben., 842.

§ 236. A debtor procured a policy of insurance on his life for \$4,000 in favor of his creditor as collateral security for a debt of the same amount. Before the bankruptcy of the debtor, \$550 was paid on the debt. He paid the premiums on the policy up to the filing of his petition. After that date the premiums were paid by money of the creditor. On an agreement submitted to the court, the value of the policy was held to be \$18.18, the then cash surrender value of the policy. This was credited on the debt. A dividend was declared after this, and the creditor received as his share \$641.64. The creditor afterwards, instead of surrendering the policy, kept it alive by paying the premiums. On the death of the bankrupt, the creditor claimed the policy as his absolute property. It was held that he was not the absolute owner of the policy, but that the debt should be charged at its original amount, with interest, then there should be credited on it the \$550, with proper interest, and the \$641.64, with proper interest; the amount of the policy, so far as necessary, should be applied to extinguish the balance due on the debt, the creditor having credit for, and being refunded, with interest, the amounts paid by him for premiums after the petition was filed; that out of the balance, if any, the assignee must be refunded the \$550, with interest, and the \$641.64, with interest; and that the \$18.18 ought not to be credited on the policy, the policy not having been surrendered. *In re Newland*, 7 Ben., 68.

§ 237. Rebate on premium note.—An insurance company issued a policy and received the promissory note of the assured for the premium upon the policy. The company became insolvent on account of the great Chicago fire, and the note passed to the assignee in bankruptcy, and the assured thereupon surrendered the policy before its expiration. When the note became due the assured refused payment, and petitioned the court that the assignee be directed to receive, in full of such premium note, such proportion of the amount thereof as the time said policy had run before its surrender bore to the whole time the property was insured thereby. The petition was denied, and the assured allowed no deduction from his note. *In re Western Ins. Co.*, 6 Ben., 159.

§ 238. Note for premiums for insurance.—Where an insurance company has lawful authority to issue policies upon an extension of the time of payment of premiums by taking a note, the note is a part of the capital of the company for the payment of losses; and the bankruptcy of the company is no defense to an action on the note. *Cary v. Nagel*, 2 Biss., 244.

§ 239. A bankrupt insurance company held a note made by A. and B. jointly, and was indebted to A. and C. on an insurance policy. *Held*, that A. could not set off his share of the liability on the note against the liability of the company on the policy, the two transactions having no relation to each other. *Gray v. Rollo*, 18 Wall., 629.

XV. INTEREST AND DAMAGES.

§ 240. Legal interest is all that can be recovered by way of damages against an insurance company for failing to pay insurance when due. *Insurance Co. v. Piaggio*,* 16 Wall., 878.

§ 241. To establish a claim to extra damages for vexatious delay, the assured must show that the underwriter had not reasonable ground for contesting either the validity or the amount of the claim. *Mack v. Lancashire Ins. Co.*,* 2 McC., 211.

B. MARINE INSURANCE.

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| <p>I. CREATION, NATURE AND REQUISITES OF THE CONTRACT, §§ 242-285.</p> <p>II. PARTIES ENTITLED TO BENEFIT OF THE CONTRACT, §§ 286-304.</p> <p>III. WARRANTY, CONCEALMENT AND REPRESENTATION, §§ 305-459.</p> <p>IV. SUBJECT OF INSURANCE: FREIGHT AND CARGO, §§ 460-510.</p> <p>V. RISK INSURED, §§ 511-647.</p> <p>1. <i>Perils of the Sea</i>, §§ 511-531.</p> <p>2. <i>Perils of Lake and River</i>, §§ 532-539.</p> <p>3. <i>Acts of Parties Concerned</i>, §§ 540-647.</p> | <p>VI. THE VOYAGE, §§ 648-689.</p> <p>VII. WORDS OF EXCEPTION, §§ 690-713.</p> <p>VIII. DEVIATION, §§ 714-772.</p> <p>IX. ABANDONMENT AND TOTAL LOSS, §§ 773-971.</p> <p>1. <i>Of Ship</i>, §§ 773-867.</p> <p>2. <i>Of Cargo</i>, §§ 868-971.</p> <p>X. AVERAGE: ADJUSTMENT OF LOSS, §§ 972-1056.</p> <p>XI. MASTER'S POWERS, §§ 1057-1064.</p> <p>XII. SUBROGATION, §§ 1065-1077.</p> <p>XIII. PLEADING, PRACTICE AND EVIDENCE (INCLUDING USAGE), §§ 1078-1093.</p> <p>XIV. CRIMINAL LAW, §§ 1094-1105.</p> |
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I. CREATION, NATURE AND REQUISITES OF THE CONTRACT.

SUMMARY — *A maritime contract*, § 242. — *Insurable interest*, §§ 243-246.

§ 242. The contract of marine insurance is a maritime contract; the underwriter may maintain an action in admiralty for the premium, and he has a lien upon the vessel for the same. (*Contra*, The Moore, 3 Woods, 68. Doubted, also, in a note to the original report of the case. 1 Flipp., 592-598.) The Dolphin, §§ 247-49.

§ 243. A master of a ship who sells a cargo at public auction after an abandonment to the underwriter, and buys it in to prevent a loss, does not become owner of the property so as to acquire thereby an insurable interest in the same. (See Church v. Marine Ins. Co.,* 1 Mason, 341.) Barker v. Marine Ins. Co., §§ 250-51.

§ 244. Insurance on outfits in a whaling voyage does not terminate *pro tanto* with their consumption or distribution, but attaches to the proceeds of the adventure. Hancox v. Fishing Ins. Co., §§ 252-59.

§ 245. A lien, or an interest in the nature of a lien, is insurable. *Ibid*.

§ 246. On sealing voyages to the South Sea it is the usage to take on board stores for the use of the crew, which are dealt out and sold to the men during the voyage, and constitute a lien upon their share of the profits. The plaintiff, who had shipped clothes under this usage to the amount of \$1,000, caused the same to be insured, "and the proceeds thereof," by a valued policy. After clothes to the amount of \$950 had been dealt out and sold to the crew, the vessel was lost. Held, that the plaintiff was entitled to recover the full amount of the insurance. *Ibid*.

[NOTES. — See §§ 260-285.]

THE DOLPHIN.

(District Court for Michigan: 1 Flippin, 590-592. 1876.)

STATEMENT OF FACTS. — This was a libel in admiralty by an underwriter, who had insured the Dolphin, for premium alleged to be due; the libellant claiming a lien upon the vessel for the payment of the same.

§ 247. *A maritime contract.*

Opinion by BROWN, J.

The question presented by the exceptions to the libel is one of great novelty and importance; and it is believed that no direct adjudication upon the point can be found either in this country or in England. After years of doubt in the minds of the profession, and some conflict of opinion in the courts, it was finally settled by the supreme court in the case of The Insurance Co. v. Dunham, 11 Wall., 1, that the contract of marine insurance is maritime in its character, and that in case of loss a libel may be sustained by the insured against the underwriter. It seems to me to follow as a necessary corollary

that the underwriter may maintain a suit in admiralty for the premium, as it would be at war with established principles to say that the maritime character of a contract could be invoked by one party and not by the other.

§ 247a. *Underwriter has lien on vessel for premium.*

The more serious question, however, remains to be decided, namely, whether the underwriter has a lien upon the vessel for the payment of his premium. The question is not discussed in this case, nor in any other where actions have been sustained in the admiralty upon contracts of insurance. If the analogies of the contract of affreightment are to govern, as indicated by the supreme court in the opinion above cited, page 30, the lien would follow as a necessary consequence. It is described in the opinion as a "contract or guaranty on the part of the insurer that the ship or goods shall pass safely over the sea, and through its storms and many casualties, to the port of its destination, and if they do not pass safely, but meet with disaster from any of the misadventures insured against, the insurer will pay the loss sustained. So, in the contract of affreightment, the master guaranties that the goods shall be safely transported, dangers of the sea excepted, from the port of shipment to the port of delivery, and there delivered. The contract of the one guaranties against loss from the dangers of the sea; the contract of the other from loss from all other dangers. . . . The object of the two contracts is in the one case maritime service, and in the other maritime casualties." If in the one case the shipper has a lien upon the vessel for a breach of the contract of affreightment, and the ship has a lien upon the cargo for the payment of the freight, though, for reasons applicable to the character of this property, this lien is dependent upon possession, it is difficult to see why, upon principle, the underwriter should not have a lien upon the ship for the payment of his premium.

§ 248. *Authorities reviewed.*

It is true the general sentiment of the profession is adverse to the existence of such a lien, but no more so, perhaps, than it was to the jurisdiction of the admiralty in actions upon policies of insurance. In the case of *The Williams*, Brown's Admiralty Reports, page 208, perhaps the most exhaustive disquisition upon maritime liens to be found in the books, the judge remarked, page 215: "Without any very thorough examination at the time, but drawing mainly upon what we had ever assumed to be the law, we ruled that all maritime contracts, made within the scope of the master's usual authority, did *per se* hypothecate the ship; and that those of affreightment, insurance, towage, the fitting out and discharge of vessels, and for aiding them in distress, were instances only of the application of the rule." I should have no hesitation in adopting the general principle there announced, that all contracts within the scope of the master's authority are binding upon the vessel, but in its application to the contract of insurance, I think the learned judge overlooked the fact that such contracts are not within the scope of the master's authority. *General Interest Ins. Co. v. Ruggles*, 12 Wheat., 408 (§§ 370-73, *infra*); *Foster v. United States Ins. Co.*, 11 Pick., 85. Even a ship's husband, whose powers with regard to the fitting and equipment of a vessel are much more extensive than the master's, has no authority to bind the other part owners by a contract of insurance. *Bell v. Humphreys*, 2 Stark., 345; *Finney v. Warren Ins. Co.*, 1 Met., 16.

The case of *The Williams* was that of a contract for services in the nature of salvage, made by a master whose power was unquestioned, and is a direct

authority only for the proposition that all contracts, whether executed or executory, which he makes within the scope of his authority are binding upon the vessel. Obviously, however, the learned judge based his opinion upon a much broader principle. On page 217, referring to the case of *The Pigs of Copper*, 1 Story, 314, he observes: "This judgment is referred to in this connection more particularly to illustrate the position that a denial of salvage is not a rejection of a proceeding *in rem*; but it quite as fully sustains the broader proposition, soon to be considered, that all authorized maritime contracts pledge the vessel for their performance." Again, on page 222, he says: "The wider principle, that every maritime agreement binds the ship as well as the owner, is that upon which we rest our decision." Although the authorities cited in support of this proposition refer to cases of salvage, or of contracts within the scope of the master's authority, and therefore do not sustain it to its fullest extent, yet I apprehend the principle is a safe one, and subject to two or three exceptions, which at an early day were imported into the maritime law of this country by the supreme court, following too closely the English authorities, one which may be acted upon without trenching upon the proper domain of the common law. So far as a *dictum* can be an authority, it is certainly an authority for the lien of the underwriters.

The doctrine that the admiralty courts of this country are restricted to the jurisdiction exercised by the high court of admiralty in England at the time of the adoption of our constitution is now so completely overthrown that no argument can be properly deduced from it. The only exceptions believed to exist to the jurisdiction *in rem* of the admiralty over maritime contracts is that of supplies furnished domestic vessels, established in the case of *The General Smith*, and recently recognized in the case of *The Lottawana*, 21 Wall., 558, and that of master's wages, held not to be the subject of a lien in the case of *The Steamboat New Orleans v. Phœbus*, 11 Pet., 175. Contracts for the construction of vessels which are recognized as maritime by the continental codes, and a lien given thereby, were also held by the supreme court, in the case of *Roach v. Chapman*, 22 How., 129, not to be subject to the admiralty jurisdiction in any form.

In determining whether a maritime lien exists in favor of the underwriter, it is well to consider the source of the doctrine, that courts of admiralty have jurisdiction over policies of insurance. The subject is fully discussed in the case of *The Insurance Co. v. Dunham*, 31-38, and the court remark: "Perhaps the best criterion of the maritime character of a contract is the system of law from which it arises, and by which it is governed. And it is well known that the contract of insurance sprang from the law maritime, and derives all its material rules and incidents therefrom. . . . These facts go to show, demonstrably, that the contract of marine insurance is an exotic in the common law. And we know the fact historically, that its first appearance in any code or system of laws was in the law maritime, as promulgated by the various maritime states and cities of Europe." Mention is here made of the maritime laws of the ancient Rhodians, of the ordinances of Barcelona, Venice, Florence and Antwerp; and the court further observe: "But an additional argument is founded on the fact that in all other countries except England, even in Scotland, suits and controversies arising upon the contract of maritime insurance are within the jurisdiction of the admiralty or other marine courts. . . . It is also clear that originally the English admiralty had jurisdiction of these as well as of other maritime contracts." . . . This last remark is corroborated

rated, not so much by positive adjudications to that effect as from the language of the commissions issued to the early vice-admiralty courts, which authorize them to take cognizance of marine policies. This would hardly have been done had such jurisdiction never been exercised by the high court of admiralty in England.

Tracing, then, the jurisdiction of the admiralty over contracts of insurance to the continental law, it is pertinent in this connection to inquire whether that law gives to the underwriter a lien upon the vessel for the payment of his premiums.

Article 16 of the Marine Ordinance of Louis XIV., title, "Of Seizure of Vessels," in enumerating the persons entitled to liens upon ships, makes no mention of underwriters, but Valin, in commenting upon this ordinance, book 1, lib. 14, sec. 16, says: "If this article had not mentioned them (the underwriters), it is probably because the ordinance takes it for granted in many articles under the title of 'Insurance,' that the premium is paid in cash at the time the policy is signed, while by the custom of this place, and of many others, it is paid after the arrival of the ship at a port of safety. However this may be, the insurer of a vessel has doubtless a lien (privilege) upon her for the payment of his premium as the insurer of a cargo has a lien upon it. This lien ranks with that of the lender upon bottomry and with material men."

A privilege is defined by article 2095 of the Civil Code as "a right which the character of a credit gives to a creditor to be preferred to other creditors, even mortgages (hypothecaries)." If not analogous in all respects to our "lien," it authorizes the like preference in payment to claims within its scope from the proceeds in court.

Emerigon treats the contracts of insurance as analogous to that of maritime loan or bottomry, and observes (Emer. on Maritime Loans, ch. 1, sec. 4): "In the one contract the lender bears the sea risks; in the other, the underwriter. In the one, the maritime interest is the price of the peril, and this term corresponds with the premium which is paid in the other. In either case it is incumbent upon the plaintiff to prove that the condition has been fulfilled. In case of a suit, it lies upon the lender, in order to render the contract of maritime loan executory, to show that the ship has arrived at her port of destination in safety, and in an action on a policy of insurance, it lies upon the assured to prove the loss, capture or shipwreck of the vessel." . . . "The policies of insurance made on loose sheets of paper create a lien on the property of the parties, provided they are executed before sworn brokers or notaries; but the other contracts do not create such a lien unless they are recorded by a notary in his public register, in the sworn form as ordinary contracts." Again, in his work upon the Contract of Insurance, ch. 3, sec. 9, Emerigon says: "The ordinance having regarded the premium as paid in cash upon signing the policy, the insurer, who had not been paid, was not placed among creditors whose ranks and preferences are determined by articles 16 and 17. Title 'Seizure of Vessels.' From this silence it has been often concluded that the insurer had no privilege, because it is said the matter of privilege is *stricti juris* (*droit etroit*), it is necessary they be expressly bestowed (*deferres*) by law, and it is never permitted to extend them from one case to another, because of equal or superior qualities. But it should be considered that the premium of insurance is comprised in the expense of the equipment or building; it becomes, then, in some measure, part of the thing

insured, which by this means is presumed to have an increased value (*valoir davantage*). Consequently the privilege which the ordinance accords to the seller or material man ought to be common to the insurer, a creditor to the amount of his premium."

In support of this doctrine the learned author cites several decrees of the tribunals of commerce. So, also, Alauzet des Assurances, Pt. 2, sec. 2, ch. 15: "It is rare that maritime premiums are paid in cash; they are settled generally in notes called premium notes (*billets de prime*), the maturity of which varies with the length of the voyage and the usage of the place; the lien of the insurer is preserved for the payment of the notes; they are not considered as working a novation, provided always the discharge (*quittance*) be not absolute, and the origin of the notes not doubtful." See, also, Cleirac, pp. 237, 318, 323 and 363; Pothier des Assurances, ch. 3, art. 3, sec. 2; Boulay Paty, vol. 1, tit. 1, sec. 2.

If any doubts, however, ever existed in the law of France with regard to this lien, they are put to rest by article 191 of the commercial code, which reads as follows: "Privileged debts are the following, and in the order in which they are classed: 1st — Judicial costs and other charges incurred in obtaining a sale of the vessel and a distribution of the price. 2d — The charge for pilotage, tonnage, hold fees, mooring and dockage. 3d — The wages of the keeper and the expenses of guarding the vessel from the time of her entrance into port to the sale. 4th — The storage of her rigging, tackle and apparel. 5th — The expenses of repairing the vessel, rigging and apparel since her entrance into port from her last voyage. 6th — Wages and pay of the captain and crew employed in the last voyage. 7th — The sums loaned to the captain for the necessary expenses of the vessel during the last voyage, and the reimbursements of the price of goods sold by him for the same purpose. 8th — The sums due to the vendor, material men and workmen employed in her construction, if she has not yet made a voyage, and those due to creditors for furnishing work, labor, and for refitting, victualing, outfits and equipments before the departure of the vessel, if she has already made a voyage. 9th — The sums loaned on bottomry, on the rigging and apparel for repairs, victualing, outfit, equipment before the departure of the vessel. 10th — The amounts of the premiums of insurance effected on the hull, rigging, apparel, outfit and equipment of the vessel for her last voyage. 11th — The indemnity due to the freighters for not delivering goods laden on board, or for the losses which the goods may have sustained from the default of the captain or crew. The creditors comprised in each of the numbers of the present article shall have a concurrent lien on the vessel for the amount of their demand, and, in case of insufficiency, the price of the vessel shall be divided equally among them (*i. e.*, those of the same class) in proportion to the amount due each."

In a recent work upon the commercial code of France, by Edmund Dufour (Paris, 1859), in speaking of this article, section 115, the author observes: "We see that if the code has admitted this opinion (of Valin) as to the principle of the lien, it has largely modified the combinations. The underwriters are still paid before the shippers, but that is all. They are ranked by the material men, who are placed two degrees above them in the scale of liens. They are also distanced by lenders upon bottomry, who immediately precede them. This classification appears to me more rational than that of Valin. For the truth is, insurance is only a private affair of the insured; it is a very proper

act of prudence; it certainly merits and it possesses all the sympathies of the law; but it is, after all, only a passive element of navigation. It rather repairs disasters than comes directly in aid of them by its efforts. It is otherwise with the material men, as well as with lenders upon bottomry. It is the labor of one, and the goods or the money of the other, which permits the vessel to undertake its voyage. There is then in their favor a reason for preference, which is not wholly arbitrary, and the code has done well in recognizing it." The nature of this lien is discussed at length, and is applied as well to time policies as to policies for a single voyage.

In a recent admirable dictionary of the maritime law of France, by Aldrick Caumont (Paris, 1867), under the head of marine insurance, section 141, the author observes: "A lien is attached to the premium for the last voyage, if it be that made during the life of the policy upon the hull. This lien for the last voyage, resulting from articles 191 and 192, exists whenever there is a policy executed. The insured, who, asserting his right to suit, has attached the proceeds of the ship for the amount of his premium, is not permitted to claim a lien for the increase of premium for the time during which navigation is closed.

Any number of voyages made during the time fixed for the duration of the insurance are considered as one and the same voyage. The broker has a lien upon the sum assured for the premium which he has paid. The liens for premiums of insurance upon property rank only after that accorded to contracts of bottomry. They constitute an expense made for the preservation of the *res*. In case where an insurance upon the hull has been made for a limited time, the underwriters have a lien upon the ship, not only for the premiums of the last voyage, but also for the entire premium due under the policy." In support of these various constructions of article 191, the author cites opinions of the court of cassation, of the imperial court of Bordeaux, and Rouen and Aix, and of the tribunal of commerce of Marseilles.

From these authorities I gather the following summary of French law upon the subject:

§ 249. *French law of lien. Lien upheld.*

1st. That the marine ordinance of Louis XIV. did not expressly recognize the lien of the underwriter, but in this regard it was held not to be exclusive, and the premium was generally (perhaps not universally) held by the courts as a privileged debt. 2d. That the privilege of the underwriter for payment of the premium due upon the policy for the last voyage is expressly recognized by article 191 of the code of commerce, and that such privilege is also extended to time policies. 3d. That this privilege is not waived by taking premium notes, unless it is thereby intended to be discharged.

Now, if the supreme court have adopted the continental law in respect to jurisdiction over contracts of insurance, must it not be presumed logically to have adopted it as an entirety, and not by piecemeal? It certainly seems so to me, and it goes very far to justify the language used by the circuit judge in the case of *The Williams*.

It is claimed, however, that these contracts are made exclusively upon the credit of the owner. If this were so, it might be presumed in a particular case that the lien was thereby waived, but with the exception of supplies, repairs, and materials furnished in the home port, the mere fact that the contract is made by the owner does not import a waiver of lien. There is no doubt of the existence of such lien in favor of seamen, although hired by the

owner in person; nor in favor of shippers, where the contract of affreightment is made with the owner. Nor is it, I believe, any objection to the lien of a lender upon bottomry, that the bond was made with the owner. In the nature of the contract itself, I see no reason forbidding such lien to the underwriter which does not apply with equal force to the salvor or material man. Their contracts differ mainly in the fact that the services of the underwriter are rendered only upon a contingency which may never happen. That the question has never before arisen is due, as before observed, solely to the fact that the contract of marine insurance was not generally recognized as maritime until the opinion was pronounced in *The Insurance Co. v. Dunham*.

Under the ruling in this case, I feel constrained to hold that the contract of insurance being maritime in its character, the underwriter is entitled to a lien upon the ship for the payment of his premium; although, for the reason given by Dufour, I think it should rank in the lowest class of strictly maritime liens.

I think, however, the libel is defective in this case, in failing to aver the names of the parties insured, and the character and extent of their interests in the vessel. I think it should also appear that the policy was a marine policy, or at least that it covered the vessel during the season of navigation. I regard it as very doubtful whether an ordinary fire policy covering a vessel while lying at the wharf during the winter would be the subject of admiralty jurisdiction. The above quotation from Caumont, citing a judgment of the tribunal of commerce at Marseilles, apparently supports this opinion. The schedule annexed to the libel seems to indicate that the policies were issued covering separate moieties of the vessel. This, however, should be made distinctly to appear.

I think I see considerable difficulty in enforcing the lien of an underwriter upon an undivided interest of a part owner, especially if the proceeding were an original one, against the vessel itself, and not against its proceeds of sale. The same difficulty, however, frequently occurs in connection with the mortgages upon undivided interests, and I should not regard it as insuperable, and if it should appear that each moiety of his vessel was covered by a lien of the same amount, the question could be easily solved, as the effect would be practically the same as if the entire vessel was covered by a single policy. The difficulty with the libel in this case is, that it has been attempted to employ the ordinary blank libels for supplies in actions for premiums, for which they are illy adapted.

Upon this ground, the exceptions to the libels must be sustained, with leave to amend. (a)

BARKER v. MARINE INSURANCE COMPANY.

(Circuit Court for Rhode Island: 2 Mason, 369-372. 1821.)

STATEMENT OF FACTS.—*Assumpsit* on a policy of insurance dated the 2d of June, 1821, whereby "Robinson Potter for account of James Barker, or Robinson Potter, or both, made assurance," etc., "lost or not lost, arrived or not arrived, \$4,000, at and from Bristol, in England, to a port of discharge in the United States, on cargo on board the brig Tom Hazard." The loss alleged was a total loss by the perils of the sea, in foundering at sea.

Upon the trial of the case upon the general issue, the following facts were

(a) Affirmed in the circuit court, by SWAYNE, J.

admitted or proved. The ship *Aristomenes* and cargo, belonging three-fourths to Robinson Potter, and one-fourth to Robert Robinson, and commanded by the plaintiff, early in the year 1820 sailed on a voyage from Newport to New Orleans, where she unloaded her cargo and took on board another cargo for Greenock in Scotland, and there she safely delivered this cargo, and sailed from thence to Stockholm with another cargo, and after delivery of it took on board a cargo of iron for account of the owners, and sailed from thence for the United States. In the course of the homeward voyage the ship met with heavy disasters, and in consequence of distress was obliged to make a port of necessity, and put into Bristol, in England, in October, 1820. She was there surveyed, and found so disabled and injured as not to be worth repairing, and was accordingly condemned and sold for the benefit of the owners and all others concerned. The master set up the cargo of iron for sale at public auction, deeming this the best for all parties, but finding it could not be sold without a sacrifice, he bought it in to prevent a loss by the public sale; and afterwards, in April, 1821, shipped it, part in the brig *Tom Hazard*, and part in another vessel, for the United States. The *Tom Hazard* foundered at sea on her voyage home, the other vessel arrived safe. The plaintiff wrote to his owners an account of all his proceedings; and they, in December, 1820, abandoned to the underwriters on several policies which had been underwritten on the *Aristomenes* and cargo; and the abandonments were accepted by the underwriters long before the present policy was underwritten; and they have received on account all the salvage from the *Aristomenes* and cargo.

The iron shipped on board the *Tom Hazard* was consigned to Messrs. R. Potter and R. Robinson (the owners of the *Aristomenes* and cargo), and expressed on the bill of lading to be three-fourths for the former, and one-fourth for the latter.

Upon these facts a verdict was taken for the plaintiff, subject to the opinion of the court upon the question, whether on the facts the plaintiff had an insurable interest. If not, then the verdict was to be amended, and entered for the defendant.

Opinion by STORY, J.

The sole question in this case is, whether the plaintiff has an insurable interest. It is contended that the plaintiff has an insurable interest: 1. By virtue of his purchase at the sale at Bristol. 2. As trustee for the underwriters, and having a special interest in the safety, in consequence of his responsibility for the proper management, of the property.

I lay out of consideration altogether the question whether there might not have been a valid insurance of this property for the underwriters, the abandonment having been accepted by them, and of course the property having vested in them, because this insurance purports only to cover the interest of the parties named in it, and is not made "for whom it may concern."

§ 250. *Master cannot purchase at sale on account of his principal.*

As to the first point, it appears to me that the sale wrought no change whatsoever in the title of the property. It was a merely inoperative act, leaving the property exactly where it found it. It is impossible that a person can at the same time be buyer and seller; and a person who acts as agent in selling cannot, upon the known principles of law, become a purchaser at the sale. This doctrine was acted upon by this court in the case of *Church v. Marine Ins. Co.* (1 Mason, 341, 344, and the cases there cited), and I see not the slightest reason to change the opinion then expressed. In truth, it is clear

from the facts of this case that the master did not contemplate this as a purchase on his own private account (which, by the rules of law, he would be prohibited from making), but as a purchase for the benefit of the owners. He bought in the property with the sole view of preventing a sacrifice of it, and a loss to the owners, whoever they might be. In so doing he did nothing more than his duty; but it is a misnomer of the transaction to call it a sale; it was the prevention of a sale by the master. The property never passed from the owners, and the case stands exactly the same as if the property had been bid in by the owners themselves.

§ 251. *Master has no insurable interest in cargo, the property of owners of the vessel.*

Then setting aside all consideration of the sale, how does the case differ from the ordinary case of a master intrusted with the property of his owners? It will not be pretended that a master *ex officio* is entitled to make insurance for his owners; and if he is not, I do not perceive how the case is varied in respect to underwriters becoming owners by an abandonment in the course of the voyage. It is true that the master was intrusted with the care of this property for the owners, and was bound to take all reasonable measures to preserve it. And that is exactly his duty in all cases. But, strictly speaking, he has no interest in the property. He is a mere agent or carrier. If the property is lost in the course of the voyage without his fault, it is the loss of the owners, and not his loss. He has not an insurable interest because he may be responsible for negligence; for this insurance is not against a liability to actions, but against loss of property. It purports to be an insurance on property; and here the property belonged to the underwriters and not to the master. The case of a trustee entirely differs from this; a trustee has the legal title to the property in himself. He is the owner at law, whoever may be the *cestui que trust* beneficially interested.

Having said thus much upon the case, the subject is, in my view of it, exhausted. Unless the court were prepared to say that in all cases a master of a ship has an insurable interest because he has the custody of it, it is impossible to sustain the plaintiff's claim. The verdict must, therefore, be amended, and a verdict entered for the defendants.

HANCOX v. FISHING INSURANCE COMPANY.

(Circuit Court for Massachusetts: 3 Sumner, 132-148. 1837.)

Opinion by STORY, J.

STATEMENT OF FACTS.—The questions arising upon this policy are of a somewhat novel character. The insurance is upon "clothes and the proceeds thereof," on a sealing voyage for seals and oil, in the South Seas, and back to the United States. In the course of the voyage the schooner was shipwrecked on Refreshment island, one of the group of the Tristan d'Acunha islands, in the South Seas; and the vessel and cargo, then consisting of about ninety barrels of whale and elephant oil, and thirty-six seal-skins, were totally lost, with the exception of the thirty-six seal-skins, about fifty barrels of whale oil, worth \$600 or \$700, and one hundred and eighty-two skins, worth about \$2,600, which had been previously sent home in another vessel, and had safely arrived.

According to the usage of this trade it is customary to take on board cloth-

ing, bedding, and stores of all kinds for the use of the crew during the voyage, which are dealt out and sold to the crew according to their wants during the voyage by the master, and they are charged against the crew accordingly. They are sometimes put on board by the owner and sometimes by other persons; and upon all such sales the master is entitled to a commission. The crew in these voyages receive a certain portion of the profits and proceeds of the oil and skins taken during the voyage in lieu of wages. Their shares of the proceeds of the voyage are received and sold by the owners, and are liable for all advances made to them by the owners, the master and the shippers of clothes during the voyage, in the following order: first, the advances of the owners are to be paid; next, those of the master, and lastly, those of the shippers.

In the present case the plaintiff was a shipper of clothes to the amount, as invoiced, exceeding \$1,000, under the usage; and it was agreed that they should be taken on board and dealt out by the master to the crew as they should need them, and be charged to them accordingly. The master was to receive a commission of seven per cent. for his services. Accordingly, in the course of the voyage, and before the shipwreck, the master had dealt out and sold to the crew about \$950 worth of the clothing, and there remained at the time of the shipwreck, unsold, about \$50 or \$100 worth of the clothing which was then lost.

It seems that the shares of the crew in the proceeds of the cargo sent home were insufficient to pay the advances due to the owners and master, and therefore nothing could be obtained from that source by the plaintiff. Some of the crew ran away, others of them have gone to places unknown, and others have no known places of residence. Upon receiving information of the loss, the plaintiff, through his agent, abandoned to the underwriters for a total loss. Three other policies had been effected by the owners of the schooner *Emily*, on the schooner and her outfits for the same voyage, upon which also, it seems, abandonments have been made, and they have received payment as for a total loss.

Such are the general facts, and upon these the question arises whether the plaintiff is entitled to recover for a total loss; if not, whether he is entitled to recover for a partial loss. That he is entitled to recover the amount of the clothing which actually perished in the shipwreck does not seem to me a matter upon which there can be any real dispute. No point of this sort was made at the argument, and I do not well see how any can be made.

§ 252. *Sale of the clothes to crew did not terminate insurable interest, lien being retained upon shares in profits.*

The real question turns upon the right to recover for a total loss. That this was a policy upon a real interest is clear, and the policy attached upon that interest to the full amount insured. The point of controversy is whether the policy upon the goods sold had terminated at the time of the shipwreck. The argument for the plaintiff is, that, upon the construction of the policy, it was either (1) a policy upon the clothing until sold to the crew, or (2) it was a policy upon the clothing until it was sold, delivered and paid for. If the former be the true construction, then it is said that by the sales to the crew the policy *pro tanto* was discharged. If the latter be the true construction, then it amounts in effect to an insurance upon the seamen's wages, for their shares of the proceeds are in the nature of wages, and the policy of the law prohibits such an insurance.

The terms of the policy, construed without any reference to the usage of the

trade, would not involve any real difficulty. A policy upon goods and their proceeds is a policy which covers the original goods, while they remain subject to the risks in the policy; and any other property, in which the proceeds of those goods are invested, when taken on board in lieu thereof, and subjected to the like risks. But it is plain that such could not have been the intention of the parties to this policy; for though it was contemplated that the clothing should be sold, it was never contemplated that the proceeds should be, in a strict sense, specifically invested in any other property during the voyage. The usage of the trade, which must be taken into consideration in construing all policies, fully explains this whole matter. Stripped of its artificial texture, the real object of the policy was to cover the risks of the shippers, arising from the loss of the goods, or the frustration of the voyage, by any of the perils insured against. The goods were to be put at risk. They were to be sold to the seamen; and if the voyage was successful, the shipper confidently looked to the proceeds of the adventure for the due payment of the sales made to the seamen. His reliance upon their personal responsibility was altogether a secondary consideration. As soon as the goods were sold to the seamen, the shipper acquired an interest in the success of the voyage, equal to the sales. It was something in the nature of an inchoate lien, and which became an actual lien upon the shares of the seamen in the proceeds of the adventure *pro tanto*, as fast as they were obtained. It was not against the marine perils alone to the goods themselves, while they were unsold, that the policy meant to protect the shipper; but also against the hazards of a loss of the voyage and adventure. It is analogous to an insurance upon outfits in a fishing or whaling voyage, where a large portion of the outfits are continually in the process of consumption in the progress of the voyage, and are expected to be repaid out of the proceeds of the adventure. No one ever supposed that an insurance upon outfits terminated *pro tanto* with every day's consumption or destruction of the outfits; or, that such a policy did not attach upon the proceeds of the adventure, though they could not be deemed in a strict sense the proceeds of the outfits. This is sufficiently apparent from what was said by the court in *Brough v. Whitmore*, 4 Term R., 206, and *Hill v. Patten*, 8 East, 373. An insurance on the ship always includes the provisions of the crew for the voyage; and if the ship be totally lost during the voyage, no deduction is ever made on account of the provisions antecedently consumed, whether the policy on the ship be open or valued. See, also, *Haskins v. Pickersgill*, 2 Marsh. Insur., 727; 1 Phillips on Insurance, 71, 72, 1st edit.; 2 Phillips on Insur., 43, 2d edit.

§ 253. "*Clothes and the proceeds thereof.*"

The terms of the present policy appear to me clearly to require this interpretation. It is a policy, as has been already stated, on the "clothes, and the proceeds thereof." The word "proceeds" can here have no sensible meaning with reference to the usage of the trade, unless it means the proceeds of the adventure. And then, again, it is added, that the insured is to be "entitled to the same average as *outfits* and cargo." So that the subject-matter of the insurance in this case is treated by the underwriters themselves as governed by the same principles and entitled to the same average losses as outfits and cargo in such voyages are. The valuation in the policy, also, in a case of this sort, seems to me to point clearly to an understanding of the parties, that the interest insured and property put on board are to be treated as of the same value during the whole of the adventure, for all the purposes of the voyage.

Nor does the policy stop here; for it goes on to provide, that in case of loss the policy itself is to be sufficient proof of interest.

If, then, under the usage of trade and the terms of the policy, we are to treat this as in the nature of a policy on outfits, it would seem that there was no substantial objection in the way of the right of the plaintiff to recover for a total loss under the abandonment. If, in the present case, the vessel had been successful in her outward voyage, and upon the homeward voyage had been lost, with her catchings and other proceeds on board, it would be difficult to resist the claim of the plaintiff to a recovery for a total loss. He would have had a lien on the shares of the seamen in those proceeds, or some interest in the nature of a lien.

§ 254. *Lien, or interest in nature of lien, an insurable interest.*

It seems perfectly clear that a person having a lien, or an interest in the nature of a lien, on the property on board, has an insurable interest. And it will make no difference, in such a case, that he might still have a right to pursue his debtor personally for the debt on account of which the lien attached. There are many authorities in the books to this effect; and among them are *Godin v. London Assurance Co.*, 1 Burr., 489; *Lucena v. Craufurd*, 5 Bos. & Pull., 294; *Hill v. Secretan*, 1 Bos. & Pull., 315; *Wolff v. Horncastle*, 5 Bos. & Pull., 316; *Wells v. Philadelphia Ins. Co.*, 9 Serg. & R., 103; *Seamans v. Loring*, 1 Mason, 127, 130 (§§ 664-69, *infra*); and *Russell v. Union Ins. Co.*, 4 Dall., 421; S. C., 1 Wash., 409; and the cases of mortgagees, factors, and agents, cited by Mr. Phillips, in his excellent *Treatise on Insurance*. 1 Phillips on Insurance, 27, 41 to 51, 1st edit; *id.*, p. 105 to p. 122, 2d edit.; 2 Phillips on Insurance, 32, 33, 34, 41, 42, 43 to 47, 61, 1st edit.

§ 255. *Insurable interest not lost by happening of mere contingency.*

But then, it is said, that in this case there were no proceeds to which the lien did in fact attach; and the mere possibility of a lien is not sufficient to found an interest. This may be true *sub modo*. But here the question is not as to an original interest in the clothing on and for the voyage; for that is clear. But the question is, whether the interest, once having attached to the policy, is gone by the subsequent sales; so that the plaintiff has ceased to have an insurable interest. Now I am not aware that any decision has been made by which it has been established that an interest ceases to be insurable, in the progress of a voyage, simply because it is subject to contingencies, or has not at the moment anything corporeal or tangible to which it is attached. What, indeed, upon such an interpretation, would become of insurances upon profits, or commissions, or freight, which are in the course of being earned?

§ 256. *Insurable interest, a thing sui generis.*

One of the difficulties of the argument is in likening an insurable interest to any other interest in property. The truth is, that an insurable interest is *sui generis*, and peculiar in its texture and operation. It sometimes exists where there is not any present property, or *jus in re*, or *jus ad rem*. Inchoate rights, founded on subsisting titles, unless prohibited by the policy of the law, are insurable; as, for example, freight, respondentia, and bottomry. So it was held by a majority of the judges in *Lucena v. Craufurd*, 5 Bos. & Pull., 294, 295. They also held that, where there is an expectancy, coupled with a present existing title, there is an insurable interest; words which approach very near to a description of the present case. After referring to the definitions by foreign jurists of the contract of insurance, they added: "These definitions clearly embrace a contingent interest, which is subject to the perils

of the seas, and for the loss of which a compensation can be made." Lord Eldon, although he differed from some of the views of the majority of the judges, in that case said: "I have in vain endeavored, however, to find a fit definition of that which is between a certainty and an expectation; nor am I able to point out what is an interest, unless it be a right in the property; or *a right derivable out of some contract about the property*, which in either case may be lost upon some contingency affecting the possession or enjoyment of the property." *Id.*, p. 321. See also on this same point, *Wiggin v. Mercantile Ins. Co.*, 7 Pick., 271; and *Buck v. Chesapeake Ins. Co.*, 1 Pet., 151, 162, 163; and *Columbian Ins. Co. v. Lawrence*, 2 Pet., 25, 46, 47 (§§ 1124-30, *infra*). See also what was said by Lawrence, J., in *Lucena v. Craufurd*, on this point (5 Bos. & Pull., 301). Now, these words are very expressive and direct as to the nature of the very interest of the plaintiff in the present case. He had a right in the original property, and he had a right founded upon a contract about that property, which has been lost by the contingencies of the present voyage. Indeed, the policy in the present case seems studiously to have provided for the very case which has happened, by the agreement of the underwriters, that, in case of loss, the policy itself shall be a sufficient proof of interest.

§ 257. *Insurance of interest in shares of profits of seamen, not an insurance of seamen's wages.*

In regard to another suggestion, that the policy is void as against public policy, because it in effect amounts to an insurance of seamen's wages, a few words may suffice. Assuming, for the purposes of the argument, that an insurance by the seamen themselves on their shares of the proceeds of the adventure would not be good, because they are in the nature of wages, though given in lieu of wages (a point upon which I desire to be understood as giving no opinion), it is a sufficient answer to the argument to say that the present is not the case of such an insurance. The plaintiff has insured his own interest in the voyage, and not theirs. They may, indeed, in a possible case, be benefited by this insurance; but the policy itself is not on wages or on shares in lieu of wages; but simply on the property originally shipped, and upon the proceeds of the adventure, so far as the plaintiff could or might have a lien thereon for his advances to the seamen.

§ 258. *Insurance of debt good, though debt still available.*

It has been suggested that the plaintiff has in fact sustained no loss, because, for anything that appears, he may still recover the debts due to him from the seamen; and if so, he has sustained no loss. This objection has already been in effect answered. The question is not, in cases of this sort, whether the party has actually lost his debt, which, if caused by the insolvency or death of the debtor, would not be by a peril within this policy; but the question is, whether he has lost the security for that debt by the perils insured against, which the underwriters agreed to assume upon themselves. A mortgagee or consignee of property may recover his insurance, if the property mortgaged or consigned is lost in the voyage, although the mortgagor or consignor still remains his debtor and is solvent.

§ 259. *It seems assured must have an interest at time of loss.*

Then, again, it has been suggested that the party insured must not only have an interest in the property at the time when the insurance was made, but also at the time of the loss. This I certainly have been accustomed to consider the established doctrine, not only in the American but in the English

courts. It was certainly so laid down by a majority of the judges in the case of *Lucena v. Craufurd*, 5 Bos. & Pull., 295; and it has been repeatedly recognized in the American courts. See 1 Phillips on Insurance, 27; *Carroll v. Boston Ins. Co.*, 8 Mass., 515; *Stetson v. Massachusetts Ins. Co.*, 4 Mass., 330, 336, 337; 2 Phillips on Insurance, 27; *Gordon v. Massachusetts Ins. Co.*, 2 Pick., 249; *Lazarus v. Commonwealth Ins. Co.*, 5 Pick., 76, 81. However, in the recent case of *Sparks v. Marshall*, 3 Scott, 186; S. C., 2 Bing. N. C., 761, 774, 776, there are intimations of opinion by the court of common pleas in England, that, if the assured had property in the goods insured at the time of the insurance, no change of interest afterwards, before or after the loss happened, would affect the right of the insurer to recover. Whether this doctrine, so novel and so difficult to be sustained upon principle, will be adhered to, is more than I am able to conjecture. I can only say that nothing in my judgment in the present case proceeds upon the admission of any such doctrine. And, indeed, it is quite possible that the court may have intended to restrict their observations to the particular frame of the policy in that case (the words of which are not given in the report), and under the peculiar circumstances there stated. The policy may have been drawn up in general terms, "for whom it may concern."

Upon the whole, my opinion is that the plaintiff in the present case is entitled to recover for a total loss. This opinion is founded upon the nature and terms of the present policy, operating upon the usage in this particular trade. I consider that the parties to this policy intended to cover the whole interest of the plaintiff, as a valued interest for the whole voyage, not only in the original clothing, but in the proceeds thereof, when attached by a lien, or a claim in the nature thereof, to the shares of the seamen in the proceeds of the adventure; and further, that the property insured was to be treated as in the nature of an outfit; and that if by the perils insured against the voyage was totally lost and frustrated, then that the plaintiff was entitled to recover the full amount of the insurance, according to the valuation in the policy, leaving to the underwriters all their rights to salvage, etc., under the abandonment, as in the common cases of an insurance upon outfits and other special interest.

§ 260. A memorandum assented to for insurance upon a vessel, disclosing the name of the vessel, the sum to be insured, her valuation, the valuation of the freight, and the sum to be insured thereon, the voyage and the premium, is sufficient to make a concluded agreement for a policy in the usual form of the underwriter. *Oliver v. Mutual Ins. Co.*,* 2 Curt., 277. Construction of a contract of insurance. *Delaware Ins. Co. v. Hogan*,* 2 Wash., 4.

§ 261. An agreement for marine insurance, made while both parties are ignorant of the loss, the policy being completed and executed though not delivered, is valid. *Kohne v. Insurance Co.*, 1 Wash., 93 (§§ 374-78).

§ 262. Loss after dishonor of premium note.—Where the insured gives his note for a premium on the policy, with a condition in the note and in the policy that upon failure to pay the note when due the policy shall become void while the note remains overdue and unpaid, and after the note is overdue and unpaid the vessel is stranded, and the insured pays the note, and a gale coming on, the vessel afterwards becomes a total wreck, the policy is inoperative. *Cardwell v. Republic Ins. Co.*,* 12 N. B. R., 253.

§ 263. Time of loss in case of stranding.—In such a case the proximate cause of the wreck is the stranding, even though she received no such immediate damage therefrom as necessarily involved her destruction had good weather continued and help been obtained; the gale only completed the wreck which had begun with the stranding. *Ibid.*

§ 264. Payment of premium.—It is no defense to an action of covenant on a policy of insurance that the plaintiff had given a note for the premium, which note was unpaid, and that he had obtained an injunction against its collection, where the defendants have acknowledged

payment under seal and reserved the right of deducting the amount of the note from any loss to be paid by them. *Hodgson v. Marine Ins. Co.*, * 5 Cr., 100; 1 Cr. C. C., 460.

§ 265. Where a policy insures goods "on board ship or ships," and it is provided that in the case of ships rating lower than "A 2" the premiums shall be fixed at the day the risk is declared or reported, the policy does not attach upon goods in ships of that description until the premium has been paid or secured, especially when it is also provided that such clauses shall "apply as the company may insert as the risks are successively reported." *Oriental Ins. Co. v. Wright*, * 23 How., 401.

As to payment of premium see title I under Fire and Life Insurance, respectively.

§ 266. **Recovery of premium — Amount due.**— A policy of insurance, at fifteen *per cent.*, upon a cargo, contained the following clauses: "Lost or not lost, in port and at sea, and at all times and places, for the space of six calendar months;" "beginning the adventure upon the said goods and merchandises from the loading thereof, . . . and so shall continue and endure until the [said] 8th of March, 1795, and continue at the same rate of premium, until her next arrival at Philadelphia," etc.; "the said goods and merchandises, for so much as concerns the assured and assurers in this policy, are and shall be valued *as interest shall appear.*" The vessel was stopped by a privateer and taken into Dunkirk, where she was permitted to sell her cargo and took on a smaller one; discharging which at her original port of departure, she again took on a cargo of less value than the original one, with which smaller cargo she arrived at her port of destination. The insurers sued for fifteen *per cent.* premium upon the first cargo shipped. *Held*, that the insurers were entitled only to fifteen *per cent.* premium upon the value of the different cargoes, for the time that they were respectively on board the vessel. *Pollock v. Donaldson*, 3 Dal., 510.

§ 267. **Insurable interest.**— Where the plaintiff was the master of a vessel which he rigged at his expense and for which he held a bond from the builder, in whose name she was registered, to convey on payment of a balance due for building, it was held that he had an insurable interest in her freight, and his agent in making application for insurance rightly described him as owner. *Simmes v. Marine Ins. Co.*, 2 Cr. C. C., 618.

§ 268. A bill of lading of property insured, in favor of the assured, is evidence of interest. *Talcott v. Delaware Ins. Co.*, * 2 Wash., 449.

§ 269. The master's right to primage is an insurable interest, but the owners are not bound to insure it for him without request. *Pedrick v. Fisher*, 1 Spr., 566.

§ 270. Where a ship is captured and condemned, wages are not payable out of insurance money received on freight; wages cannot be insured. *The Penelope*, 2 Pet. Adm., 276.

§ 271. A debt by a vessel for equipment in a foreign port and for procuring a cargo gives the creditor an insurable interest in her creating a maritime lien. *Insurance Co. v. Baring*, 20 Wall., 159.

§ 272. A maritime lien for advances for necessary repairs or supplies in a foreign port constitutes an insurable interest. *Insurance Co. v. Baring*, 20 Wall., 159; 10 Alb. L. J., 44.

§ 273. One who has built a vessel, and retained title therein until paid for by the person for whom it was built, has an insurable interest in the vessel for its full value, notwithstanding an equitable interest by the purchaser. *Stuart v. Columbian Ins. Co.*, * 2 Cr. C. C., 442.

§ 274. A policy for \$10,000 on merchandise on a vessel, the policy to be the only proof of interest, is not a wager policy where the assured had property on board, and neither he nor the underwriters intended wager insurance. *Alsop v. Commercial Ins. Co.*, * 1 Sumn., 451.

§ 275. Strictly speaking, there cannot be a gaming policy by our law unless both parties intend to game. *Ibid.*

§ 276. If one party intend wagering insurance and procure it to be as insurance upon interest, the policy is void for fraud. *Ibid.*

§ 277. But if both parties intend a policy on interest, and the assured has a substantial interest in the property, an overvaluation made *bona fide* will not avoid the policy. *Contra*, if the overvaluation is made with intent to mislead or defraud the underwriter. *Ibid.*

§ 278. Action upon a policy on the cargo of a vessel, in which the interest of the assured was that of a surety for the payment of the value of the vessel and cargo in case of condemnation in Spain, the cargo having been delivered to him by way of indemnity. *Held*, an insurable interest. *Held*, also, that it might be covered without disclosing the particulars of the matter. *Russel v. Union Ins. Co.*, * 1 Wash., 409.

§ 279. A factor has an insurable interest in goods on which he has a lien for advances. *Ibid.*

§ 280. So generally of one having a lien on cargo. *Russel v. Union Ins. Co.*, 4 Dal., 421.

§ 281. The plaintiffs in an action upon a marine policy stood in the position of mortgagees, trustees or consignees of half a cargo and freight thereon belonging to H., to secure them for advances made on his behalf. *Held*, that they had an insurable interest in the freight and cargo. *Aldrich v. Equitable Ins. Co.*, * 1 Woodb. & M., 272.

PARTIES ENTITLED TO THE BENEFIT OF THE CONTRACT. §§ 282-287.

§ 282. In an open policy the plaintiff must prove his interest and the value of his property. The bill of lading of the outward cargo is no proof of interest in the homeward cargo. *Beale v. Pettit*,* 1 Wash., 241.

§ 283. The indorsement of a bill of lading and the other papers showed that the interest of three owners, after shipment, was joint. But there was an indorsement on the bill of lading, stating that half the cargo was the property of one of the plaintiffs, and the other half the property of the other plaintiff and the supercargo. *Held*, that the indorsement was intended only to show the extent of each owner's interest, and that the separate purchase of the cargo, together with the indorsement, did not show that their interests were several. *Catlett v. Pacific Ins. Co.*,* 1 Paine, 594.

§ 284. Where by the contract the master was entitled to "five per cent. primage on the freight as collected," and there was no freight earned or collected, the master has no right of action against the owners on account of insurance on freight recovered by them. *Pedrick v. Fisher*, 1 Spr., 565.

§ 285. *Semble*, that to the right of insurance, the obligation of abandonment, in case of loss, is an inseparable incident; and *quære*, whether an insurable interest can exist where the claimant has nothing in the property which he could abandon upon a loss. *Russel v. Union Ins. Co.*, 4 Dal., 421.

II. PARTIES ENTITLED TO THE BENEFIT OF THE CONTRACT.

SUMMARY— "*For whom it may concern*," § 286.

§ 286. A policy in the name of a specified person "on account of whom it may concern" will be applied to the interest of the persons for whom it was intended by the person who orders it, if the latter had authority from the former, or if his act was afterwards adopted; it matters not that neither the broker nor the underwriter knew who was intended, and it is not a concealment for a broker not to state who are interested by a clause "*for whom it may concern*," if the underwriter make no inquiry. *Hooper v. Robinson*, §§ 287-92.

[NOTES.— See §§ 293-304.]

HOOPER v. ROBINSON.

(8 Otto, 528-541. 1878.)

ERROR to U. S. Circuit Court, District of Maryland.

STATEMENT OF FACTS.— Hooper was agent for a steamer, the *Carolina*, which in leaving the port of Baltimore was injured, and put back for repairs. These cost about \$8,000, and McGarr, the captain, drew for that amount on Good & Co., of Hull, England, and Hooper caused the draft to be discounted and paid for the repairs. At McGarr's suggestion he insured the ship for \$8,000, lost or not lost, for account of whom it might concern, the repairs and draft. Good & Co. paid all McGarr's draft at maturity. On her voyage out the *Carolina* was lost, and proof being made of that fact, Hooper collected the insurance money, \$8,000, and immediately remitted it to Good & Co., to reimburse them for McGarr's draft.

This suit was brought by the underwriters to recover back the money paid to Hooper on the ground that he had no insurable interest. There was judgment for the plaintiff.

Opinion by MR. JUSTICE SWAYNE.

As the facts of which the instruction given was predicated were all indisputable and undisputed, that instruction was equivalent to a direction to find for the plaintiffs. The same remarks reply *mutatis mutandis* to the instruction asked by the defendant. The case, then, resolves itself into this: Were the plaintiffs entitled to recover upon the case as presented in the record?

§ 287. "*On account of whom it may concern*."

A policy like the one here in question, in the name of a specified party, "*on account of whom it may concern*," or with other equivalent terms, will be ap-

plied to the interest of the persons for whom it was intended by the person who ordered it, provided the latter had the requisite authority from the former, or they subsequently adopted it. 1 Phillips, Ins., sec. 383. This is the result, though those so intended are not known to the broker who procures the policy, or to the underwriters who are bound by it. Id., sec. 384. One may become a party to an insurance effected in terms applicable to his interest, without previous authority from him, by adopting it either before or after the loss has taken place, though the loss may have happened before the insurance was made. Id., sec. 388. The adoption of the policy need not be in any particular form. Anything which clearly evinces such purpose is sufficient.

"It is now clearly established that an insurable interest, subsisting during the risk and at the time of loss, is sufficient, and that the assured need not also allege or prove that he was interested at the time of effecting the policy; indeed, it is every day's practice to effect insurance in which the allegation could not be made with any degree of truth; as, for instance, where goods are insured on a return voyage long before they are bought." 1 Perkin's Arnould, 238. This is consistent with reason and justice, and is supported by analogies of the law in other cases. We will name a few of them.

A deed voidable under certain circumstances may be made valid for all purposes by a sufficient after-consideration. A devise to a charitable use may be made to a grantee not *in esse*, and vest and take effect when the grantee shall exist. The doctrine of springing and shifting uses is familiar to every real-property lawyer. They always depend for their efficacy upon events occurring subsequently to the conveyance under which they arise.

§ 288. "*Lost or not lost*" insures the past as well as the future, contingent as well as vested interests.

Where the insurance is "lost or not lost," the thing insured may be irrecoverably lost when the contract is entered into, and yet the contract be valid. It is a stipulation for indemnity against past as well as future losses, and the law upholds it. Where a vessel insured for a stated time was sold and transferred, and was repurchased and transferred back within that time, it has been held that the insurance was suspended while the title was out of the assured, "and was revived again on the reconveyance of the assured during the term specified in the policy." *Worthington v. Bearse*, 12 Allen (Mass.), 382.

§ 289. *Insurable interest.*

A right of property in a thing is not always indispensable to an insurable interest. Injury from its loss or benefit from its preservation to accrue to the assured may be sufficient, and a contingent interest thus arising may be made the subject of a policy. *Lucena v. Craufurd*, 3 Bos. & Pul., 75; S. C., 5 id., 269; *Buck v. Chesapeake Ins. Co.*, 1 Pet., 151; *Hancox v. Fishing Ins. Co.*, 3 Sumn., 132 (§§ 252-59, *supra*).

In the law of marine insurance, insurable interests are multiform and very numerous. The agent, factor, bailee, carrier, trustee, consignee, mortgagee, and every other lienholder, may insure to the extent of his own interest in that to which such interest relates; and by the clause, "on account of whom it may concern," for all others to the extent of their respective interests, where there is previous authority or subsequent ratification. Numerous as are the parties of the classes named, they are but a small portion of those who have the right to insure.

Where money is advanced, as in this case, for repairs and supplies to enable

a vessel to proceed on her voyage, the lender has a lien, not on the cargo, but upon the vessel, and the amount of the debt may be protected by insurance upon the latter. Insurance Company v. Barings, 20 Wall., 163, and the authorities there cited.⁶ If the owner of a vessel, being also the owner of the cargo, or the owner of the cargo not being the owner of the vessel, procures a third person to make such advances upon an agreement that he shall be repaid from the cargo, and a bill of lading is furnished to him, he has a lien on the cargo for the amount of his advances, and may insure accordingly. Clark v. Mauran and others, 3 Paige, 373; Dows v. Greene, 24 N. Y., 638; Holbrook v. Wight, 24 Wend., 169. The assignment of a bill of lading passes the legal title to the goods. Chandler v. Belden, 18 Johns., 157. The assignment of a debt *ipso facto* carries with it a lien and all other securities held by the assignor for the discharge of such debt. The Hull of a New Ship, 2 Ware, 203; Pattison v. Hull, 9 Cow., 747; Langdon v. Buel, 9 Wend., 80.

Where a lien subsists either on the vessel or cargo, a third party may pay the debt, and with the consent of the debtor and creditor be substituted to all the rights of the latter. Dixon on Subrogation, 163; Garrison v. Memphis Ins. Co., 19 How. 312 (§§ 537-39, *infra*); The Cabot, 1 Abb. (U. S.), 150. Where there is neither an agreement nor an assignment there can be no subrogation unless there has been a compulsory payment by the party claiming to be substituted. Sanford v. McLean, 3 Paige, 117.

§ 290. *Disclosure of party for whom insurance is to be made not necessary unless inquiry is made.*

Recurring to the facts, there are two points upon which we deem it proper particularly to remark:

First. We find no ground for any imputation of bad faith upon Hooper. We think there was no indirection and no purpose of concealment on his part. Before the insurance was effected, the underwriters had a clear right, if they so desired, to know for whom they were asked to insure. Buck v. Chesapeake Ins. Co., *supra*. They made no inquiry. This excused Hooper from making any communication upon the subject. When the insurance money was paid, although the face of the policy and other facts patent and notorious, which must have been known to the underwriters, showed clearly that the advances were made, and that the insurance was effected by Hooper, not for himself but for others, the underwriters were again silent. The draft on Good Brothers & Co. had then been sold and Hooper had received the money. Thereafter he had nothing at stake but the solvency of the drawees. When the adjuster, more than a month later, made the inquiry which should have been made before, Hooper had paid over the money. He then made a frank and full disclosure. We see no reason to doubt that if the inquiry had been made earlier it would have been answered in the same way. In this respect the underwriters have themselves to blame rather than Hooper. The record discloses no ground upon which, *ex equo et bono*, he can be called upon to pay back the fund in controversy.

Second. It does not appear in the record to whom the vessel and cargo belonged. There is not a ray of light upon the subject. In that respect the case is left wholly in the dark.

§ 291. *In suit to recover insurance money paid by mistake, the underwriter has burden of proof in regard to insurable interest.*

The proof as to who were intended to be insured is that they were Good

Brothers & Co., and no one else, though, according to the terms of the policy, payment in the event of loss was to be made to Hooper & Co. The former fact is established by the testimony of Hooper, and there is none other upon the subject. He is unimpeached, and his testimony is conclusive. The inquiry then arises whether Good Brothers & Co. had any insurable interest in the cargo. It does not appear whether they had or had not. We have suggested several ways in which such an interest may have arisen, and have shown that under the policy in question it would have been sufficient if it had subsisted at any time before the loss was known to them. It may possibly have arisen in other modes. This brings us to the question of the burden of proof. Did it rest upon the plaintiffs or upon the defendant? In order to maintain the plaintiffs' case it was necessary to be made to appear that Good Brothers & Co., the assured, *had no insurable interest* in the cargo, the cargo being the thing insured. Upon both reason and authority, we think the *onus probandi* was upon the plaintiffs.

It was for them to make out their case. The premium had been paid, the loss had occurred, and the indemnity money had been received by the agents of the assured and paid over to their principals. The plaintiffs claim the right to go behind all this and to reclaim from Hooper the fund thus received and parted with. It was incumbent upon them to establish everything necessary to entitle them to recover, and they have no right to throw upon the defendant any part of the burden that belonged to themselves. For authorities upon this subject see 1 Greenl. Ev., secs. 34, 35, 80, 81, and the notes. Such is the legal result, notwithstanding the negative form of the averment to be established.

§ 292. *Agent having received money, and without notice of any adverse claim promptly paid it to his principal, not liable for it.*

But suppose the case were made out as against Good Brothers & Co., and that a recovery could be had if the action were against them, still it by no means follows that the plaintiff in error was liable. There was laches on the part of the underwriters, or their agents, which is the same thing. Nothing in the record is clearer than that Hooper received the money as the agent of the assured. It was his duty immediately to advise his principals and promptly to pay them. 1 Wait, Actions and Defenses, 252, 255. This latter duty it appears he performed. He had then received no notice of the adverse claim subsequently made, and had no reason to expect it. His parting with the money is proof of his sincerity and honesty. Under all the circumstances, we think he is entitled to the benefit of the principal, which in such cases gives immunity to the agent and refers the party complaining for satisfaction to the principals who have received and hold the money.

There was error in the instruction given by the court to the jury. The counsel on neither side referred to the state of the pleadings. We have, therefore, not adverted to that subject, but have considered the case as it was argued — entirely upon the merits. The judgment of the circuit court will be reversed, and the cause remanded for further proceedings in conformity to this opinion; and it is so ordered.

§ 293. *Who contracts.*—He who makes a proposal for insurance which is accepted is to be taken to be the person contracted with, unless the contrary appear. The omission of the assured to give any direction on this subject would not prevent the issuing of a policy; and if the applicant discloses no interest in the property, the policy is to be treated as made for him as agent or for whom it might concern. *Oliver v. Mutual Ins. Co.*, * 2 Curt., 277.

§ 294. When a complete contract for a policy is made by a known agent, and nothing is said respecting any declaration of interest, the contract is to insure the property of his principal, and in order that this contract may take effect, power is impliedly reserved to the agent specially to declare the interest upon which the insurance is to attach, and to have the declaration inserted in the policy, or to have the policy drawn so as to insure him as agent, leaving the declaration of interest to be made afterwards, in case of loss. *Ibid.*

§ 295. If in such a case the agent deviate from his authority, the principal may ratify his act even after loss. A charge of fraud on the part of the agent in such respect must be made out by the underwriter. The evidence of the supposed fraud considered and deemed insufficient. *Ibid.*

§ 296. A stipulation in a policy that from the money to be paid in case of loss is to be deducted debts due "from the insured" means from the person for whose benefit the insurance was made. *Hurlbert v. Pacific Ins. Co.*, * 2 Sumn., 471.

§ 297. Where a consignee insures without request of the consignor, the latter cannot maintain an action against the underwriter. *Bank of South Carolina v. Bicknell*, * 1 Cliff., 85. Party entitled to recover who has an interest at the time of the loss. *Henshaw v. Mutual Safety Ins. Co.*, * 2 Blatch., 90.

§ 298. "For whom it may concern."—A policy which is issued "on account of whom it may concern" apprises the underwriter that others may have an interest in the property besides the party directly assured, and such may sue in their own names, without an assignment of the policy. Against their claim nothing can be set off not due from them. A premium note in such a case given by the assured is to be paid by him by deducting the sum due thereon from the amount due on the policy after paying the party for whose "concern" the policy is made, if the surplus due the assured is sufficient. *Aldrich v. Equitable Ins. Co.*, * 1 Woodb. & M., 372.

§ 299. Where a policy purports to insure the plaintiff "for whom it may concern," he is not bound to prove that, at the time of effecting the insurance, or at any other time, he disclosed to the underwriter that belligerent property was intended to be covered, unless inquiry was made by the underwriter prior to the insurance. *Buck v. Chesapeake Ins. Co.*, * 1 Pet., 151.

§ 300. Where F. is legal and equitable owner of part of a cargo insured, and legal but not equitable owner of the rest, held, that a policy "for whom it may concern" will cover the entire cargo, and F., or his agents suing for him, may recover therefor. *Ibid.*

§ 301. Same—Nationality.—If a policy be for A. or for whom it may concern, and made by an agent without any warranty or representation of national character, it will cover the interest of any person, American or foreigner, who has authorized the insurance. By a policy on vessel and cargo, a party having a lien for advances or a special ownership and possession may protect his interest in the vessel and cargo to the extent of his advances and lien. *Seamans v. Loring*, 1 Mason, 127 (§§ 664-69).

§ 302. A policy in the name of one joint owner "as property may appear," without stating it to be for the benefit of all concerned, will not cover the interest of another joint owner. *Graves v. Boston Ins. Co.*, * 2 Cr., 419.

§ 303. The plaintiffs purchased separately each a moiety of the cargo, which was specie, and instructed their agent to get it insured on their joint account. The agent effected the insurance but the policy was expressed to be on account of owners. Afterwards one of the plaintiffs transferred half his share to the person who was to go in the vessel as supercargo. Held, that the term "owners" was descriptive of the persons intended to be insured, and, referring to matters out of the policy, was open to explanation. *Catlett v. Pacific Ins. Co.*, * 1 Paine, 594.

§ 304. The underwriters in that case understood when they made the insurance that it was on account of the plaintiffs only. Held, that they could not set up the fact that the supercargo became an owner before the risk began. *Ibid.*

III. WARRANTY, CONCEALMENT AND REPRESENTATION.

SUMMARY — *Warranty of seaworthiness*, §§ 305-311. — *Of nationality*, §§ 314-316, 384. — *Concealment*, §§ 312, 313, 317-336. — *Notice*, §§ 326, 328. — *Misrepresentation*, §§ 337-340.

§ 305. There is no implied warranty of seaworthiness in a time policy, unless it be of seaworthiness at the beginning of the risk, or under circumstances in which the vessel might, by diligence, have been repaired. *Jones v. Insurance Co.*, § 341.

§ 306. There is a warranty of seaworthiness in the case of a time policy on a vessel in her home port, and not in distant foreign waters, at the time of insurance. *Rouse v. Insurance Co.*, §§ 342-344.

§ 307. Where the underwriters set up the defense of misrepresentation, negligence, deviation and unseaworthiness, the burden of proof of the first three rests upon the defendants; but seaworthiness must be shown by the plaintiff. *Tidmarsh v. Washington Ins. Co.*, §§ 845-48.

§ 308. What is the proper rule as to seaworthiness. In what cases it is to be measured by the standard in the ports of the country to which the vessel belongs. *Ibid.*

§ 309. What equipments are generally necessary to constitute seaworthiness. *Ibid.*

§ 310. An applicant for insurance upon a vessel which had put into port leaking and in distress, having said that she would be repaired at a certain other port, from which she was insured, may show, in an action upon his policy, that he had her surveyed at that port, and that she was truly reported not in need of repairs and was seaworthy. *Lunt v. Boston Ins. Co.*, §§ 849-51.

§ 311. In such a case it is for the plaintiff to prove the seaworthiness of the vessel. *Ibid.*

§ 312. Where a party orders insurance and afterwards, before the insurance is effected, receives intelligence material to the risk, or has knowledge of a loss, he ought to communicate it as soon as, with reasonable diligence, he may. And the question of diligence in such a case is for the jury. *McLanahan v. Universal Ins. Co.*, §§ 852-59.

§ 313. In a letter asking for insurance by the defendant on the brig *Creole*, the plaintiff's agent wrote in regard to the vessel: "She was, and I presume still is, owned by McLanahan & Bogart and J. J. Coiron. The latter gentleman was on board her, and I presume is returning in her to New Orleans. He writes from Havre under date of 20th October, but does not say when the brig would sail [for the voyage to be insured]." Held, that the omission in the letter of 20th October to mention the time of the sailing could not be said as matter of law to avoid the policy either as a concealment of a material fact or as a virtual representation that the vessel was not then ready or about to sail on the voyage to be insured. The question of the materiality of the time of sailing is a question of fact. *Ibid.*

§ 314. A vessel, warranted American, was condemned in an English admiralty court for alleged attempting a breach of blockade. Held, that persisting in an *intention* merely to enter a blockaded port, after warning, was not a breach of the warranty. *Fitzsimmons v. Newport Ins. Co.*, §§ 860-62.

§ 315. Insurance on goods on board the *Liberty*, from Philadelphia to Charleston, lost or not lost. Held, that it was the duty of the assured to communicate to the underwriters a letter received by him containing particulars of a hurricane which had occurred at Charleston after the vessel sailed, though the fact of there having been gales on the coast of Carolina was known to them. *Moses v. Delaware Ins. Co.*, § 863.

§ 316. The knowledge of the plaintiff was particular; that of the defendants general. *Ibid.*

§ 317. A vessel insured was captured on her voyage to Carthage and condemned on the ground of illicit trade, part of the cargo having been brought from Spain to New York by a Spaniard, entered for exportation, and afterwards sold to the plaintiff, the Spaniard going out as passenger on board the vessel, and the transaction being considered by the British court of admiralty as illegal. Held, that if the jury considered that the assured was guilty of concealment of the shipment of the goods of Spanish origin, the policies effected by the plaintiff would be void. *Marshall v. Union Ins. Co.*, §§ 864-866.

§ 318. The assured is not bound to anticipate every possible ground of suspicion which may, against right, weigh with the belligerent cruisers and courts, and to communicate the circumstances; though if against right the belligerent courts are in the habit of condemning property under particular circumstances, he should disclose the circumstances, if they exist. *Ibid.*

§ 319. If a policy authorize a ship to stop at a particular port, it is not necessary for the assured to disclose the fact that the ship will stop there. *Hubbard v. Coolidge*, §§ 867-69.

§ 320. The plaintiffs having stated to the underwriters, in answer to some general inquiries, that they had no knowledge that the ship would call at the Cape, and knew of no motive for calling there, and no further inquiries being made, held, that this was not a binding representation that the vessel would not call at the Cape. *Ibid.*

§ 321. A representation as to the destination of the ship (true at the time) does not require that the destination shall not be changed. *Ibid.*

§ 322. The master of a vessel, knowing that it had been lost, concealed the fact from the owner, who, in ignorance thereof, caused insurance upon it to be obtained. Held, that the contract was valid, the master having become, by operation of law, agent of the underwriters after loss. (a) *General Interest Ins. Co. v. Ruggles*, §§ 870-73.

(a) This decision, affirming the decision of Mr. Justice Story on the circuit (4 Mason, 74), though on other grounds, is denied in *Proudfoot v. Montefiore*, L. R., 2 Q. B., 511, 521. See also *Fitzherbert v. Mather*, 1 T. R., 12; *Gladstone v. King*, 1 Maule & S., 35. And see especially *Blackburn v. Vigers*, 17 Q. B. D., 553, 563, 568, 575, 577.

§ 323. The omission to mention that the voyage from a second port had begun at the time of the insurance is not, it seems, material, if the vessel was in good order when she left the first port. *Kohn v. Insurance Co.*, §§ 374-82.

§ 324. If a concealment that the cargo insured had been shipped at a colonial port, and had not been landed in the United States, is material, it should be disclosed. *Ibid.*

§ 325. If a foreign regulation be known only to the underwriter, he must ask for information in regard to the facts; if known to the assured, he must disclose them. *Ibid.*

§ 326. *Quære*, if these regulations are not of general notoriety, whether the underwriter or the assured is bound to disclose them, unless express notice of them is proved. *Ibid.*

§ 327. The underwriter, by consenting to take a risk which the assured is not willing to bear, does it always under an implied condition that, as to all facts within the knowledge of the assured, he shall be equally informed. *Ibid.*

§ 328. The underwriter is presumed to be acquainted with public transactions, foreign laws or ordinances, the course of nature and of trade. *Ibid.*

§ 329. The absence from an application for insurance upon a ship of anything showing whence the ship sailed, or where she was going, or by whom commanded, is not evidence of concealment as to such matters. *Folsom v. Mercantile Ins. Co.*, §§ 383-85, 386-88.

§ 330. The defense of concealment, as *e. g.* of circumstances pointing to the loss of a vessel to be insured, must be established by the underwriter. *Ibid.*

§ 331. Where an underwriter had had the same information as the owner of the loss of a vessel, though by the name of her master instead of by her right name, and the underwriter knew who was master of the vessel, it was not a material concealment of the fact for the owner in applying thereafter for insurance upon the vessel not to call the attention of the underwriter to such information. *Ibid.*

§ 332. It matters not in such a case that there had been time for receiving further information from the master, if he had not sent it, especially where the facts made non-communication excusable. *Ibid.*

§ 333. A vessel lost may be insured though the words "lost or not lost" be not used. *Insurance Co. v. Folsom*, §§ 389-90.

§ 334. In the case of a warranty of neutrality in insurance upon cargo, the assured is not understood to warrant that the whole cargo is neutral, but only that the interest insured is neutral. This principle applied to a joint ownership of cargo, the joint owner insured being a neutral, the other being a belligerent. *Livingston v. Maryland Ins. Co.*, §§ 391-94.

§ 335. If a vessel take on board papers which increase the risk of capture, and if it be not according to the usage of trade insured to take such papers, the non-disclosure of them will vacate the policy. *Ibid.*

§ 336. If by usage it be necessary that certain papers should be on board an insured ship, the concealment of them cannot affect the right of the assured. *Livingston v. Maryland Ins. Co.*, §§ 395-408.

§ 337. A Spanish subject who came to the United States in time of peace between Spain and Great Britain, to carry on trade between this country and the Spanish provinces, under a royal Spanish license, and who continues to reside here and carry on that trade after the breaking out of war between those countries, is to be considered an American merchant, though the trade could be carried on by a Spanish subject only. *Ibid.*

§ 338. If a letter ordering insurance upon a ship refer to another letter previously laid before the underwriters, which contained information that the vessel had permission to trade to the Spanish colonies, the underwriters are bound to notice that fact, and to know that the vessel would take all the necessary papers to make the voyage legal. *Ibid.*

§ 339. In a policy insuring a ship there is always an implied representation that the ship's papers disclose the true legal ownership. (*Affirming Ohl v. Eagle Ins. Co.*,* 4 Mason, 172.) *Ohl v. Eagle Ins. Co.*, §§ 409-11.

§ 340. If the policy is intended to insure a special or an equitable ownership, notice must be given to the underwriter. A common policy on ship covers only the legal ownership. *Ibid.*
[NOTE.—See §§ 412-459.]

JONES v. INSURANCE COMPANY.

(Circuit Court for Pennsylvania: 2 Wallace, Jr., 278-282. 1882.)

STATEMENT OF FACTS.—Suit upon time policies of insurance on a ship which was lost by perils of the sea insured against. The defense, raised on demurrer, was unseaworthiness at the commencement of the voyage.

Opinion by GRIER, J.

Although some of the treatises on marine insurance do not, in treating this subject, make any distinction between voyage and time policies, and many *dicta* of judges may be found to the same effect, while others (*Paddock v. Franklin Ins. Co.*, 11 Pick., 231, and cases there cited) express doubt, the precise point does not appear to have been decided on full argument in a court of error till very lately.

§ 341. *Except under particular circumstances no warranty of seaworthiness in a time policy.*

The case of *Small v. Gibson*, 3 Eng. L. & Eq., 290-9; 14 Jurist, 368; 15 id., 325, was first argued and decided in the queen's bench, in November, 1850, and it was there decided "that there is an implied warranty of seaworthiness in time policies, if nothing appear in them to the contrary, as well as in policies on a voyage." This case was removed by writ of error to the exchequer chamber, where the judgment of the queen's bench was reversed. The opinion of Baron Parke, which had the concurrence of the whole court, contains a full review of all the cases and arguments bearing on the subject. This decision of a doubtful point is of the highest authority, and as I fully assent to the reasons on which it is founded, I consider it conclusive on the general question, and shall therefore content myself by referring to that case, where the arguments on both sides of the question have been exhausted by the counsel and court. It is true this case does not decide that there is no warranty of seaworthiness at all in a time policy, or that there is not a warranty that the ship is or shall be seaworthy for that voyage, if the ship be then about to sail on a voyage; or if she be at sea that she was not seaworthy when the voyage commenced. It may be true, also, that there is in a time policy a warranty of seaworthiness at the commencement of the risk, so far as lay in the power of the assured to effect it, so that if the ship had met with damage before and could have been repaired by the exercise of reasonable care and pains, and was not, the policy would not attach. But in all such cases the plea must state such facts and circumstances as shall show either that at the time the insurance commenced the ship was in her original port of departure, and commenced her voyage in an unseaworthy condition, and so continued till the time of her loss, or that having come into a distant port in a damaged condition before or after the commencement of the risk, where she might and ought to have been repaired, and the owner or his agents neglected to make such repairs, and the vessel was lost by a cause which may be attributed to the insufficiency of the ship.

As neither of these pleas comes within the conditions stated, we overrule them and give judgment for plaintiff on the demurrers.

ROUSE v. INSURANCE COMPANY.

(Circuit Court for Pennsylvania: 3 Wallace, Jr., 367-374. 1862.)

STATEMENT OF FACTS.—Action on a time policy of insurance on a vessel lying at the time of insurance in her home port, from which she sailed on her first voyage a few days afterward, unseaworthy at the time, and foundered at sea on that voyage. There was a special verdict to the foregoing effect, and the question was raised whether on time policies there was an implied warranty of seaworthiness.

§ 342. *Authorities reviewed in regard to seaworthiness in time policies.*

Opinion by GRIER, J.

As neither the case of *Small v. Gibson*, 14 Jurist, 368, nor that of *Jones v. The Insurance Co.*, 2 Wall. Jr., 278 (§ 341, *supra*), decide that *all* time policies differ from voyage policies as to the implied warranty, but as each decide only that the peculiar species of time policies then under consideration (which, as will appear, was the same in both cases) did not come under the rule applicable to voyage policies, it will be necessary to notice more particularly the covenants of those policies, and then examine the reasons given for not subjecting the assured to this implied covenant of warranty. For if the reasons for this exception of the time policies in the cases referred to do not apply to the form and species of time policy now under consideration, the same rule ought not to apply.

The words of the policy in *Small v. Gibson* are as follows: "on the good ship or vessel called the *Susan*, *lost or not lost* in port and at sea, in all trades and services whatsoever and wheresoever, during the space of twelve calendar months, commencing," etc.

§ 343. *No implied warranty of seaworthiness when the vessel is on a distant ocean where insurance on a time policy is granted.*

The vessel was on a distant ocean; neither party could know what her condition was; if she had been seaworthy when she left her home port, neither party could know what storms she had encountered after her departure. The very object in effecting the policy is to pay a sum of money or premium for the purpose of casting upon another the perils and chances of the voyage during the period insured. If the ship was in existence at the time the policy was made, and in a storm, which dismantled her and rendered her wholly un navigable, if she should go to the bottom the next day from leaks sprung before the date of the policy, it was evidently the intent of the parties that the underwriter was paid for taking upon himself the hazard. It is true a policy may be made on a ship from Calcutta to New York, and the owner may not know whether his vessel is seaworthy or not. But he knows that the master of his vessel will not leave Calcutta without putting his vessel in a condition to meet the usual perils of the voyage, and may well be presumed to warrant that fact with regard to his absent vessel. It is his bounden legal duty towards the mariners for the safety of their lives, and towards the merchants who load their goods, that the ship should be stout, stanch and strong, or in other words, seaworthy, before she commences a voyage either *from* or *to* a distant port. And it may most properly be implied, that in this contract with the underwriter the owner should be taken to warrant, as a foundation of the contract, that the ship shall be, at the time of sailing from Calcutta, a seaworthy vessel. This rule is founded on policy, also, and courts should enforce strict compliance with it; otherwise the effect of insurance might be to render those who are protected from loss by the policy, exceedingly careless about the condition of the ship, and the consequent safety of the crew. Every vessel at the commencement of each particular voyage requires appliances commensurate and appropriate to the ordinary risks of navigation during the particular voyage contemplated. In such a case there can be no difficulty in fixing the commencement of the risk, and making proof of the vessel's condition. But it is otherwise in a time policy like that in *Small v. Gibson*, where the risk begins to run on a given day, wherever the ship may be. Whether the vessel is sea-

worthy or not is clearly one of the risks assumed by the underwriter, who has covenanted to bear a part of the risk of the owner for a given period.

The words of the policy in *Jones v. The Insurance Company*—the case I mean in our own circuit—were also “lost or not lost,” and in point of fact the vessel was on the main at the time when the assurance was effected.

§ 344. *Time policy; vessel in home port; seaworthiness.*

But there are many policies of insurance which may be classed under the genus time policies, as distinguished from voyage policies, to which this course of reasoning would be wholly inapplicable. Let us take the case before us: It is true it is a time policy, but it is not on a vessel in a distant ocean, or in parts unknown, where the parties have contracted without a knowledge of her situation and with a premium paid for assuming the risk of her seaworthiness at the time by the underwriter. It is, in fact, but an agreement to insure the vessel in so many voyages between New York and Galveston, as she may choose to make within the year. If the insurance had been for twelve successive voyages back and forth, it would have been classed as a voyage policy, and the same implied warranty of seaworthiness would have applied to each, as if there had been several policies for each voyage. Can the fact that the number of voyages is indefinite, and may be more or less than twelve, if within the year, constitute a difference in the essence of the contract, because the accident of its form places it in the general category of a time policy as distinguished from a voyage policy?

Parke, B., in delivering the opinion of the court of exchequer chamber, in *Small v. Gibson*, after stating the reasons why the implied warranty of seaworthiness, which it is the policy of the law to enforce, did not apply to that peculiar form or species of time policy, is careful to exclude the idea that this same rule would apply to all time policies; and very justly, as the decision in that case first established the doctrine that any time policy should be held as excepted from the general rule as to seaworthiness.

Martin, B., in his opinion, delivered in the house of lords, says: “If the record in this case had shown that the policy had been effected upon the ship upon her setting out from her original port, I am of opinion that from analogy to the case of a voyage policy, the warranty ought to be implied. If a time policy be effected on a ship about to sail from a given port on a voyage or voyages, the ship must, in my opinion, be seaworthy at the time of sailing.”

“Such a condition or warranty,” says Platt, B., “is intelligible; its observance is practicable, and would be calculated to extend to the assured and the underwriter respectively every reasonable protection.”

Lord Campbell, C. J., admits there might be an exception to the general rule of implied seaworthiness where the time policy is effected on an outward bound ship in a port where the owner resides, but thinks it better to have a short, sharp rule, applying to all time policies—and thinks it more *expedient* that the rule should remain without any exception.

It seems not to have occurred to that learned judge that the exception to the general rule as to seaworthiness was, itself, a “*judge made*” one, then for the first time decided, and that to include other cases bearing no analogy to the one before the court (and to which the reasons given would not apply), within that exception, would be “*gratuitous*,” however it might facilitate the business of a court to follow “*plain rules*” without distinguishing between things that differ.

Judgment for defendant.

TIDMARSH v. WASHINGTON F. & M. INSURANCE COMPANY.

(Circuit Court for Massachusetts: 4 Mason, 439-443. 1827.)

STATEMENT OF FACTS.— *Assumpsit* on a policy of insurance. The declaration averred a total loss by perils of the sea and shipwreck. Plea, general issue. For the defendant it was contended (1) that the vessel was not seaworthy at the commencement of the voyage; (2) misrepresentation in a letter written by plaintiff and shown to the underwriters; (3) that the loss was occasioned by negligent navigation.

§ 345. *Defense of misrepresentation, negligence and deviation puts burden of proof on underwriter.*

Charge by STORY, J.

There being a great conflict of opinion on the testimony upon some of the questions made at the bar, it may be necessary to consider upon whom the burthen of proof lies, for that may naturally influence your verdict. If, upon the whole evidence, the case hangs in great doubt upon any point, then the party whose duty it is to satisfy your minds beyond a reasonable doubt on that point, having failed to establish it, must, to that extent, surrender his right to a verdict. Now, upon the three points of misrepresentation, negligent navigation and deviation, my opinion is that the burthen of proof rests on the defendant. Each of them constitutes a substantial ground of defense, in respect to which the plaintiff is not to prove the negative, but the defendant is required to establish the affirmative. So far indeed as the plaintiff's own proofs let in or assist such a defense, they are fairly before the jury to weigh as far as they may; but beyond these the defendant must satisfy your remaining doubts, or the defense miscarries.

§ 346. *Seaworthiness at commencement of voyage; burden of proof.*

In respect, however, to the point of seaworthiness a very different principle prevails. There the burthen of proof rests on the plaintiff himself, for the existence of seaworthiness at the commencement of the voyage is a condition precedent, implied by the law, to the attaching of the policy. Unless, therefore, the vessel be seaworthy at the commencement of the voyage, the underwriter is never bound, for the contract has never attached itself to the risk.

§ 347. *Seaworthiness to be measured by standard of port or country to which the ship belongs.*

Much argument has been employed at the bar upon the question of the nature and extent of seaworthiness. It has been properly remarked that the standard of seaworthiness has been gradually raised within the last thirty years, from a more perfect knowledge of ship-building, a more enlarged experience of maritime risks, and an increased skill in navigation. In many ports, sails and other equipments would now be deemed essential, which at an earlier period were not customary on the same voyages. There is also, as the testimony abundantly shows, a considerable diversity of opinion, among nautical and commercial men, as to what equipments are or are not necessary. Many prudent and cautious owners supply their vessels with spare sails and a proportionate quantity of spare rigging; others do not do so, from a desire to economize, or from a different estimate of the chances of injury or loss during the same voyage. Of course, different men may well therefore come to different conclusions from the same premises, on a point like this, from their own habits of life, and the general custom of the place to which they belong. But I think I may say, that it would not be a just or safe rule in all cases to take

that standard of seaworthiness, exclusively, which prevails in the port or country where the insurance is made. In the present case the insurance is made in Boston upon a British vessel belonging to the port of Halifax in Nova Scotia. If the Boston standard of seaworthiness should essentially differ from that in Halifax, in respect to equipments for a South American voyage of this sort, it would be pressing the argument very far to assert that the vessel must rise to the Boston standard before the policy could attach. It seems to me, that where a policy is underwritten upon a foreign vessel belonging to a foreign country, the underwriter must be taken to have knowledge of the common usages of trade in such country, as to equipments of vessels of that class for the voyage on which she is destined. He must be presumed to underwrite upon the ground that the vessel shall be seaworthy in her equipments, according to the general custom of the port, or at least of the country to which she belongs. It would be strange that an insurance upon a Dutch, French or Russian ship should be void because she wanted sails, which, however common in our navigation, never constituted a part of the marine equipments of those countries. We might as well require that their sails and rigging should be of the same form, size and dimensions, or manufactured of precisely the same materials, as ours. In short, the true point of view in which the present case is to be examined is this: Was the Emily equipped for the voyage in such a manner as vessels of her class are usually equipped in the province of Nova Scotia, and port of Halifax, for like voyages, so as to be there deemed fully seaworthy for the voyage, and sufficient for all the usual risks? If so, the plaintiff, on this point, is entitled to a verdict. Of course, the question of seaworthiness must be, in some respects, the same in all countries. Cables and anchors, and proper rigging and sails, to meet the ordinary exigencies of the voyage, must be, in every country, put on board for common safety.

§ 348. *Falsity of facts stated on information not to be considered.*

Upon the point of misrepresentation there is one other consideration which requires attention. Where a letter contains a representation of facts not known to the party, but from the information of others, and so the letter states the facts, or it is a necessary inference from the nature of them, there the representation is not falsified by the mere proof that the facts are not so, if the party communicating the facts did receive such information, and *bona fide* confided in it. He undertakes there, not for the truth of the facts, but for the truth of his information. (Verdict for the defendant.)

LUNT v. BOSTON MARINE INSURANCE COMPANY.

(Circuit Court for New York: 19 Blatchford, 151-158. 1881.)

Opinion by WALLACE, J.

STATEMENT OF FACTS.—The plaintiffs having obtained a verdict, the defendant now moves for a new trial, alleging error in the rulings of the court on the trial. The action is on a contract for marine insurance, evidenced by a certificate, whereby the defendant undertook to insure the plaintiffs for \$3,000, on a cargo of potatoes on board the schooner Lacon, "at and from Yarmouth (Nova Scotia), to New York city." At the time the insurance was effected the vessel was at Shelburne, to which port she had put in, leaking and in distress. A survey was ordered at that port and the vessel was pronounced unseaworthy. By an arrangement between underwriters who had insured the cargo and the plaintiffs, the insurance was canceled and the plaintiffs were paid \$2,000. They

thereupon applied for new insurance to agents of the defendant. The defendant's agents refused to insure the cargo from Shelburne, but agreed to insure from Yarmouth, to which port the vessel was to proceed from Shelburne. The action was defended upon the theory that the plaintiffs represented that the vessel should be repaired at Yarmouth and no repairs were made; also upon the ground of concealment and of unseaworthiness.

It was not claimed upon the trial that there was a warranty in reference to the repairs, but that there was a promissory representation made orally, and in the application for insurance, that the vessel was "to be repaired at Yarmouth." Evidence was given by the plaintiffs, that, upon the vessel's arrival at Yarmouth, a new survey was had, and it was found, upon examination, that no repairs were required. The court ruled that the defense of concealment could not be predicated upon the failure of the plaintiffs to disclose the fact of a survey at Shelburne, or the cancellation of the previous insurance, because the law implied a warranty of seaworthiness, and the underwriter is presumed to rely upon the warranty, and the application for insurance need not proffer any disclosures to the prejudice of the ship's seaworthiness; and ruled that the cancellation of the outstanding insurance was a fact extrinsic to the risk. The correctness of this ruling is not contested on the present motion. The court also ruled that if, when the ship arrived at Yarmouth and was examined, it was found no repairs were needed, and no repairs were in fact necessary, but the vessel was in a seaworthy condition for her voyage, the defendant could not prevail upon the defense of a non-compliance with the representation; that the fair construction of the representation, assuming it not to have been the statement of an expectation but a promissory representation, was that the vessel was to be put in a seaworthy condition at Yarmouth for her voyage, before the commencement of the risk, and that if, when she left Yarmouth, she was in that condition, the representation was satisfied. To this ruling there was an exception, which is now insisted on.

§ 349. "*To be repaired at Y.,*" where repairs were found unnecessary; repairs may be made elsewhere.

There was no conflict of testimony as to the terms of the representation and no evidence of usage respecting the meaning of the language used. It was, therefore, the duty of the court to decide, as a matter of legal construction, what was the force and effect of the representation. The representation was, that the vessel was "to be repaired," without specifying the character or extent of the repairs. Nothing had been stated between the parties as to what repairs should be made. In the negotiations there had been nothing mentioned regarding the condition of the ship, except that she had put into Shelburne, in distress and leaking. If the particulars of her mishap had been further specified, this circumstance might have qualified and characterized the meaning of the language used. The insurers were informed, in substance, that the vessel was not in a seaworthy condition. This information having been given, the insurers could not rely upon the implied warranty of seaworthiness, and insisted on an assurance that she would be repaired at Yarmouth, where the risk was to commence. The plaintiffs were not the owners of the vessel, and could not be expected to have any voice in repairing her beyond the immediate necessities of the situation. Under these circumstances, the inference seems almost irresistible that such repairs were contemplated as would render her seaworthy for the voyage and when the insurance should take effect, and that any other repairs were a matter of indifference to the parties.

§ 350. *Distinction between representations and warranties.*

I do not understand it to be contended, that, if the representation was properly construed, it was error to rule that there was not a breach of the representation; but, if this is contended, I think the defendant cannot maintain its contention. It is not necessary to refer to the strict rules which require a warranty to be fulfilled. As to representations more liberal rules obtain. In *De Hahn v. Hartly*, 1 T. R., 343, Lord Mansfield said: "A representation may be equitably and substantially answered, but a warranty must be strictly complied with." The two cases most frequently referred to in illustration of the rule are *Suckley v. Delafield*, 2 Caines, 222, and *Pawson v. Watson*, 1 Cowp., 785. In *Suckley v. Delafield*, where the representation was that the ship would sail "in a few days for the West Indies, in ballast," it was held to mean that the vessel would not be exposed to the sea perils attending a loaded ship, and that there was a substantial performance, although the master secretly conveyed into the ship and transported a small quantity of merchandise. In *Pawson v. Watson*, the representation was that the ship was to sail with twelve guns and twenty men. She sailed with ten guns and six swivels, and with sixteen men and seven boys. It was held that, as the representation had not been departed from fraudulently, nor in a manner detrimental to the underwriter, the policy was in force. The elementary writers are unanimous to the effect that it is sufficient if promissory representations are substantially complied with. Mr. Arnould states the doctrine thus: "Where, however, it appears reasonable to conclude, from the whole circumstances of the case, that the failure to comply with the strict terms of the representation has not substantially altered the nature of the risk, as described in the policy, such non-compliance will not discharge the underwriter's contract." 1 Arnould on Marine Ins., 4th London ed., 499. If it were represented that a vessel should sail with convoy or a certain armament, and peace be proclaimed before the voyage commenced, it would be manifestly unreasonable to exact the performance of this representation as a condition of the underwriter's liability. Duer on Representations, 89. In Duer on Ins., vol. 2, p. 702, Lecture 14, § 36, it is stated: "There exists, however, in regard to representations, this necessary exception: when they cease to be material before the risks commence, by an entire alteration in the state of things that alone led to their being made, and from which alone they derived their value, a compliance with their terms is no longer requisite." In the present case, it is to be assumed that the jury found that, after an examination at Yarmouth, it was evident no repairs were needed and the vessel was in a fit condition to proceed upon her voyage. This being so, it would seem too plain to doubt that neither the interests of the insurers nor the fair purport of the promise required that to be done by the plaintiffs which would have been superfluous and futile.

§ 351. *Burden of proof in regard to seaworthiness. Conflict of authority considered. In this case put upon the plaintiff.*

It is also contended that the court erred in instructing the jury that the burden of proof was upon the defendant to establish the unseaworthiness of the vessel. If this instruction had been limited to that branch of the defense which was predicated upon the breach of the implied warranty of seaworthiness, I should be disposed to adhere to it now as correct. It is everywhere conceded, that, in every policy of insurance on a vessel, there is an implied warranty that the vessel is seaworthy; but many of the authorities declare

that this warranty is a condition precedent to the obligation of insurance; and, as the general rule is undoubted, that the performance of a condition precedent must be pleaded and proved whenever it enters into the cause of action, the application of that rule to actions for marine insurance seems consistent, and has, therefore, been enforced. On the other hand, it would seem to be the reasonable presumption of fact, that a ship is seaworthy, in the absence of any circumstances indicating the contrary; and, as it is quite unnecessary to make proof of facts which will be assumed to exist in the absence of proof, it has been held, in many cases, that the onus of proving unseaworthiness is on the party that alleges it. Out of this conflict of opinion the commentators have deduced still another rule, which has been approved by high authority, but never adjudged when necessarily under consideration in the particular case. Mr. Justice Duer, in *Moses v. Sun Mutual Insurance Co.*, 1 Duer, 176, says that the true rule deducible from a full comparison of the cases appears to be that stated by Mr. Arnould (2 Arnould on Ins., § 447, p. 1345): "The assured is bound to aver and prove that the ship was seaworthy when the risks commenced, but the proof to be given by him in the first instance need not be particular in full. Although slight and general, if not contradicted, it is deemed sufficient, and, when given, it shifts the burden upon the underwriter." Mr. Phillips, after stating that seaworthiness is said to be presumed in divers cases, says: "Whether, however, it is to be proved in the first instance by the assured, or is presumed, is usually of very little practical importance, since the proof required in such case is necessarily only of a general character and may ordinarily be readily had." 1 Phillips on Ins., § 724. In the present case, where the testimony left the fact in grave doubt, the unsatisfactory character of this middle view is well illustrated. The burden was on the one side or the other to overcome a presumption either of law or of fact, and the court was required to decide where the burden rested, and, in a doubtful case like this, the ruling might well be decisive with the jury. If the onus is shifted from the plaintiff to the defendant, when the former has given "slight and general" proof of seaworthiness, it would seem to be shifted back again when the latter had given proof which is more cogent; and thus the court would be required to determine a question of fact upon conflicting evidence, before instructing the jury upon a question of law. It is a safer rule, because capable of a more certain application, to hold that one party or the other has the onus of proof.

There are two cases in the federal courts which are entitled to great consideration, because of the learning and eminence of the judges before whom they were tried, where the question was directly considered and instructions to the jury were delivered; but, unfortunately, they are in direct antagonism. Mr. Justice Story, in *Tidmarsh v. Wash. Ins. Co.*, 4 Mason, 440 (§§ 345-48, *supra*), instructed the jury that the burden of proof to establish seaworthiness was upon the assured, while Mr. Justice Curtis, sitting in the same circuit, in the later case of *Bullard v. Roger Williams Ins. Co.*, 1 Curt., 148, instructed the jury that the burden of proof was upon the insurer. The English cases favor the conclusion that seaworthiness is assumed as a fact, in the absence of counter-vailing facts, and, therefore, that the assured is entitled to the benefit of the presumption (*Watson v. Clark*, 1 Dow, 336; *Parker v. Potts*, 3 Dow, 23); and, in the recent case of *Pickup v. Thames Ins. Co.*, decided by the court of appeal, in 1878 (L. R., 3 Q. B. Div., 594), all the judges agree that the presumption of law is *prima facie* in favor of seaworthiness and the burden of

proof to the contrary is on the insurer. That was an action on a policy, and it was proved on the trial that the vessel put back from inability to proceed, eleven days after she started on her voyage. The judge directed the jury that this circumstance was sufficient to shift the onus of proof from the underwriter and make it incumbent on the assured to prove that the unseaworthiness arose from causes occurring subsequently to setting sail. This was held to be error, all the judges agreeing that the presumption is *prima facie* in favor of seaworthiness, and that the burden of proof to show the contrary is upon the insurer. The same conclusion is sanctioned by the weight of authority in our own courts. *Taylor v. Lowell*, 3 Mass., 347; *Paddock v. Franklin Ins. Co.*, 11 Pick., 227; *Myers v. Girard Ins. Co.*, 26 Penn., 192; *Snethen v. Memphis Ins. Co.*, 3 La. Ann., 474.

In the present case, however, the jury were instructed that the burden of proof was upon the defendant to show unseaworthiness. When it appeared that the plaintiffs had represented that the vessel should be repaired at Yarmouth and no repairs had in fact been made, it then appeared there had not been a compliance with the representation, and it then devolved upon the plaintiffs to excuse their non-compliance. This they attempted to do by proof that the vessel was seaworthy and needed no repairs. The plaintiffs held the affirmative as to this. The instruction imposed the affirmative upon the defendant. The manifest tendency of the instruction was to mislead the jury. Had my attention been specifically directed on the trial to the point now made, the instruction would have been limited to the issue arising upon the implied warranty of seaworthiness. As it was, a broad exception was taken to the instruction, which would probably be unavailing upon a bill of exceptions, for failure to specify the precise point of objection. But, on a motion for a new trial, and when the misdirection may very possibly have had a material influence upon the result, a technical criticism of the exception is out of place. The motion for a new trial is granted.

McLANAHAN v. UNIVERSAL INSURANCE COMPANY.

(1 Peters, 170-192. 1828.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This is a writ of error to the circuit court of the district of Maryland. The original action was brought by the plaintiffs in error against the defendants, upon a policy of insurance underwritten by the defendants, whereby “they caused Thomas Tenant, for whom it may concern, to be insured, lost or not lost, at and from Havre de Grace to New Orleans, with liberty to touch and trade at Havana,” \$10,000 upon brig Creole and appurtenances. The declaration averred the interest in the plaintiffs, and a total loss by the perils of the seas. The defendants pleaded the general issue; and upon the trial, after the whole evidence on both sides had been given in, the court, upon the prayer of the defendants’ counsel, instructed the jury “that, upon the whole evidence in the case” as stated, the plaintiffs are not entitled to recover, and the verdict of the jury ought to be for the defendants.” Nine different instructions were then prayed for on behalf of the plaintiffs, which were all refused by the court upon the ground that the opinion already given disposed of the whole cause upon its merits. If that opinion was correct this refusal was entirely justifiable, for the court was under no obligation to discuss or decide other points when the plaintiffs’ case was already shown to

possess a fatal defect. The general question, then, before this court, is upon the propriety of the instruction so given to the jury.

§ 352. *The instruction not advisory.*

A suggestion has been thrown out at the bar that this instruction was not intended to be positive and absolute, but merely advisory to the jury; that it was not meant to take away the right of the jury to decide freely on the facts, but merely to offer for their consideration those views which the court had arrived at, and which it might at all times properly suggest to the jury. It is doubtless within the province of a court, in the exercise of its discretion, to sum up the facts in the case to the jury and submit them, with the inferences of law deducible therefrom, to the free judgment of the jury. But care should be taken in all such cases to separate the law from the facts, and to leave the latter in unequivocal terms to the jury, as their true and peculiar province. We do not, however, understand that the present instruction was in fact, or was intended to be, merely in the nature of advice to the jury. It is couched in the most absolute terms, and imposed an obligation upon the jury to find a verdict for the defendants. It assumed there were no disputable facts or inferences proper for the consideration of the jury upon the merits, and that, upon the unquestioned facts, the plaintiffs had no legal right of recovery. It is in this view that it is open for the consideration of this court, and in this view it will now be discussed, as it was discussed in the argument at the bar.

§ 353. *The grounds of contention.*

Four grounds have been presented to justify the opinion of the circuit court, which, it is said, are apparent from the record itself, and each of them is decisive upon the case. The first is the unseaworthiness of the ship at the time when she broke ground at Havre and commenced the homeward voyage, by reason of the master and a sufficient crew not being then on board. The second is the laying off and on near the port of Havre, after departure on the voyage, for several hours, waiting for the master to come on board, which, it is said, was an improper detention and amounted to a deviation. The third is the omission of Coiron to communicate to his agent or other persons in America the knowledge of the loss, by the way of Havana, so as to countermand the order of insurance, which it contended was a fatal omission of duty. The fourth is the omission to mention the time of the vessel's sailing from Havre, in the letter of the 20th of October, ordering the insurance, which, whether fraudulent or not, was a material concealment, and misled the underwriters in the same manner as if there had been a representation that the time of the sailing was uncertain.

It is to be considered that these points do not come before this court upon a motion for a new trial after verdict, addressing itself to the sound discretion of the court. In such cases the whole evidence is examined with minute care, and the inferences which a jury might properly draw from it are adopted by the court itself. If, therefore, upon the whole case, justice has been done between the parties and the verdict is substantially right, no new trial will be granted, although there may have been some mistakes committed at the trial. The reason is that the application is not matter of absolute right in the party, but rests in the judgment of the court, and is to be granted only when it is in furtherance of substantial justice. The case is far different upon a writ of error, bringing the proceedings at the trial, by a bill of exceptions, to the cog-

nizance of the appellate court. The directions of the court must then stand or fall upon their own intrinsic propriety as matters of law.

§ 354. *Seaworthiness a question of fact.*

The first and second points appear to us, in the present case, to resolve themselves into matters of fact; and the facts are too imperfect and too general to enable the court to draw any legal conclusion from them, either as to seaworthiness or deviation. There is no doubt that every ship must, at the commencement of the voyage insured, possess all the qualities of seaworthiness and be navigated by a competent master and crew. But how is this court to arrive at the conclusion that the brig *Creole* was not in that predicament at the commencement of the present voyage? The argument assumes that the ship ought not to have got under weigh, or proceeded into the offing, until the master and all the crew necessary, not for that act but for the entire voyage, were on board. If the law were so, we have no means of ascertaining what crew was actually on board at the time; nor whether the voyage was absolutely intended to be commenced on that day; nor whether the departure was merely contingent and dependent upon the master's procuring the proper ship's papers, and the breaking ground and standing off and on in the offing were preparatory steps only for this purpose; nor whether for such purposes the pilot and crew on board were not amply sufficient. But we are far from being satisfied that the law has interposed any such positive rule as the argument supposes. Seaworthiness in port or for temporary purposes, such as mere change of position in harbor, or proceeding out of port, or lying in the offing, may be one thing, and seaworthiness for a whole voyage, quite another. A policy on a ship at and from a port will attach, although the ship be at the time undergoing extensive repairs in port so as, in a general sense, for the purposes of the whole voyage, to be utterly unseaworthy. What is a competent crew for the voyage, at what time such crew should be on board, what is proper pilot ground, what is the course and usage of trade in relation to the master and crew being on board when the ship breaks ground for the voyage, are questions of fact dependent upon nautical testimony, and are incapable of being solved by a court without assuming to itself the province of a jury, and judicially relying on its own skill in maritime affairs. In this view of the point, it is not necessary to rely on the doctrine of Lord Chief Justice Abbott, in *Weir v. Aberdeen*, 2 Barn. & Ald., 320, which goes the length of asserting that if there be unseaworthiness at the commencement of the voyage, and the defect is cured before loss, a subsequent loss is recoverable under the policy. This is an important doctrine, and well worthy of discussion whenever it comes directly in judgment.

§ 355. *Delay as deviation a question of fact.*

The like answer may be given to the point of deviation. This court cannot intend that here there was any unnecessary delay in the commencement or course of the voyage. The delay for the want of papers may have been entirely justifiable, and, indeed, may have conduced to an earlier inception of the voyage by putting the ship in a situation to depart at a moment's warning. The usage of trade may be generally, or at least in that particular port, to get the ship under weigh, as in this case, and wait in the offing until the master is ready to come on board; and that usage may be not only convenient and beneficial to all parties, but absolutely necessary, in given cases, from the nature of the port, and the winds and seasons. How then can this

court undertake to decide, as matter of law apparent upon the record, that any delay admitting of such explanations amounts to a deviation?

§ 356. *If, after ordering insurance, new information is received, it should be communicated to the underwriter, if possible, by reasonable diligence.*

The next point is the omission of Coiron to communicate information of the loss to his agent, so as to countermand the order for insurance. The contract of insurance has been said to be a contract *uberrimæ fidei*, and the principles which govern it are those of an enlightened moral policy. The underwriter must be presumed to act upon the belief that the party procuring insurance is not, at the time, in possession of any facts material to the risk which he does not disclose, and that no known loss had occurred which by reasonable diligence might have been communicated to him. If a party, having secret information of a loss, procures insurance without disclosing it, it is a manifest fraud which avoids the policy. If, knowing that his agent is about to procure insurance, he withholds the same information for the purpose of misleading the underwriter, it is no less a fraud; for under such circumstances the maxim applies, *qui facit per alium, facit per se*. His own knowledge, in such a case, infects the act of his agent in the same manner and to the same extent which the knowledge of the agent himself would do. And even if there be no intentional fraud, still the underwriter has a right to a disclosure of all material facts which it was in the power of the party to communicate by ordinary means; and the omission is fatal to the insurance. The true principle deducible from the authorities on this subject is that where a party orders insurance, and afterwards receives intelligence material to the risk, or has knowledge of a loss, he ought to communicate it to the agent as soon as, with due and reasonable diligence, it can be communicated, for the purpose of countermanding the order, or laying the circumstances before the underwriter. If he omits so to do, and by due and reasonable diligence the information might have been communicated so as to have countermanded the insurance, the policy is void. This doctrine is supported by the English as well as the American authorities, and particularly by *Watson v. Delafield*, 1 John., 152; 2 Caines, 224; 2 John., 526; where most of the early cases are collected and commented upon; and it is well summed up by Mr. Phillips in his *Treatise on Insurance*, p. 96. We do not go over the cases at large, because there is no controversy as to the general result. The only matter for observation is whether the rule as to diligence may not, in certain cases, be somewhat more strict, so as to require what, in *Andrew v. Marine Insurance Company*, 9 John., 32, is called "extreme diligence;" or what, in *Watson v. Delafield*, is left open for discussion as extreme diligence, the duty of communication where the countermand may not only probably but possibly arrive in season. We think, however, that the principle of the rule requires only due and reasonable diligence, to be judged of under all the circumstances of each particular case; and that the expressions thrown out in the cases above mentioned were not so much intended to point out a stricter rule as to intimate that there might be cases in which a very prompt effort for communication might be fairly deemed not due and reasonable diligence, as where the loss takes place very near the port at which the insurance is to be made, and the means of communication by mail or otherwise are regular or numerous; or where, from the lapse of time and the date of the order for insurance, the party cannot but feel that every moment's delay adds many chances in favor of the insurance being made before knowledge of the loss. Under such cir-

cumstances, in proportion as the delay would properly give rise to stronger suspicion of intentional concealment, the duty of prompt communication would naturally seem to press upon the party a more vigilant diligence. The case of *Wake v. Atty*, 4 Taunt., 494, lays down no new rule, but merely applies the old one to circumstances somewhat nice and peculiar in their presentation.

§ 357. *What constitutes reasonable diligence, a question of fact in cases like this.*

What constitutes due and reasonable diligence in cases of this nature is principally matter of fact for the consideration of a jury. When, indeed, all the facts are given and the inferences deducible therefrom, the question may resolve itself into a mere question of law. But it is, in general, impossible to lay down a fixed rule on the subject, from the almost infinite variety of circumstances which may affect its application; much must depend upon the means of communication, the situation of the parties, the knowledge of conveyances, the fair exercise of discretion as to time, mode and place of conveyance, the course of trade, and nature of the voyage, and the probable chances of the countermand being effectual. All these are matters of fit inquiry before the jury, and must, from their very nature, apply with very different force to different cases.

To bring these remarks home to the present case, there are certainly circumstances which deserve the most careful consideration of a jury upon the point of due diligence. The loss occurred at no great distance from the port of Havana; and if letters had been sent ashore at that port there is strong reason to believe that they could have reached Mr. Stoney in time for a countermand, and at all events, if the loss had been made generally public at the Havana, the news might have reached Baltimore before the insurance. But the record does not contain facts enough to establish a want of reasonable diligence on the part of Mr. Coiron. It is nowhere stated that he was in a situation to make such a communication, or that he knew of the mate and crew being landed, or that vessels were about to depart for the United States from Havana. Nor is it shown what were the means and facilities of communication in the course of trade and voyages between that port and the United States, regular or irregular, from which we might deduce his knowledge of these means and facilities. Nor is it shown that the parties contemplated a stoppage off the Havana so as to put him upon diligence in writing; nor that this mode of conveyance of news was more certain or quicker than others which might have been resorted to in the ordinary course of the voyage of the ship *Trumbull* to New Orleans. We may, indeed, conjecture how these matters were, by general surmise or personal information; but judicially we can know nothing beyond what the record presents of the facts; yet all these circumstances must or may be material to the point of due diligence. In their very essence they are matters of fact and not conclusions of law.

The opinion, therefore, to which the learned counsel wished to conduct us, that the policy is void because there has been gross negligence in not countermanding the order for insurance, is one to which upon this record we cannot judicially arrive. It would be assuming the rights and exercising the functions of the jury upon matters not proved, or wholly indeterminate in their own nature. This ground for maintaining the instruction of the circuit court must then be abandoned.

§ 358. *Omitting to mention time of sailing not fatal as matter of law.*

The next point is the omission in the letter of the 20th October of any mention of the time of the vessel's sailing. This is put to the court in a double aspect; first, as the concealment of a material fact, and secondly, connecting the language of the letter with the accompanying circumstances, as a virtual representation that the vessel was not then ready or about to sail on the voyage.

Whether this omission in the letter was merely accidental, or with design to mislead the underwriters; and whether, if so designed, it had the effect (which upon the testimony in the case would be a matter of serious doubt), it is not now necessary to inquire. If accidental, it would not prejudice the insurance, unless material to the risk; if fraudulently intended, it might not in fact mislead; and whether fraudulent or not, was matter of fact for the jury. That there was no virtual representation as to the time of sailing seems to us conclusively established by the language of the letter of Colonel Tenant, requesting insurance. He there says: "He (Coiron) writes from Havre, under date of the 20th of October; but does not say when the brig would sail." Now this letter in direct terms negatives any intention to represent any particular time of sailing. It leaves the question freely open to the underwriters, either for further inquiry or for any presumptions most unfavorable to the assured. The natural result ought to be that the underwriters should calculate the time of sailing as very near the date of the letter, so as to ask a premium equal to the widest range of risk from the intermediate lapse of time. The underwriters had no right to presume that the ship would sail at some future indefinite period and to bind the assured to that presumption. The letter told them in effect that the assured would bind themselves to no representation as to the time of sailing; but asked for insurance whenever the ship might sail, be it on that day or any future day. In this view the point as to representation vanishes; and the like consideration would in a great measure dispose of that of concealment.

But the question as to this latter point has been argued at the bar upon much more broad and comprehensive principles, upon which it seems proper for this court to express an opinion, especially as this case may again undergo the consideration of a jury. It is admitted that a concealment to be fatal to the insurance must be of facts material to the risk, and certainly of this doctrine there cannot at this time be any legal doubt. It is further admitted (and so is the unequivocal language of the authorities) that generally the materiality of the concealment is a question of fact for the jury. But it is said that there are exceptions from the rule, and that concealment of the time of sailing belongs to the class of exceptions, and is a question of law for the exclusive decision of the court. It is necessary, to maintain this position in its full extent, to extricate the present case from its pressing difficulties, and if this shall be successfully made out, it will still remain to be decided whether the facts stated in the record are sufficient to enable the court to pronounce the conclusion of law.

That the time of sailing is often very material to the risk cannot be denied; that it is always so is a proposition that will scarcely be asserted, and certainly has never yet been successfully maintained. How far it is so must essentially depend upon the nature and length of the voyage, the season of the year, the prevalence of the winds, the conformation of the coasts, the usages of trade as to navigation and touching and staying at port, the objects of the

enterprise, and other circumstances, political and otherwise, which may retard or advance the general progress of the voyage. The material ingredients of all such inquiries are mixed up with nautical skill, information and experience, and are to be ascertained in part upon the testimony of maritime persons, and are in no sense judicially cognizable as matter of law. The ultimate fact itself which is the test of materiality, that is, whether the risk be increased so as to enhance the premium, is in many cases an inquiry dependent upon the judgment of underwriters and others who are conversant with the subject of insurance. In this case the introduction of testimony was indispensable to show the usual length of the voyage, and it was quite questionable whether in a just sense the vessel could be deemed a missing vessel at the time of the insurance. Upon such a point it would not be a matter of surprise if different underwriters should arrive at different results. In the nature of the inquiry, then, there is nothing to distinguish the time of sailing of the ship from any other fact, the representation of concealment of which is supposed to be material to the risk. It must still be resolved into the same element.

It has been said that there is no case in which the materiality of the time of sailing has been doubted where the ship was abroad at the time; whether this be so or not it is not important to ascertain, unless it could be universally affirmed (which we think it cannot) that the time of sailing abroad must always be material to the risk. If it may not always be material, the question whether it be so in the particular case is to be decided upon its own circumstances. Indeed, we cannot perceive how the place of sailing, whether from a home or foreign port, can make any difference in the principle. The time of sailing from a home port may be material to the risk, and if so, the concealment of it will vitiate the policy; but, whether material or not, opens the same inquisition into facts as governs in cases of foreign ports. There may be less intricacy in conducting it, or less difficulty in arriving at a proper conclusion, but it is essentially the same process. The case of *Fort v. Lee*, 3 Taunt., 381, did not proceed upon the ground that the time of sailing from a home port was never material to be communicated, but that under the circumstances of that case the underwriter, if he wished to know whether the ship had sailed, ought to have made inquiry. It was a mere application to the discretion of the court to grant a new trial where the plaintiff had obtained a verdict, and there was no pretense of any misdirection at the trial. In *Foley v. Moline*, 5 Taunt., 430, the court said that there was no pretense for the proposition, as a general rule, that it was necessary to communicate to the underwriters whether the vessel on which an insurance was proposed had sailed or not. There might be circumstances that would render that fact highly material, as if the ship were a missing ship or out of time. So that here a denial of the proposition now asserted before us was in the most explicit terms avowed and acted on.

§ 359. *Authorities reviewed.*

Two *nisi prius* cases before Lord Mansfield have been relied on to establish the supposed exception to the general rule of cases relative to the time of the sailing of the ship, in which it is argued that his lordship undertook to decide the point of materiality as matter of law, and to give it as a rule to the jury. It is proper to remark that little stress ought to be laid upon general expressions of this sort by judges in the course of trials. Where the facts are not disputed, the judge often suggests in a strong and pointed manner his opinion as to the materiality of the concealment, and his leading opinion of the con-

clusion to which facts ought to conduct the jury. This ought not to be deemed an intentional withdrawal of the facts or the inferences deducible therefrom from the cognizance of the jury; but rather as an expression of opinion, addressed to the discretion of counsel, whether it would be worth while to proceed further in the cause. And the like expression in summing up any cause to the jury must be understood by them merely as a strong exposition of the facts, not designed to overrule their verdict, but to assist them in forming it. And there is the less objection to this course in the English practice; because, if the summing up has had an undue influence, the mistake is put right by a new trial upon an application to the discretion of the whole court. This is so familiarly known that it needs only to be stated to be at once admitted. It is with reference to these considerations that the cases above alluded to should be examined.

The first is *Ratcliff v. Shoobred*, cited from *Marshall on Insurance*, page 290. It would certainly seem, at the first view, that Lord Mansfield did decide that concealment was material. But even by Mr. Marshall's report, brief as it is, it by no means appears that the materiality was in question at the trial, but only the effect of the concealment in avoiding the policy. The same case is reported more fully and more accurately by Mr. Park on *Insurance*, page 290, where it is perfectly clear that the point of materiality was left to the jury. "The question is," said his lordship, "whether this be one of those cases which is affected by misrepresentation or concealment. If the plaintiffs concealed any material part of the information they received, it is a fraud, and the insurers are not liable;" and the jury found a verdict for the defendant under this direction. So that the point was left fully open to them.

The next case is *Fillis v. Berton*, cited in *Marshall on Insurance*, 465, and reported also in *Park on Insurance*, 292. The insurance was on a ship from Plymouth to Bristol; and it appeared that the broker's instructions stated that the ship was ready to sail on the 24th of December, when in fact she had sailed on the 23d. Mr. Marshall states that Lord Mansfield ruled that this was a material concealment and misrepresentation; but Mr. Park, from whose work the report is professedly taken, uses no such expression. His words are, Lord Mansfield said this was a material concealment and misrepresentation; and the jury hesitating, he proceeded to expound to them the general principles of law on the subject of misrepresentation and concealment; and he seems to have taken it for granted that the misrepresentation was material (as from the short duration of such a voyage might naturally be inferred), and that the only point was whether the ship had sailed or not. The same explanation disposes of the case of *M'Andrews v. Bell*, 1 Esp., 373. Indeed, in any other view it would be impossible to reconcile these decisions with the judgment pronounced by Lord Mansfield and other judges, upon more mature deliberation, when causes have been brought before them in bank. Take for instance what fell from the court upon the motion for a new trial, in *M'Dowall v. Fraser*, Doug., 247, 260; *Shirley v. Wilkinson*, Doug., 306, n.; *Hodgson v. Richardson*, 1 Bl., 463; *Littledale v. Dixon*, 4 Bos. & Pul., 151, and *Hull v. Cooper*, 14 East, 479. In the case of *The Maryland Ins. Co. v. Ruden*, 6 Cranch, 338, this court expressed the opinion that "it was well established that the operation of any concealment on the policy depends on its materiality to the risk, and that this materiality is a subject for the consideration of a jury." That opinion was acted upon by the court of errors of New York, in the case of *The New York Fireman Insurance Company v. Walden*, 12 John.,

513, where Mr. Chancellor Kent in a very elaborate judgment reviewed the authorities, and laid down the doctrine in a manner that merits our entire approbation.

We think, then, that the exception insisted upon at the bar cannot, upon principle or authority, be supported; and that the question of materiality of the time of the sailing of the ship to the risk is a question for the jury, under the direction of the court, as in other cases. The court may aid the judgment of the jury by an exposition of the nature, bearing and pressure of the facts; but it has no right to supersede the exercise of that judgment, and to direct an absolute verdict as upon a contested matter of fact, resolving itself into a mere point of law. If, indeed, the rule were otherwise, the facts in the record are not so full as to enable the court to reach the desired conclusion. There is not sufficient matter upon which we could positively say that the time of sailing was, in this case, necessarily material to the risk.

For these reasons, the judgment of the circuit court must be reversed, and the cause remanded with directions to award a *venire facias de novo*.

FITZSIMMONS v. NEWPORT INSURANCE COMPANY.

(4 Cranch, 185-202. 1808.)

ERROR to U. S. Circuit Court, District of Rhode Island.

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This suit is instituted to recover from the underwriters the amount of a policy insuring the brig John, on a voyage from Charleston to Cadiz. The vessel was captured on her passage by a British squadron then blockading that port, was sent into Gibraltar for adjudication, and was there condemned by the court of vice-admiralty as lawful prize. The assured warrants the ship to be American property; and the defense is, that this warranty is conclusively falsified by the sentence of condemnation.

The points made for the consideration of the court are: 1. Is the sentence of a foreign court of admiralty conclusive evidence, in an action against the underwriters, of the facts it professes to decide? If so, 2. Does this sentence upon its face falsify the warranty contained in the policy? If not, 3. Does the special verdict exhibit facts which falsify the warranty?

The question on the conclusiveness of a sentence of a foreign court of admiralty having been more than once elaborately argued, the court reluctantly avoids a decision of it at present. But there are particular reasons which restrain one of the judges from giving an opinion on that point, and another case has been mentioned in which it is said to constitute the sole question. In that case, it will of course be determined. (a)

Passing over the consideration of the first point, therefore, the court proceeded to inquire whether this cause could be decided on the second and third points. Admitting for the present that the sentence of a foreign court of admiralty is conclusive, with respect to what it professes to decide, does this sentence falsify the warranty contained in this policy, that the brig John is American property?

The sentence declares "the said brig to have been cleared out for Cadiz, a port actually blockaded by the arms of our sovereign lord the king, and that the master of said brig persisted in his intention of entering that port, after

(a) Croudson v. Leonard, 4 Cranch, 434, deciding the question in the affirmative.

warning from the blockading force not to do so, in a direct breach and violation of the blockade thereby notified." The sentence, then, does not deny the brig to have been American property. But it is contended by the counsel for the underwriters, that a ship warranted to be American is impliedly warranted to conduct herself during the voyage as an American, and that an attempt to enter a blockaded port, knowing it to be blockaded, forfeits that character. This position cannot be controverted.

§ 360. *Intention to enter blockaded port, without any attempt, no breach of blockade.*

It remains, then, to inquire whether the sentence proves the brig John to have violated the laws of blockade; that is, whether the cause of condemnation is alleged in such terms as to show that the vessel had forfeited her neutral character, or in such terms as to show its insufficiency to support the sentence. The fact of clearing out for a blockaded port is in itself innocent, unless it be accompanied with knowledge of the blockade. The clearance, therefore, is not considered as the offense; the persisting in the intention to enter that port, after warning by the blockading force, is the ground of the sentence.

Is this intention, evidenced by no fact whatever, a breach of blockade? This question is to be decided by a reference to the law of nations, and to the treaty between the United States and Great Britain. Vattel, b. 3, s. 117, says, "All commerce with a besieged town is entirely prohibited. If I lay siege to a place, or even simply blockade it, I have a right to hinder anyone from entering, and to treat as an enemy whoever attempts to enter the place, or carry anything to the besieged without my leave." The right to treat the vessel as an enemy is declared by Vattel to be founded on the attempt to enter, and certainly this attempt must be made by a person knowing the fact.

But this subject has been precisely regulated by the treaty between the United States and Great Britain which was in force when this condemnation took place. That treaty contains the following clause: "And whereas it frequently happens that vessels sail for a port or place belonging to an enemy, without knowing that the same is either besieged, blockaded or invested, it is agreed that every vessel so circumstanced may be turned away from such port or place, but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless, after notice, she shall again attempt to enter; but she shall be permitted to go to any other port or place she may think proper."

This treaty is conceived to be a correct exposition of the law of nations; certainly it is admitted by the parties to it, as between themselves, to be a correct exposition of that law, or to constitute a rule in the place of it. Neither the law of nations nor the treaty admits of the condemnation of the neutral vessel for the intention to enter a blockaded port, unconnected with any fact. Sailing for a blockaded port, knowing it to be blockaded, has been in some English cases construed into an attempt to enter that port, and has, therefore, been adjudged a breach of the blockade from the departure of the vessel. Without giving any opinion on that point, it may be observed that in such cases the fact of sailing is coupled with the intention and the sentence of condemnation is founded on an actual breach of blockade. The cause assigned for condemnation would be a justifiable cause, and it would be for the foreign court alone to determine whether the testimony supported the allegation that the blockade was broken. Had this sentence averred that the brig John had broken the blockade, or had attempted to enter the port of Cadiz after warning from the blockading force, the cause of condemnation would have been

justifiable, and without controverting the conclusiveness of the sentence, the assured could not have entered into any inquiry respecting the conduct of the vessel. But this is not the language of the sentence. An attempt to enter the port of Cadiz is not alleged, but persisting in the intention, after being warned not to enter it, is alleged as the cause of condemnation. This is not a good cause under the treaty. It is impossible to read that instrument without perceiving a clear intention in the parties to it, that, after notice of the blockade, an attempt to enter the port must be made in order to subject the vessel to confiscation. By the language of the treaty it would appear that a second attempt, after receiving notice, must be made in order to constitute the offense which will justify a confiscation. "It is agreed," says that instrument, "that every vessel so circumstanced," that is, every vessel sailing for a blockaded port, without knowledge of the blockade, "may be turned away from such port or place, but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless, after notice, she shall again attempt to enter."

These words strongly import a stipulation that there shall be a free agency on the part of the commander of the vessel, after receiving notice of the blockade, and that there shall be no detention nor condemnation, unless, in the exercise of that free agency, a second attempt to enter the invested place shall be made.

§ 361. *What would be evidence of attempt to enter.*

It cannot be necessary to state that testimony which would amount to evidence of such second attempt. Lingering about the place, as if watching for an opportunity to sail into it, or the single circumstance of not making immediately for some other port, or possibly obstinate and determined declarations of a resolution to break the blockade, might be evidence of an attempt, after warning, to enter the blockaded port. But whether these circumstances, or others, may or may not amount to evidence of the offense, the offense itself is attempting again to enter, and "unless, after notice, she shall again attempt to enter," the two nations expressly stipulate "that she shall not be detained, nor her cargo, if not contraband, be confiscated." It would seem as if, aware of the excesses which might be justified, by converting intention into offense, the American negotiator had required the union of fact with intention to constitute the breach of a blockade.

The cause of condemnation, then, as described in this sentence, is one which, by express compact between the United States and Great Britain, is an insufficient cause, unless the intention was manifested in such manner as, in fair construction, to be equivalent to an attempt to enter Cadiz, after knowledge of the blockade. This not being proved by the sentence itself, the parties are let into other evidence.

§ 362. *Special verdict examined.*

However conclusive, then, the sentence may be of the particular facts which it alleges, those facts not amounting, in themselves, to a justifiable cause of condemnation, the court must look into the special verdict, which explains what is uncertain in the sentence. The special verdict shows that the vessel was seized on her approaching the port of Cadiz, without previous knowledge of the blockade; that she never was turned away, and "permitted to go to any other port or place;" that she was "detained" for several days, and then sent in for adjudication, without being ever put into the possession of her captain and crew, so as to enable her either "again to attempt to enter" the port of Cadiz, or to sail for some other port; that while thus detained, the commander

of the blockading squadron drew the captain of the John into a conversation which must be termed insidious, since its object was to trepan him into expressions which might be construed into evidence of an intention to sail for Cadiz, should he be liberated; that availing himself of some equivocal, unguarded, and perhaps indiscreet answers on the part of the captain, the vessel was sent in for adjudication; and on those expressions was condemned.

This court is of opinion that these facts do not amount to an attempt again to enter the port of Cadiz, and, therefore, do not amount, under the treaty between the United States and Great Britain, to a breach of the blockade of Cadiz. The sentence of the court of vice-admiralty in Gibraltar, therefore, is not considered as falsifying the warranty that the brig John was American property, or as disabling the assured from recovering against the underwriters in this action, and the testimony in the case shows that the blockade was not broken.

The judgment of the circuit court is to be reversed, with costs, and it is to be certified to that court that judgment is to be entered on the special verdict for the plaintiff.

MOSES v. DELAWARE INSURANCE COMPANY.

(Circuit Court for Pennsylvania: 1 Washington, 385-389. 1806.)

STATEMENT OF FACTS.—The Liberty sailed from Philadelphia for Charleston, August 28, 1804. On the 22d of September goods shipped by her were insured “lost or not lost.” The vessel was found at sea some time in September, bottom upwards. The defense was, that the insured had concealed important information from the insurer, to wit, his knowledge that a letter had been received stating that a “dreadful storm” had occurred in the vicinity of Charleston and that “the damage to the shipping was very great.”

The application for insurance was made after the insurer had heard of the letter. The insurance offices had heard generally of severe gales in the region in question, but nothing specially of the hurricane at Charleston.

§ 362. *Material facts to be disclosed, though underwriter has general knowledge which by inquiry would lead to such facts. (a)*

Charge by WASHINGTON, J.

It is admitted that the plaintiff did not communicate to the office the information he had received of the storm at Charleston, or that there was a letter in town respecting it; but it is contended by the plaintiff that this was unnecessary, since it was sufficiently known to the defendants to render the communication unnecessary. The rule is, that the insured must disclose every fact, material to the risk, within his own knowledge, which the insurer does not know, or is not bound to know. They were not bound to know of the particular storm mentioned in this letter; and there is no evidence which brings home to them, in any respect, a knowledge of it. The only question, then, is whether the communication of the contents of that letter was material to the risk, taken in connection with the knowledge which the defendants had obtained through other channels.

The defendants knew generally that there had been heavy gales on the coast, in the latitude of South Carolina; that damage had been the consequence; that a vessel, which had left Savannah on the 4th, was lost; that another had

(a) The assured is not bound to communicate the age of the vessel, or where she was built, unless required so to do. *Popleston v. Kitchin*,* 3 Wash., 138.

experienced its violence, was damaged, but had arrived. But the plaintiff knew of a particular storm, more violent than had ever been experienced, which had done great injury to the shipping at Charleston, the port to which the *Liberty* was destined. She had been out ten or eleven days previous to the storm, and the usual voyage is from ten to twelve days, but not much out of time if extended to eighteen. She might, or might not, be within the fury of this particular storm. Was there any material difference between the general information which the defendants possessed, and that which the plaintiff possessed, as it respected the fate of the *Liberty*? If there was, the latter should have been communicated. Would you, after seeing this letter, and being yet ignorant of the fate of the vessel, have deemed the risk increased from what it would have been estimated with the general information possessed by the defendants? What was the plaintiff's opinion on the subject? At the time he received the account from Steel, he was his own insurer. Though he seemed to think lightly of the information given in the letter, he yet applied to insure the same evening; repeated it the next morning; and, after evident marks of impatience, got it concluded before the arrival of the post. If you think that this conduct was induced by the contents of that letter, then it is plain that he at least thought the information very material, and, on this point, furnishes strong evidence against himself. What was the conduct of the insurance offices? Under the impression of the general information of gales on the coast, double premiums were thought sufficient. After the news of the Charleston storm had reached one of the offices, they still insured at five per cent.; but they did not know that it was as severe as the letter to Steel had stated it, and they calculated that the *Liberty* had not reached the place where it happened. After it was known, it appears that at another office the risk would not have been taken at fifty per cent., if at all. Now, if the information of this particular storm was material, the defendants ought to have known it, so as to have had an opportunity of deciding whether to take the risk and at what premium. (Plaintiff suffered a nonsuit.)

MARSHALL v. UNION INSURANCE COMPANY.

(Circuit Court for Pennsylvania: 2 Washington, 357-360. 1809.)

STATEMENT OF FACTS.—This was an action on four policies; one on the vessel, another on the freight, a third on the cargo, and a fourth on an additional cargo, effected in October, 1806.

The additional cargo consisted principally of goods brought by a Spaniard from Cadiz to New York and entered for exportation for the benefit of drawback. These goods were afterwards sold by the Spaniard to one Cazenove, recently before they were reshipped, and sold by Cazenove to the plaintiff. The policies contained the usual warranty of neutral property, to be proved here, and against illicit or prohibited trade. The defendant was informed that five Spaniards, with passports, were to go passengers in this vessel to Carthagena, but that any part of the cargo had been brought by one of those passengers from Spain, and had been recently sold by him to the plaintiff, was not disclosed. The vessel and cargo, after having had her papers taken away at sea by a British vessel, was again detained by another British vessel, carried into Jamaica, and condemned. The whole record was read, not as containing evidence, but to show the ground of condemnation.

The objections to the recovery were, first, that there were strong circum-

stances in the case to show that the sale by the Spaniard was not *bona fide*, and that the apparent sale was as a cover; and, secondly, that the circumstance of part of the cargo having been brought from Spain, and recently sold by one of the passengers, ought to have been disclosed to the defendants. Three presidents of insurance offices were examined, and they all gave it as their opinion that those circumstances were material. Two of them said that a disclosure of them would have increased the premium. The third said that it would have led him to inquire into the fairness of the transaction; but that if he had found it *bona fide*, it would have made no difference with him.

§ 364. *Circumstances sufficient to avoid policies for concealment.* ●

Charge by WASHINGTON, J.

The judge observed to the jury that it was for them to weigh the evidence, and to decide, not upon suspicions, but upon such circumstances as ought to influence a correct mind, whether the sale was *bona fide* or not. If not, it was a fraud upon the neutrality of the United States, as well as upon the defendants, and amounted to a breach of warranty in the policy on those goods. That if the jury should be satisfied upon this point against the insured, it would be sufficient to avoid all the policies upon the ground of concealment, because although the taint upon part of the cargo would not or ought not to have caused a condemnation of the other parts, or of the vessel, yet it would necessarily occasion a seizure, detention, and expense, if not danger to the whole, and would, at all events, give a right to the insured, on hearing of the capture, to abandon. The insurer calculates not only the risk of condemnation, but of capture and detention, and a concealment of circumstances which may produce the latter must be material to the risk, and would, if known, increase the premium.

§ 365. *Assured not bound to anticipate every possible ground of suspicion.*

As to the second point, the jury must inquire for themselves whether these circumstances were material to the risk, and in making this inquiry they should carry back their minds to the time when these insurances were effected, without attending to the subsequent capture and condemnation. We are all very wise in finding out the causes which have led to particular events, after the events have taken place; and we are apt to give weight and consequence to circumstances which would originally have passed unnoticed. Would the circumstances of this case which were disclosed have appeared material in October, 1806, to any of these parties? The insured knew, provided his purchase was *bona fide*, that the goods became thereby neutral, and were not liable to condemnation. He also knew that, in general, it was not necessary for the insured to disclose from whom he had purchased the cargo which he asks to be insured; and he also knew that, according to the law of nations, it was no cause of condemnation that the vendor was an enemy, and was to be a passenger in the vessel carrying the goods. It might or might not have occurred to him that these were circumstances which, with a suspicious court or rapacious captors, might lead to difficulty; but we do not know that the insured is bound to anticipate every possible ground of suspicion, which might weigh with some minds, and totally escape the observation of others. If, according to any established adjudications of the belligerent courts, generally known, certain circumstances become grounds of condemnation, though in opposition to the law of nations, those circumstances, if known to the insured, should be disclosed. So a case may happen where the circumstances are of such a nature as to make the danger of capture very great, in which the court mean not to

say that a disclosure ought not to be made. But it is not every conjecture or opinion as to the materiality of the circumstances concealed which ought to weigh with the jury.

§ 366. *Opinions of witnesses.*

In this case the opinions of the witnesses upon this point deserve to be respected. Still, however, they are but opinions, which are not obligatory upon a jury. One of those witnesses put the question upon the true ground. The circumstances, if known, would have led him to inquire into the fairness and good faith of the transaction, and if he found it fair, they would have made no difference. This is certainly a very proper inquiry for the jury to make. (Verdict for plaintiff.)

HUBBARD v. COOLIDGE.

(Circuit Court for Massachusetts: 2 Gallison, 358-358. 1815.)

STATEMENT OF FACTS.— *Assumpsit* on a special policy of insurance. The insurance was on a cargo from Calcutta to the United States, and covered perils usually expressed in policies of insurance. It was agreed that the vessel's stopping at the usual places of refreshment should not be deemed a deviation. The vessel stopped at the Cape of Good Hope, and was seized as prize of war.

It was contended by the defense that there was a concealment in respect to a letter written by the master on the 14th of July, 1812. This letter, among other things, said: "Let the insurance be at and from Calcutta to New York, with the privilege of stopping at the Cape and at St. Helena." "I shall proceed from this directly to New York, the stoppages before alluded to excepted." "I may not stop at either of the above places; of course there will be a return premium. I shall sail in all August."

§ 367. *Assured not bound to disclose facts the policy expresses or implies.*

Charge by STORY, J.

If, on the point of concealment, the jury are satisfied that the substance of the letter of the 14th of July was not communicated to the underwriters, and that it would have materially enhanced the premium, it becomes my duty to declare the law applicable to this point. It is incumbent on the assured to disclose all facts, in his possession material to the risk, which are not contained or implied in the policy itself. But he may be innocently silent as to facts which the policy necessarily imports. If the policy authorized the ship to stop at a particular port, it is not necessary for the assured to disclose that the ship will call there, although he has information of the fact. The underwriter, in such a case, takes upon himself the chance of her stopping; and he cannot but know that the permission to stop implies a chance or probability of its being done, and he estimates his risk accordingly. If he want further information, he is bound to ask for it; and if he waive any inquiry, he cannot reasonably complain that the calling at such port was not estimated in his risk. Suppose, at the present time, a policy from Boston to any port in France; the assured need not disclose to what port he intends sending his ship, although in consequence of the Algerine war, the risk to a port in the Mediterranean might materially enhance the premium, beyond that to a port in the Atlantic ocean. If the underwriter sign the policy without inquiry, he agrees that the ship may go to any port which the assured may elect. It would be a different thing if the assured fraudulently misrepresented the port of destination. *Seton v. Low*, 1 Johns. Cas., 1.

§ 368. *Non-disclosure. Intention to call.*

The present case, however, does not require so strong a principle. The concealment is stated to consist in the non-disclosure of the contents of the letter of the 14th of July. That letter does not disclose a decided intention to call at the Cape or at St. Helena. It merely requires that the insurance should include a permission to stop at these ports without any absolute determination, one way or the other. It seems to have been a measure of extreme caution, to guard against possible events. As the defendants allowed the permission to stop at these ports, I am entirely satisfied that the non-disclosure of the letter of the 14th of July was not such a concealment as could, in point of law, avoid the policy. If, therefore, the concealment be made out, the plaintiffs are, notwithstanding, by law entitled to a verdict on this point.

But it is argued that the underwriters did call for information, and it was not truly given. The call was very general; and when the answer was given, it was not complained of as not sufficiently precise and special. If dissatisfied, the underwriters were bound to make further inquiries, and to point out the deficiencies, and not lie by until after a loss, when the assured is no longer able to save himself. General answers are sufficient to general inquiries; and if the underwriters do not insist upon more exact information, they waive the benefit of it; and this applies more strongly in cases where the questions are not so explicit as to point to any definite facts.

§ 369. *Change of destination as represented, not fatal to insurance, if representation not fraudulent.*

Where the underwriters call for information on a particular point, the assured is bound to answer truly. If he misrepresent a material fact, or give it a false coloring, by design or by accident, it is fatal to the policy.

Representations as to the destination of the ship, however, have been thought susceptible of a distinction. It has been held that such a representation, if not fraudulently made, does not avoid the policy. If true at the time, it is sufficient, although another destination should ultimately be given; for the assured in effect says, this is my present intention or expectation, but I reserve a right by the policy to go to other ports. *Bize v. Fletcher*, Doug., 271; *S. C.*, Park, 270; *Marsh.*, b. 1, ch. 10, sec. 2, p. 459; *Vandervoort v. Smith*, 2 Caine, 155.

In the present case there is not the slightest pretense that the plaintiffs fraudulently misrepresented the destination of the ship. The supposed misrepresentation consists in the plaintiffs' having affirmed that they had no knowledge that the ship would call at the Cape, and knew of no motive for calling there, and thought, as rumors of war existed at Calcutta, it would be madness in the captain to call at the Cape; whereas the defendants contend that the letter of the 14th of July clearly showed an intention to call there. I have already stated what is my construction of that letter. The jury will consider whether it is possible to give it any other reasonable construction. If that letter was disclosed there is an end to the defense. If it was not, it seems to me very difficult to maintain that the plaintiffs have falsely interpreted it. (Verdict for the plaintiffs.)

GENERAL INTEREST INSURANCE COMPANY v. RUGGLES.

(12 Wheaton, 408-419. 1827.)

Opinion by MR. JUSTICE THOMPSON.

STATEMENT OF FACTS.—This is an action on a policy of insurance, bearing date the 9th of February, 1824, for \$3,000, on the sloop Harriet, lost or not lost, at and from Newport, Rhode Island, to, at, and from all ports and places to which she may proceed in the United States, during the term of six months, beginning on the 12th of January, 1824. And also, \$600 property on board said sloop, at and from Newport to Charleston, or Savannah, or both. The sloop, whilst proceeding on her voyage, and within the term of six months, to wit, on the 19th of January, was wrecked on Cape Hatteras, and both vessel and cargo wholly lost. An abandonment was in due time made, and a total loss claimed. The case comes before this court upon a bill of exceptions taken to the directions given by the circuit court for the district of Massachusetts, to the jury, upon the law of the case.

The loss, it will be seen, happened on the 19th of January, and the policy was not effected until the 9th of February. And the question upon the trial turned upon the legal effect and operation of the misconduct of the master after the loss occurred. It was proved that the master, immediately after the loss, for the purpose, and with the design, that the owner, not hearing of the loss of the vessel, might effect insurance thereon, did express his intention not to write to the owner, and took measures to prevent the fact of the loss being known; and that, by the conduct of the master in this particular, and in consequence of the measures adopted by him to suppress intelligence of the loss, knowledge thereof had not reached the parties at the time the policy was underwritten.

Upon these facts the court instructed the jury that, although it was the duty of the master to give information of the loss to his owner as soon as he reasonably could, yet that, in the present case, when there had been an abandonment in due time for a loss really total, if the owner, at the time of procuring the insurance, had no knowledge of the loss, but acted with entire good faith, he was not precluded from a recovery. Nor was the policy void by the omission of the master to communicate the information, or by his acts in suppressing intelligence of the loss, although such omission and acts were wilful, and resulted from the fraudulent design to enable the owner to make insurance after the loss; the owner himself not being conscious of such acts and design at the time of procuring the insurance. And, under this direction, a verdict was found for the plaintiff for a total loss.

§ 370. *Insurance after loss concealed by master, but not known by assured, valid.*

The statement of the case admits fraudulent misconduct on the part of the master, by reason whereof the policy was effected before any knowledge of the loss reached the assured or the underwriters; but that the assured was entirely ignorant of this misconduct in the master; and that, on his part, there was the most perfect good faith in procuring the policy. Here, then, is a loss thrown upon one of two innocent parties; and the question is, by which is it to be borne? The determination of this question must depend, in a great measure, if not entirely, upon the relation in which the master stood to the respective parties when this misconduct occurred. If the loss of the vessel had been occasioned by any misconduct of the master, short of barratry,

whilst in the prosecution of the voyage, and before the loss happened, or if at the time this misconduct is alleged against him he was the exclusive agent of the owner for any purposes connected with procuring the insurance, the owner must bear the loss. But if, after the loss, the agency of the master ceased, and was at an end, or if he in judgment of law became the agent of the underwriters, his misconduct cannot be chargeable to the assured.

The researches of counsel have not furnished the court with any adjudged cases, either in the English or American courts, which seem to have decided this question. Some have been referred to which have been urged as having a strong bearing upon the point, but which, on examination, will be found distinguishable in some material facts and circumstances. The precise point, therefore, now before the court may be considered new, but we apprehend is to be governed by the application of principles understood to be well settled in the law of insurance.

It is important to understand with precision and accuracy the relation in which the master stood to the owner of the vessel at the time when he was guilty of the fraud and misconduct imputed to him. It was after the loss occurred, and at a time when there had been a total destruction of the subject insured, over which the master's agency had extended.

§ 371. *Master's agency ceases after wreck.*

The case has been argued, on the part of the underwriters, as if the agency growing out of the relation of master and owner of the vessel existed at this time; and that the assured was responsible for all consequences arising from the misconduct of the master; and that the law would presume that whatever was known to the master must be considered as impliedly known to the owner. These propositions may be true when applied to a state of facts properly admitting of such application; but cannot be true to the extent to which they have been urged in the present case. If the owner is presumed to know whatever is known to the master, there could be no valid policy effected upon a vessel after she was, in point of fact, lost. Such loss must be known to the master; and if it follows, as a legal conclusion, that it is known to the owner, the policy would be void. Nor upon this doctrine could there ever be any insurance against barratry or any other misconduct of the master; for his own acts must necessarily be known to himself. And indeed the principle, pressed thus far, would render it impracticable ever to have any guaranty whatever against the fraud or misconduct of an agent any more than against that of the principal himself. The knowledge of the agent, therefore, with respect to the fact of loss, cannot affect the insurance; nor could the knowledge of the owner himself, with respect to such loss, affect the insurance in all cases. Suppose the owner should himself be the master, or be on board, having left orders with an agent to procure insurance in a given time, unless he should hear from him, or have information of the arrival of the vessel at her port of destination; and the vessel should be lost the day before the policy was underwritten, and at a distance that rendered it impossible that information thereof could reach the agent, would such a policy be void? No one could certainly maintain such a proposition. And it is by no means an unfrequent practice to obtain insurance in this way. It is not, therefore, true, as a universal rule, that either the fact of loss or the knowledge of such fact by the agent or the principal, at the time the policy is procured, will vacate it. But such knowledge must be brought home to some of the parties or agents connected with the business of procuring the insur-

ance; and then the rule properly applies, which puts the principal in place of the agent, and makes himself responsible for his acts. There is, then, the relation of principal and agent in the subject-matter of the contract. But the master, in his character as master, has no authority to procure insurance, nor is he in any sense an agent for such purpose, or in any way connected with it. There may, undoubtedly, be superadded to his powers and duties as master, an agency in other matters, to effect insurance or any other lawful business; but in his appropriate character of master, the law considers him an agent only for the navigation of the vessel, and in such matters as are connected with and incident to such employment. And when the books speak of the master's being agent of the owner they are to be understood in this sense. He is not to be considered as the general agent of the owner for all purposes whatsoever that may have connection with the voyage. He is a special agent for navigating the vessel, and can neither bind nor prejudice his principal by any act not coming properly within the scope and object of such employment. Unless the powers of agents are thus limited, no man could be safe in the transaction of any business through the agency of another. The master, in his character as such, had certainly no authority to procure insurance. He could not bind the owner by such a contract; and if he could not, why should his acts, totally unconnected with the business of procuring the insurance, render void a contract entered into in good faith in all parties having any concern in the transaction? It is a general rule, applicable to agencies of every description, that the agent cannot bind his principal except in matters coming within the scope of his authority; and this rule applies particularly to a master and owner of a vessel, and is construed with considerable strictness. Thus, in the case of *Boucher v. Lawson*, Cas. Temp. Hardwicke, 85, and *Abbott*, 119, the action was against the owner of a ship for goods lost by the carelessness of the master; and judgment was given for the defendant because it did not appear that the ship was usually employed in carrying goods for hire. For Lord Hardwicke said, no man could say that the master, by taking in goods of his own head, could make the owners liable.

It is a little difficult to perceive how, in any legal sense, the relation of principal and agent could exist at the time when the misconduct of the master is alleged to have taken place. So far as he was agent for navigating the vessel, it had terminated by the absolute destruction of the subject. The agency would seem to have ceased from necessity. There was nothing upon which it could act. Had there not been a total loss of the vessel, there would have remained a duty and legal obligation, on the part of the master, to use his best exertions to save what he could from the wreck. But when the subject-matter of the agency becomes extinct, it is not easy to understand how, in any just sense, the agency can be said to survive. There might be a moral duty resting on the master to communicate information of the loss to his owner. But how could there have been any legal obligation binding upon him to do it? The information could neither benefit nor prejudice the owner. It is a general rule of law that if an injury arises to a principal in consequence of the misconduct of his agent, an action may be sustained against him for the damage. Could an action in this case be sustained by the owner against the master for not giving him information of the loss? And, if not, it would seem to follow, as a necessary consequence, that the owner could not be prejudiced by his acts.

§ 372. *After wreck master becomes agent of underwriter, if agent at all.*

But suppose the agency of the master not to have terminated, but that, in judgment of law, he was the agent of some one. The question recurs, whose agent was he? The answer cannot admit of a doubt. If agent at all, he was, by operation of law, the agent of the underwriters.

The policy, taking the risk on the vessel and cargo, lost or not lost, although effected after the loss happened, related back; and, by the abandonment, the underwriters were substituted in the place of the assured; and the master, although the agent of the owner until the loss occurred, became, upon the abandonment, the agent of the underwriters. The law upon this subject is well settled, where there is only a technical total loss, and any part of the subject insured remains. The interest in the salvage, whatever it may be, becomes transferred to the underwriters, and the agency is, of course, transferred with the subject; and the agent, thereafter, becomes responsible to the underwriters for the faithful discharge of his trust. No action could be sustained against him by the assured, for the proceeds, or any misconduct in the management thereof. This is not only the settled rule of law, but a contrary doctrine would involve the greatest absurdity. It would be placing the absolute interest in the property in one party, and making the agent accountable for its management to another. No action could be sustained by the assured, for the plain reason that he would have no interest in the subject of the agency.

And if such would be the effect of an abandonment, in case of a technical total loss, there can be no good reason assigned why the rule should not be applied to a loss really total, so far as to transfer whatever agency could remain. So that, whether the agency terminated by the total destruction of the subject, or was transferred by the abandonment to the underwriters, the misconduct of the master could not prejudice the rights of the owner. The connection of principal and agent was dissolved, and they stood towards each other as mere strangers, so far as any legal responsibility could be involved in the conduct of the master. Such we apprehend to be the result of the application of well-settled principles of law to the facts and circumstances presented by the bill of exceptions, in the absence of any authority to govern the case.

We will proceed, then, briefly to notice the cases that have been supposed to have a bearing upon this question, favorable to the underwriters.

§ 373. *Authorities reviewed.*

In *Fitzherbert v. Mather*, 1 Term R., 12, the fraud or concealment relied upon to avoid the policy was, that one Thomas, who, on the 16th of September, and before the loss happened, had written a letter to the agent of the assured, and put it in the postoffice, but the mail did not leave the place until the afternoon of the next day, before which time, and on the morning of the 17th, he knew of the loss, but did not withdraw his letter from the postoffice, or write another giving information of the loss. Here was, then, a palpable case of gross negligence, if Thomas was to be considered the agent of the assured; and that he was, appears not only to have been assumed by the whole court, but the conclusion is fully warranted by the facts in the case. The assured, in his letter to Fisher, who procured the insurance, directed him to procure it on receiving the bills of lading; which bills, it appears from the case, were to be sent to him by Thomas. The letter and information from Thomas was, therefore, made the foundation of the insurance, and the assured adopted Thomas as his agent, by directing Fuller to procure insurance on receiving the bills of lading from him. It was, therefore, a case of concealment or misrep-

resentation, by one who stood in the relation of agent to the assured, in the subject-matter of the contract, and whose information lay at the foundation of it.

The case of *Stewart v. Dunlop*, 4 Brown, Parl. Cas., 483, and Park, 320, decided in the house of lords, is very imperfectly reported, the reasons of the judgment, and the ground on which the decision rested, not appearing in any report of the case. Enough, however, is shown, from the statement of facts, to put the decision upon the plain ground that the policy was procured by an agent of the assured, expressly instructed by him to obtain the insurance; he, the agent, having grounds to suspect a loss of the ship, which grounds were not communicated to the underwriter; and, besides this, there was enough to afford strong suspicion that the assured himself knew of the loss. The men who arrived at Greenock, knowing of the loss, communicated the information to the friend and intimate acquaintance of the assured, who desired it might be concealed. The same day this friend held a conversation with the clerk of the assured, and asked him if he knew whether there was any insurance upon the vessel, and if there was any account of her; and, after this, the assured directed this clerk to write to get insurance. The case was open to strong suspicion that the friend of the assured had communicated to him the information he had received of the loss, which would have been a plain ground for declaring the policy void. But if such a conclusion is not fairly warranted, there was enough communicated to the clerk to lead him to suspect a loss had happened; and he being the agent employed to procure the insurance, his principal was properly chargeable with all the information he had in relation to the loss.

The case of *Andrews v. Marine Ins. Co.*, 9 Johns., 32, does not seem to have much bearing upon this point. The decision turned upon a question of fact, whether there was such gross negligence or constructive fraud as to vacate the policy. There was no question of agency involved in the decision. The master of the vessel was part owner and one of the insured, and there was no point raised as to his legal obligation to use ordinary diligence in giving information of the loss to his co-owners; but the court considered that, under the circumstances of the case, he was not chargeable with such negligence as to vacate the policy. But what would have been the result if the doctrine now contended for had been applied to that case? If what is known to the agent is considered as impliedly known to the principal, with much more propriety should the knowledge of one part owner be imputable to all. And the policy must have been held void because procured with implied knowledge of the loss.

The case of *Gladstone v. King*, 1 Maule & S., 35, did not turn upon the question now before the court. The claim was for an average loss upon the ship, in consequence of an injury received before the policy was effected. The defense set up was a concealment of this fact, or negligence in the master, in not mentioning it in a letter written to his owners after the injury had been received, and before the policy was underwritten. The policy, however, took up the vessel from the commencement of the voyage, and would, of course, cover the injury. The court considered the concealment material, and that the underwriter ought not to be charged with the loss. They did not, however, decide the policy to be void, which would seem to have been the necessary consequence of a material concealment, according to the principles of insurance law. But they exonerated the underwriter, by the application of

what was avowed to be a new principle, that this antecedent damage should be considered an implied exception out of the policy; and this principle, say the court, although new, is adopted, as being consistent with justice and convenience.

It is unnecessary to say whether, to such a case arising here, we should think proper to adopt and apply this new principle. It is enough for the present to say the principle does not apply to the case now before us. It may, however, be observed, that the decision in that case, so far, at least, as it went to exonerate the insurer from the payment of the average loss, may be supported upon well-settled rules. Information of the injury was withheld by the captain whilst he was acting in his appropriate character of master, and, as such, was the exclusive agent of the owner, and for whose negligence he alone was responsible. And from what fell from Lord Ellenborough, upon the trial, it may be presumed this letter was shown to the underwriter, and, if so, it amounted to a representation that the vessel had sustained no injury at the date of the letter. But unless the case is imperfectly reported, it would be difficult to sustain it upon principles heretofore understood to govern analogous cases.

These are all the cases cited on the argument, on the part of the underwriters, which are supposed to have a bearing upon the present question. We think, however, they are distinguishable, in many material circumstances, and particularly in this, that the fraud or concealment, which was held to vitiate the policies, was traced to some agent having connection in some way with procuring the insurance; and the agency was, therefore, concerning the subject-matter of the contract.

It is, no doubt, true, with respect to policies of insurance, as well as to all other contracts, that the principal is responsible for the acts of his agents; and that any misrepresentation or material concealment by the agent is equally fatal to the contract, as if it had been the act of the principal himself. But such responsibility must, of necessity, be limited to cases where the agent acts within the scope of his authority. In the present case, the master was clothed with no authority or agency in any manner connected with procuring insurance. The misconduct charged against him occurred, not whilst he was acting as master, but at a time when the relation of master and owner may well be considered as dissolved from necessity, by reason of a total destruction of the whole subject-matter of the agency; and if not, the master, by the legal operation of the abandonment, became the agent of the underwriters, and was their agent at the time of his alleged misconduct.

It is said that, if this is a new question, the court should adopt such rule as is best calculated to preserve good faith in effecting policies of insurance. But it is by no means clear that this end would be best promoted by adopting the rule contended for on the part of the underwriters. Cases may very easily be supposed where negligence or misconduct, in agents of underwriters, as to matters not immediately connected with effecting a policy, will still have a remote influence which may have a tendency to prejudice the interest of the assured. Such cases, however, as well as those of the description now under consideration, will most likely be of rare occurrence, and nice and minute distinctions practically operate unfavorably on the business of insurance.

If underwriters feel themselves exposed to fraudulent practices in such cases, the protection is in their own hands, by not assuming any losses that may have happened prior to the date of the policy. It is considered a hazardous under-

taking to insure, lost or not lost, and a proportionate premium is demanded, according to the circumstances stated, to show the probability or improbability of the safety of the subject insured.

Although no adjudged cases directly applicable to the one before us have been found, we do not consider this decision as establishing any new principle in the law of insurance, but as grounded on the application of principles already settled, to a new combination of circumstances.

● *Judgment affirmed.*

KOHNE v. INSURANCE COMPANY OF NORTH AMERICA.

(Circuit Court for Pennsylvania: 1 Washington, 98-99. 1804.)

STATEMENT OF FACTS.—Trove for a policy of insurance. It was admitted that if the agreement for insurance was perfected, and the plaintiff would have recovered upon the policy, the want of it should produce no difficulty.

The plaintiff directed his agent to effect an insurance on goods on board the ship Gadsden, from Newport in Rhode Island, to Port Passage in Spain. The agent, on Saturday the 12th of October, 1799, applied to the president of the company, and left with him the orders of insurance; which were, upon the cargo of the ship, at and from Newport to Port Passage; the ship an excellent one, copper bottomed, etc. The agreement was made at — per cent., for which a note was to be given with approved security. The agent left the office before the policy was filled up, but it was done in a few hours afterwards, of which the president gave notice to the agent, but mentioned that they had received information of the ship having been carried into Halifax. This information appeared in one of the newspapers published on Saturday; but was not known to either the agent or the company when the agreement was entered into and the policy executed. The agent called on Tuesday afterwards, to deliver the note and receive the policy, but the company refused, having heard of the loss.

It appeared in evidence that the Gadsden was the property of the plaintiff, a citizen of the United States, and left Charleston on the — day of — on a voyage to Lagaira, with passports from the Spanish consul at Charleston; that she took in a cargo of cocoa in bulk, tobacco, hides, etc., at Lagaira and Porto Cabello, and returned to Charleston on the — day of —, bringing passports from the Spanish consul at Lagaira.

The ship entered at Charleston on the 27th day of May, 1799, and having landed part of her cargo, obtained a special permission from the collector not to land the balance; this, as the collector deposed, being customary where the cargo was intended to be re-exported for the benefit of drawback. The duties, however, upon the cargo, thus retained on board, were regularly bonded. On the 17th day of June, 1799, the ship took on board at Charleston a full cargo, and cleared out for Port Passage, but shortly after struck upon the bar and sustained some injury. It seems that she remained in that situation for some days, and preferring, in consequence of a protest of the seamen against proceeding on the voyage until the leak should be stopped, rather to go to Newport for the purpose of repairing, than returning to Charleston, she proceeded, and arrived at Newport on the 14th day of July, where she landed her cargo, and where she was completely repaired. On the 6th day of September, she took in her cargo, and on her voyage was captured, the 10th of September, by a British privateer; carried into Halifax; and *the cargo brought from La-*

guira and Porto Cabello, and not landed at Charleston, was condemned. Amongst the papers found on board were the two passports before mentioned, and a third from the Spanish consul at Charleston, given at the time she left that place for Spain, together with a certificate that the cargo was from Laguirra for Spain. It was stated by one of the witnesses that the cargo sustained a trifling injury, occasioned by the leak; and by another, that it was landed at Newport in complete order.

§ 374. *A policy completed and executed but not delivered is binding.*

Charge by WASHINGTON, J.

The first objection to this action was not much relied upon by the defendant's counsel, and there is certainly nothing in it. There is no charge of unfairness on the part of the agent of the plaintiff; nor is it pretended that he knew of the loss on the 12th, when he waited upon the president of the insurance company. It appears that everything was agreed upon; and although on account of the fever then in the city, he did not wait to receive the policy, yet it was, immediately after he left the office, filled up and signed by the president, and has been produced on the trial. The contract, therefore, was not inchoate, but perfected, before notice of the capture by either of the parties. The objections to the recovery relied upon are a material misrepresentation, and a concealment of two facts material to the risk.

§ 375. *Omission to mention that a voyage from a second port has commenced is not material.*

The misrepresentation is stated to be in respect to the commencement of the voyage. It must be admitted that there was a misrepresentation; but, unless it was material to the risk, it is not sufficient to avoid the policy. I cannot perceive what consequence it was to the underwriters to be informed whether the voyage commenced at Charleston or Newport. The cargo was put on board at Newport in good order, and the insurers were free of average; which was not the case in Hodgson and Richardson. Besides, that case turned upon a usage proved on the trial, that if the insurance was effected in the middle of a voyage, it was necessary to disclose the circumstance. In this case no such usage has been proved.

§ 376. *Concealment of a previous injury not material if the ship was in good condition when risk began.*

The next objection is, concealment of the injury the vessel sustained from Charleston to Newport. The matter for the jury to decide on is whether, at the time the risk commenced, the vessel deserved the character given of her. If the jury should be of opinion that she did, the accident that happened to her in her voyage from Charleston does not, to the court, seem material.

§ 377. *British regulations of colonial trade binding upon neutrals.*

The last and most important objection remains to be considered. It is, that the defendant should have disclosed the importation from Laguirra to Charleston, and the not landing of the cargo. A great deal has been said of the rights of neutral nations; and the principle contended for by the British government has been pronounced repugnant to the laws of nations. I mean not to enter into the consideration of this question, because, whether the principle asserted by the British government and practiced by its courts be authorized or not by the laws of nations, yet the consequence to neutrals is the same. If they act improperly, the matter must be adjusted between that and our nation; but as to the individuals of our nation, they certainly incur a risk if they

trade in contravention of the rule thus established, whether it be right or wrong.

The principle contended for is, that neutral nations shall not trade *directly* in time of war from the colonies of one of the belligerent powers in Europe, unless to the nation to which the neutral belongs, or carry on a trade from such colonies to the mother country in time of war, which in time of peace is interdicted. The first branch of the question then is, if the concealment was material to the risk, was the plaintiff bound to disclose it, or was the insurer to ask for information?

§ 378. *Obligation upon the insured to communicate information to insurer. Duty of latter to ask for information.*

An insurance is a contract of indemnity, and the assurer agrees to stand in place of the assured, and to take the risk upon himself. It is therefore necessary that the latter should possess the former with a knowledge of every fact with which he is acquainted, material to the risk, that he may know how to estimate the premium. If a foreign regulation which may affect the risk be known only to the insurer, he must ask for information. But if known also to the assured, it is his duty to state such facts as may be material, to enable the insurer to see the extent of the hazard to which such regulation exposes him. The absurdity, stated in argument, if the assured should be obliged to inform himself of all the various regulations of the different belligerent powers which may endanger his property, is not greater than to lay the same burden on the shoulders of the insurer. But in neither case does the principle apply, unless such regulations be public and generally known, or if not so, can be proved to have been known by one party and not by the other; in which case, the assurer, if he only knows of it, must take the risk upon himself; and if known only to the assured, it is a fraud if he does not disclose it.

The second branch of the question is, was the nature of the cargo, and not the landing of it at Charleston, material to the risk; or in other words, was there a *bona fide* importation into Charleston, to avoid the charge of a *direct* trade from Lagaira to Spain? This must depend upon the evidence. It is clear that if the vessel had merely called at Charleston, the circumstance of stopping there would not have amounted to an importation into that place. The cases cited from Robinson's Reports admit that paying duties and landing are *prima facie* evidence of a *bona fide* importation; but these are only circumstances which may be repelled by other evidence, showing that the importation was not *bona fide*; and I confess I cannot see why the paying duties may not afford satisfactory evidence of a *bona fide* importation if other circumstances concur to prove it so; though the case is certainly not so strong as if the cargo were landed. The evidence relied upon to prove that this was a direct trading, from a colony of Spain to the mother country, is clearly very strong. The passport to Lagaira; the passport from thence to Charleston; the permission not to land, upon the ground that this is usually granted where the cargo is intended to be re-exported for benefit of drawback; the passport and certificate of the Spanish consul at Charleston, found amongst the papers, and describing the cargo as coming from Lagaira, and intended for Spain, afford evidence of the original destination of the cargo, very difficult to be reconciled with the assertion of a *bona fide* importation into Charleston.

If the jury, upon that evidence, are of opinion that the calling at Charleston and paying or bonding the duties under all the circumstances of this case

were with a view to proceed on to Spain or to land some of the cargo and take in other articles, it will be very difficult to maintain the argument that the circumstances were immaterial to the risk, and in that case their verdict ought to be for the defendants. Verdict for plaintiff. (a)

KOHNE v. INSURANCE COMPANY OF NORTH AMERICA.

(Circuit Court for Pennsylvania: 1 Washington, 158-167. 1804.)

STATEMENT OF FACTS.—This is a retrial of the preceding case (§§ 374-378, *supra*). Besides the evidence given on the first trial, a complete record of the proceedings in the vice-admiralty court at Halifax was produced and read. In it is stated at length the following papers:

A passport from the Spanish consul at Charleston, to the plaintiff, 17th February, 1799, to go to Lagaira to attend to his concerns there. A clearance for the Gadsden and cargo at Lagaira; stating that a cargo of cocoa and tobacco had by special permission of the Intendant been shipped on board the Gadsden, for Charleston, with leave to touch at Porto Cabello; and that the said goods were free of duty, by order of the Intendant. Another clearance at Porto Cabello, for the United States, the duties being paid. A passport of the Spanish consul at Charleston, dated 18th June, 1799, for the plaintiff to go to Spain; and a certificate that the cargo was from Lagaira and Porto Cabello, as appears by the above-mentioned Spanish papers which he certifies.

The following new testimony was given: Mr. Buntin was in Lagaira when plaintiff arrived there. He sold part of his cargo to the Intendant there, and was to receive in return cocoa, tobacco and some specie, and to be free of duties upon his inward as well as outward cargo; from thence he went to Porto Cabello, where he sold the rest of his cargo, and took in cocoa, hides, etc., and left a quantity, which he could not bring away, in the king's warehouses. It was proved by two or three witnesses that it was practiced in Charleston, and had been done in a few instances at Philadelphia, for vessels coming from the Spanish colonies, by special permission of the collector, to enter there, secure the duties, and clear out for Spain without landing the cargo. That policies on such cargo had been underwritten at Charleston, and by private underwriters in Philadelphia, and upon a disclosure of those facts they had been done at ten per cent., and that the circumstance of *not landing* made no difference in the premium until it was known that the British courts condemned such vessels and cargoes. That it was some time after the insurance in question that the difference was made.

Amongst the papers found on board the Gadsden when she was captured was a letter from plaintiff to his clerk in Charleston, saying that he did not wish to run any risk except as to the ship, but that the cargo must be insured, cost what it would. In Kohne's answer to the libel he states that special permission to enter and clear without landing was granted to some as matter of favor but not to every one.

Charge by WASHINGTON, J.

I am much pleased that a new trial was granted in this cause. I was not satisfied with the verdict, yet I felt some little hesitation about setting it aside, not knowing whether the jury went upon the immateriality of the circumstance of not landing the cargo to the risk, or upon some legal point on

(a) See the next case.

which the court had charged them. But I was principally influenced by the importance of the question and an expectation that the evidence would be more complete, and the counsel would be better prepared to devote their attention to the only question in the cause. In both respects I have been gratified; instead of extracts of the proceedings at Halifax, we have now the entire record, and new testimony has been introduced as to the custom of not landing, and the materiality of that circumstance to the risk. The question, what is a legal importation, according to the laws of congress? was only hinted at then, and has now been thoroughly argued.

RESTATEMENT OF FACTS.—This is the case of an insurance on a cargo on board the Gadsden, at and from Newport to Passage in Spain, effected on the 12th of October, 1799. But as the previous history of the ship and cargo forms the whole ground of difficulty in the case, it becomes necessary for the jury perfectly to understand it.

It appears that the plaintiff left Charleston in February, 1799, in this ship with a cargo of flour for Laguira, taking with him a passport from the Spanish consul at Charleston to go to Laguira to attend to his concerns; that he arrived at Laguira on the 23d, entered into a contract with the Intendant for the sale of a part of his cargo; by which it was agreed that he should receive in return cocoa, tobacco, and some specie, and that both his inward and outward cargo should be free from duties. He received from the officer at Laguira a clearance for Porto Cabello, where he arrived, disposed of the residue of his cargo for cocoa, hides, etc., took in a full load, and obtained his clearance for the United States, having paid duties on the goods taken in at this last port. On the 23d of June he arrived at Charleston, landed some of his cargo, and took in articles the produce of Carolina, and obtained a special permission from the collector to enter and secure the duties without landing the residue of his cargo. Here he obtained another passport from the Spanish consul, for passage in Spain; with a certificate that the cargo (except the part taken in at Charleston) was from Laguira and Porto Cabello; and authenticating the Spanish papers, to serve as occasion might require. With these papers and the passports to Laguira, he cleared out for Spain; was obliged on account of a leak to put in at Newport, where he landed his cargo, repaired the ship, proceeded on his voyage, and on the 10th of September was captured by a British privateer, carried into Halifax, and his vessel, and *such of the cargo from Laguira and Porto Cabello as had not been landed at Charleston*, was condemned.

§ 379. *Material facts to be disclosed; knowledge of public transactions presumed.*

The question is, ought the not landing of the cargo at Charleston and the circumstances attending the cargo, or indeed any other of the circumstances before related, to have been disclosed to the underwriters at the time they were applied to to insure this property? And this depends upon another question, which is, were those circumstances, or any of them, material to the risk? and if it should be determined that the not landing such a cargo as this, under the above circumstances, was material to the risk, then the law declares that they ought to have been communicated to the defendants, and that the omission to do so, whether by fraud or accident, vacates the policy. The underwriter, by consenting to take upon himself that risk which the assured is not willing to bear, does it always under an implied condition that he shall, as to all facts within the private knowledge of the assured, be equally in-

formed as himself, have the same opportunity of measuring the extent of the danger, and be enabled to judge of the compensation at which he would think it prudent to enter into the indemnity. As to public transactions, foreign laws or ordinances, the course and nature of the trade, etc., by which the risk may be affected, the underwriter is always supposed to be equally well informed as the assured, provided they are notorious and generally known. The argument that the underwriter is bound to inquire into facts which he may suppose material to the risk can never be maintained. It would subvert the whole law of insurance. Without previous information of the circumstances which had attended the vessel, he would not know what inquiries were pertinent; and though he should exhaust himself with interrogatories, he might at last omit the only question which was important. The assured, in his answers, might answer truly; and yet, by omitting to tell the whole truth, might conceal all that was useful for the assurer to know. No hint was suggested to the defendants of the nature of the cargo, or the information proper for them to obtain; for although they knew that cocoa in bulk was probably the produce of a Spanish colony, yet they could never suspect from that circumstance that it had been brought in and imported again without landing.

It is contended for the defendants that the not landing the cargo at Charleston subjected it to confiscation in a British court of admiralty for a breach of the order issued by the British cabinet in 1798, authorizing her armed vessels to bring in for adjudication all neutral vessels trading directly between any colony of France, Spain, or the United Provinces, and any port in Europe except that of England, or the country to which the vessel belongs. On the other side it is insisted that no proof was given to the jury that the plaintiff knew of the order. It is not necessary for the defendants to bring home to the plaintiff a knowledge of this fact; because if it were notorious, and generally known in the United States, the jury may fairly presume it was known to the plaintiff. But how does this matter stand? It is well known, or ought to be known, by all men engaged in commercial matters, and particularly in the business of insurance, that Great Britain has, for a long time, asserted the right to confiscate the property of neutrals, if taken engaged in carrying on, in time of war, a trade with the colonies of her enemy, which was interdicted in time of peace. This principle was declared, and announced to neutral powers, by the orders of 1793. In consequence of the remonstrances of the American government against the severity of the rule, it was so far relaxed by the orders of 1794 as to permit a trade between those colonies and the American neutrals; and the orders of 1798 extended the same relaxation to European neutrals; so that the rule itself is ancient, and the relaxation was as old as 1794; of which it would be going too far to say the plaintiff was ignorant.

§ 380. *Illegal trading.*

The decision whether the cargo of the Gadsden came fairly within the scope of these orders must depend upon the fair construction of them, uninfluenced by the opinion of the court at Halifax in this case, or of any of the decisions which have been read from Robinson's Reports, of which the plaintiff could not be informed.

It is plain that if the original voyage had been from Laguira to Spain, the calling at Charleston, and reporting the cargo, or even the paying of duties; nay, the landing of the cargo, would not have taken her out of the operation of the orders of 1794. If the trade, directly, was deemed illegal, the attempt to cover the voyage, under an appearance which was not real, would not

change its nature. The British courts would not, and ought not, to be duped by such an artifice. That which in its real character is illegal cannot be rendered legal by any device whatever, though it may often prevent the discovery of the truth. But when the covering, thus put on by fraud, is removed the transaction is not rendered less illegal by the attempt to conceal its real character.

So, on the other hand, if the voyage had really been to Charleston, the cargo landed, entered and duties secured, a determination formed on second thought, to send the cargo to Spain, would not render it a direct trading from Lagaira to Spain, though the goods never were warehoused or removed from the wharf. The circumstance of warehousing would be no more evidence of a *bona fide* importation — a kind of testimony of the sincerity of the transaction.

It has been insisted by the defendants' counsel that the evidence is strong enough to prove that the original voyage was from Lagaira and Porto Cabello to Spain, and that the calling at Charleston was merely colorable. To prove this, the defendants rely on the following circumstances: the nature of the cargo — cocoa and indigo — which could not have been intended for consumption in the United States. The answer to this is, that the plaintiff had an ulterior view, as no doubt he had, to the Spanish market for these articles; if the voyage from Lagaira was really to Charleston, and the importation there complete, it could not be termed a direct trade between Lagaira and Spain; and this conclusion, I think, perfectly just. The other circumstances relied upon are, the reasons assigned for the special permission not to land, to save time and expense, and granted only in cases where the goods are intended for exportation. The passport of the Spanish consul to Lagaira, which, though it had answered his intended purpose as soon as it was shown to the Intendant there, was still carefully preserved, and was found amongst the papers at the time of the capture. The sale to a Spanish officer, under a contract, in no manner accounted for, and of an exemption from duties on the inward and outward cargo. The clearance at Lagaira and Porto Cabello. The passport of the Spanish consul at Charleston, to Spain, and his certificate that the cargo (not landed at Charleston) was from Lagaira and Porto Cabello, with his authentication of the Spanish papers, which it is said could be in nowise useful but to entitle the plaintiff to particular privileges in consideration of the risk he has run in carrying on an unlawful trade. The answer given to these circumstances is that the cocoa from the Carraccas, commanding in Spain a much higher price than that produced elsewhere (as proved by one of the witnesses), it was important, on account of obtaining this high price, to prove it the product of that settlement, a motive very consistent with a *bona fide* importation into the United States. Another circumstance relied upon by the defendants is the plaintiff's letter to his clerk, in which he shows his confidence in the safety of his ship, and his apprehensions as to the cargo, which could only arise from a consciousness of having, as to the cargo, exposed himself to the risk of capture by British cruisers.

§ 381. *Imported goods must be landed. Paying duties and re-exporting without landing not enough.*

The last circumstance most relied on, not only as evidence of the voyage being direct from Lagaira to Spain, but as being most material in increasing the risk, is the not landing the cargo at Charleston. And if the laws of congress did require that to be done, the omission would most certainly be deemed an important circumstance in a British court of admiralty to prove the illegality of the voyage. It would be perfectly fair to say: "Notwithstanding your

clearance at Porto Cabello is for the United States, your failing to perform those things required, in cases of importation, by the laws of your own country falsifies your professions. How can you call that an importation into the United States which does not correspond with the provisions of your own laws?"

How then does this question stand? The law does not in express terms say they shall be landed, but yet it cannot be construed to mean anything else. The literal meaning of importation is to bring in, with intent to land; but where the goods are intended for exportation, the law of congress requires something further to be done. The law declares that duties on goods imported are to be paid or secured before a permit is given to *land*. To entitle the importer to drawbacks on the exportation of the same article, he is, previous to *putting or landing* the same on board, to give notice to the collector of his intention to export. Then they are to be *inspected* by a particular officer, and, if found to correspond with the notice and proof, a permit for lading is to be granted. But the *lading* is to be under the superintendence of the person who inspected them. Now, without landing, these things cannot be done. Bringing in a cargo without landing is no more an importation, in reference to the above act of congress, than is, by the same act, a mere *reporting*, without paying duties or claiming drawbacks. For a cargo brought in and reported is as much within the territorial jurisdiction of the United States, and is as much a part of the national stock, if the property of a citizen, as if the duties had been secured and drawn back; but it is not an importation within the revenue laws of the United States, if they are carried away without landing. In the one case no duty is paid; in the other it is secured and drawn back.

If the above principles be correct, the custom set up as existing at Charleston and Philadelphia, in some cases, is void, and cannot control the law.

§ 382. *Imported goods. Circumstances of non-landing should be disclosed.*

But even if this point were doubtful, if the circumstance of not landing were material to the risk, the facts should have been stated to the underwriters, that they might have an opportunity, as well as the plaintiff, of judging as to the effect of that circumstance. If, as has been argued, it would be a hardship to require of the plaintiff to communicate what he did not deem material, it is not less hard that the defendants should suffer because it was not communicated. If one of two men, equally innocent in intention, must suffer, the loss should fall on him whose conduct contributed to the loss, or contributed to mislead the other.

Upon the subject of the materiality of the concealment, some additional evidence has been given which is proper for your consideration. It is proved that the defendants always rejected such risks, or demanded such high premiums as to turn away applicants. On the other hand, it is proved that in Charleston, and by private underwriters in Philadelphia, those circumstances made no difference in the premium. The defendants no doubt construed the English orders and the acts of congress as the court does — the other underwriters differently. With these observations, I shall leave the case with the jury. (Judgment for defendants on a special verdict.)

FOLSOM v. MERCANTILE MUTUAL INSURANCE COMPANY.

(Circuit Court for New York: 9 Blatchford, 201-204. 1871.)

Opinion by BLATCHFORD, J.

STATEMENT OF FACTS.—This is an action on a time policy of marine insurance on a vessel, tried before the court without a jury. After the plaintiff had rested his case, at the trial, the defendants offered in evidence a paper purporting to be an application presented to the defendants, requesting them to effect the insurance covered by the policy. The plaintiff objected to the introduction in evidence of the paper, on the ground that the application was merged in the policy, and that there was no plea in the case that the policy was obtained by any fraud, or by any misrepresentation. The court rejected the paper, on the ground that the evidence was inadmissible at that stage of the case. The defendants excepted to the ruling. At the close of the testimony on the part of the defendants, they renewed their offer to put the application in evidence. The objection on the part of the plaintiff to its introduction was renewed, and the court rejected it as inadmissible, and the defendants excepted. They now move for a new trial, on the ground of an alleged error committed by the court in excluding the application as evidence.

§ 383. *Application not evidence of contract of insurance.*

It is urged, for the defendants, that the application was the written contract, by which the defendants agreed to issue for a certain premium, and the plaintiff agreed to take, a policy of insurance on the terms and conditions agreed upon therein. Such contract, however, must be evidenced by the policy itself. The policy must control, in this action, in case of any difference between its provisions and those of the application. In point of fact, however, a comparison of the application with the policy shows that the provisions of the two do not differ. As to any terms or conditions contained in the application, which might be in the nature of warranties or representations, it is not contended, on the part of the defendants, that there was any misrepresentation on the part of the plaintiff, by setting out untruly any fact contained in the application. The offer of the application in evidence was not preceded, or accompanied, or followed by any offer to put in evidence, or by any putting in evidence, of any such misrepresentation.

§ 384. *Application not evidence that a fact not referred to in it was not disclosed.*

It is further urged that the application was admissible, because it did not show on its face where the vessel was when the application was made, or from what port she had sailed, or on what voyage she was bound, or who was her master. But the policy itself contained none of these things. The absence of them from the application has no tendency to show that the plaintiff did not, when he made the application, communicate to the defendants the facts referred to, or answer truly all questions put to him in regard thereto. As I held, in my opinion deciding the cause (8 Blatch., 170; §§ 386-88, *infra*), it was for the defendants to show, affirmatively, that the facts referred to were concealed by the plaintiff and were material to the risk; and they gave no such proof. Moreover, the application, which was in form one for a time policy, contains no blanks for any information as to the voyage of the vessel, or her whereabouts at the time of the application. It contains, as does the policy, a blank, not filled, for the name of her master, but it appeared, on the trial, that the defendants knew the name of her master at the time the application was

made. Moreover, the policy, being a time policy, contains, as does the application, a warranty as to the ports and places the vessel should not visit or use. It was not claimed that she was lost while in a forbidden place or on a forbidden voyage; and, therefore, any statement of her voyage or whereabouts was immaterial. I am satisfied, for these reasons, that the application was properly excluded, as being entirely irrelevant to the case.

It is also urged, as a ground for a new trial, that it appeared that, in fact, the plaintiff concealed from the defendants, when he applied for the insurance, and at all times before the policy was issued, facts known to him, which were material to the risk; and that the court erred in refusing to rule, as requested by the defendants, in accordance with certain propositions of law made to the court by the defendants. In regard to the question of concealment, and the requests to rule, proposed by the defendants, I carefully considered the views urged on the part of the defendants, in giving my decision in the case after it was tried (8 Blatch., 170), and no new views on the subject are now presented. The conclusions I arrived at are fully stated, with the reasons therefor, in such decision, and I have not been able to satisfy myself that they are erroneous.

§ 885. *Court not bound to make special finding of facts when it tries a case without a jury.*

A new trial is also asked for, on the ground that the court erred in refusing to make, on the request of the defendants, a special finding of facts in the case. The reasons which governed the court in so refusing were those which are set forth in the opinion in the case of *Clement v. Phoenix Ins. Co.*, 7 Blatch., 51. I understand the views which I there took of the effect of the provisions of the fourth section of the act of March 3, 1865 (13 U. S. Stat. at Large, 501), to be sustained by the supreme court in the case of *Norris v. Jackson*, 9 Wall., 125. The court which, after the waiver of a trial by jury, tries a case without a jury, is not required to make a special finding upon the facts. It may make a general finding, and it may rightfully decline to make a special finding. There is nothing in the case of *Generes v. Campbell*, 11 Wall., 193, or in any other decision of the supreme court, inconsistent with this view. In this case I think it was a proper exercise of the discretion of the court not to make a special finding, and that a new trial ought not to be granted because of the refusal of the court to make a special finding.

In regard to the objection that the policy does not contain the words "lost or not lost," and that the vessel had, in fact, been lost before the policy was issued, I fully considered the question in my opinion given on deciding the cause, and adhere to the views then expressed. The motion for a new trial is denied. (a)

FOLSOM v. MERCANTILE MUTUAL INSURANCE COMPANY. (b)

(Circuit Court for New York: 8 Blatchford, 170-176. 1871.)

Opinion by BLATCHFORD, J.

STATEMENT OF FACTS.—This is an action tried before the court without a jury, to recover the sum of \$3,000 on a policy of marine insurance. The policy was issued to the plaintiff, March 1, 1869, on the schooner *B. F. Folsom*, for the sum of \$3,000, from January 1, 1869, to January 1, 1870. The

(a) See the next two cases.

(b) See the preceding case.

policy valued the vessel at \$35,000. It did not state who the master of the vessel was or what voyage she was upon. The rate of premium was expressed to be twelve *per cent.*, net. The policy contained this written clause: "Privileged to cancel at the expiration of six months; *pro rata* premium to be returned for time not used, no loss being claimed." The words "lost or not lost" were not contained in the policy.

The vessel had sailed from Boston for Montevideo and Buenos Ayres, on the 6th of January, 1869, with John Orlando as her master. She was a three-masted schooner. She was disabled at sea on the 13th of January, losing two of her masts, and her entire hull, except a part of her bow, going under water. Her crew remained on her for twenty days and nights, the vessel being kept from sinking by the buoyancy of some lumber which formed part of her cargo. Her crew were taken off from her by a Bremen vessel, bound to Bremen, and were landed at Bremerhaven on the 18th of February. The schooner was totally lost through the perils of the sea. On the 20th of February, John Orlando, the master of the schooner, wrote and mailed, at Bremerhaven, a letter to the plaintiff (who was one of the owners of the schooner), at Philadelphia, announcing the loss of the schooner. This letter reached the plaintiff in due course of mail, after March 9th, bearing, when it reached him, a Bremerhaven postmark of February 20th, and a New York postmark of March 9th. The master wrote a second letter, from Bremerhaven, to the plaintiff, at Philadelphia, on the 26th of February, giving fuller particulars of the loss. This letter reached the plaintiff in due course of mail, after March 14th, bearing, when it reached him, a Bremerhaven postmark of February 27th, a New York postmark of March 14th, and a Philadelphia postmark of March 14th. The master had no money with which to prepay for his passage to the United States or for a telegraphic dispatch to his owners, and was a stranger in Bremerhaven. His owners had no friends or credit there. Prepayment of a telegraphic dispatch to the United States was required. The master obtained a passage from Bremerhaven to the United States, on an American steamer, by giving an order on the plaintiff for the passage money. He noted his protest against the loss of the schooner, before the United States consular agent at Bremerhaven, on the 18th of February, informed that officer of the loss of the vessel and of the arrival of the crew, and applied to him for assistance. He and his crew were furnished with a boarding place by the consular agent. He did not communicate with the plaintiff or with any of the owners of the schooner by telegraph.

On the 22d of February, there was published in the daily public newspapers in the city of New York and in the city of Philadelphia (the defendants being located in New York and the plaintiff residing in Philadelphia), a telegraphic dispatch in these words: "Liverpool, Feb. 21. Orlando, from Balt. for Buenos Ayres, lost at sea; crew saved and landed at Bremerhaven." This dispatch, as so published in Philadelphia, was seen by the plaintiff before he applied to the defendants to effect the insurance in question. The dispatch, as published in New York, was cut out from one of the newspapers by a clerk in the employ of the defendants, at their office in New York, and pasted, on the 22d of February, in a scrap book, with seventeen other items of marine disasters which were pasted therein on the same day, such scrap book being regularly kept by such clerk, as a record of disasters. Over the dispatch in question, in the book, was written, in large letters, the word "Orlando." The plaintiff made application in person to the defendants to effect the insurance in question, and

did not call their attention to the dispatch or to its publication. At the time he so made application he knew that John Orlando had sailed in the schooner as her master, and also from what port and on what voyage she had sailed. In the shipping register used by the defendants at the time of issuing the policy, the existence of a bark called the Orlando, a whaler, was noted, but no schooner Orlando was noted. Such bark had in fact been owned within two or three years before the date of the policy by a person who was the partner of the plaintiff, but the plaintiff did not at the time the policy was issued know in what trade such bark was. Such shipping register contained the name of the schooner B. F. Folsom and her rating and the name of J. Orlando as her master.

The proper proofs of loss were duly furnished, and if the plaintiff is entitled to recover, his proper claim is \$3,000, with interest from May 7, 1869.

§ 386. *Insurance from stated day to fixed time takes effect from the first date though vessel was then lost, and no words "lost or not lost" used.*

The defendants contend that, as the vessel was lost when the contract was made March 1st, and the words "lost or not lost" are not found in the policy, the insurance never took effect and the plaintiff cannot recover. This view would be sound if the vessel had been lost before January 1, 1869. But, by the policy, the risk expressly taken is from January 1, 1869, to January 1, 1870. It is a risk for the whole of that period. It covers a loss during any part of that time. The premium paid was for the whole time. If the vessel was safe and in being on the 1st of January, 1869, the defendants guarantied her safety from that time. The inception of the contract in this case was not the 1st of March, 1869, but the 1st of January, 1869. As the vessel was safe on the 1st of January, 1869, she was within the terms of the contract, so that the defendants took the risk upon her. If this were not so the defendants would be enjoying the premium for the two months from January 1st to March 1st, and yet be running no risk for that time. 1 Phillips on Insurance, sec. 925; 1 Arnould on Insurance, sec. 20; Hammond v. Allen, 2 Sumn., 387, 396-398. In the present case it is not shown that either party knew of the loss when the policy was issued, and I am of opinion that the policy must be construed as covering any loss which occurred after January 1, 1869, although before March 1, 1869.

§ 387. *Defendant to show concealments.*

It is urged, as a defense, that the plaintiff concealed from the defendants material facts known to him. The concealment alleged is that he did not inform the defendants before the policy was issued that the name of the master of the schooner was John Orlando, and that she had sailed for Montevideo and Buenos Ayres, and that he, the plaintiff, had seen in the newspapers the published dispatch as to the loss of the Orlando. Conceding that the facts thus alleged to have been concealed were material, yet the defense of concealment is one that must be made out affirmatively by the underwriters. The defendants have not shown that the plaintiff did not, before the policy was issued, communicate to them the fact that the name of the master of the schooner was John Orlando, and that she had sailed for Montevideo and Buenos Ayres. In the absence of such evidence it must be assumed that the defendants were advised of these facts. As to the dispatch about the Orlando and its publication, the defendants knew of it and had a copy of it in their disaster book. In view of this fact and of the knowledge the defendants had as to who was the master of the schooner and as to what voyage she was upon, it cannot be regarded as a

concealment of a fact material to the risk, that the plaintiff did not call the attention of the defendants to the dispatch or to its publication. They had already seen it, and the fact that he had seen it cannot be regarded as a material fact. With the dispatch, the fact of what voyage the schooner was on, and the name of her master, the defendants had all the information of material facts which the plaintiff had. He was not bound to communicate to the defendants intelligence known to them, or his expectations, opinions or speculations based upon facts known to them. 1 Phillips on Insurance, secs. 574, 575, 603; 1 Arnould on Insurance, secs. 207, 211.

No evidence is given to show that the premium stated in the policy was fixed without reference to any of the three facts so alleged to have been concealed, nor can the court say, in the absence of all evidence, that it is reasonably probable that with a knowledge of such three facts, the defendants would have declined the risk, or asked a higher premium than that at which the policy was effected. No evidence is given to show whether the rate of premium stated in the policy was a high rate or a low rate — a rate indicating a great risk, or a rate indicating an ordinary risk. There is nothing to raise the legal presumption that the name of the master and the voyage were not communicated so as to relieve the defendants from the necessity of giving direct negative evidence to establish that such two facts were not communicated, and to throw on the plaintiff the necessity of giving affirmative evidence that such facts were communicated. Arnould on Insurance, § 213.

§ 388. *Assured not bound by omission of master to communicate loss of vessel.*

The plaintiff had no information tending to show any disaster to the schooner, except what was contained in the dispatch relative to the Orlando, if that can be regarded as such information. But it is urged, on the part of the defendants, that the plaintiff must be presumed to have had knowledge on the 1st of March of the actual loss of the schooner before that day, because information of the fact could have been communicated to him by telegraph, by the master, from Bremerhaven, before the policy was issued. It is claimed that it was the duty of the master to communicate intelligence of the loss by telegraph to the plaintiff as soon as he arrived at Bremerhaven; and that it is shown that such information by telegraph could have reached the plaintiff at Philadelphia as early as the 22d of February. But this view is contrary to the decision of the supreme court in the case of *The General Interest Ins. Co. v. Ruggles*, 12 Wheat., 408 (§§ 370-73, *supra*). In that case the vessel was, in fact, wholly lost and destroyed at the time the insurance was effected, but the fact of the loss was not known to her owner, and such ignorance arose from the designed omission of the master to advise the owner of the loss, in order that the insurance might be effected, and the result of such conduct of the master was that intelligence of the loss had not reached either the owner or the insurers at the time of the underwriting. But the court held that, as the loss did not occur through any misconduct of the master's before the happening of the loss, and as at the time of the misconduct of the master in suppressing intelligence of the loss, he was not the agent of the owner for any purposes connected with procuring the insurance, and as the agency of the master ceased with the loss of the vessel, so that there was no legal obligation resting on him to communicate information of her loss to her owner, the policy was not vitiated. The decision in that case fully covers the present case.

The absence of any evidence on the part of the defendants to show any concealment by the plaintiff of any fact material to the risk, joined with the fact that ordinary prudence on the part of the defendants in insuring by a time policy running back for two months would naturally lead them to inquire what voyage the vessel was upon, imposing the necessity of a truthful answer, leads to the conclusion that nothing is shown to impeach the good faith of the plaintiff. Underwriters, in assuming the risk of a loss that may have happened before the date of the policy, assume a hazardous undertaking, and charge a proportionate premium, and must be presumed to inquire as to all obvious matters which may affect the taking of the risk at all or the rate of premium. Their protection is in their own hands, by rejecting such risks or charging adequate premiums therefor.

I find for the plaintiff, for the sum of \$3,000, with interest from May 7, 1869. (a)

INSURANCE COMPANY v. FOLSOM. (b)

(18 Wallace, 287-254. 1873.)

ERROR to U. S. Circuit Court, Southern District of New York.

Opinion by MR. JUSTICE CLIFFORD.

Underwriters in a policy of marine insurance undertake, in consideration of a certain premium, to indemnify the party insured against loss arising from certain perils of the sea, or sea risks to which the ship, merchandise or freight of the insured may be exposed during a particular voyage or for a specified period of time. Long experience shows that such a system is essential to commerce, as it tends to promote the spirit of maritime adventure by diminishing the risk of ruinous loss to which those who engage in it would otherwise be exposed. Losses of the kind cannot be prevented by any degree of human forecast or skill, but the system of insurance, as practiced among merchants, enables those engaged in such pursuits to provide themselves with indemnity against the consequences of such disasters. By such contracts either associated capital becomes pledged for such indemnity, or the loss is so distributed among different underwriters that the ultimate sufferers are not in general seriously injured. Indemnity is the great object of the insured, but the underwriter pursues the business as a means of profit.

STATEMENT OF FACTS.—On the 1st of March, 1869, the defendant subscribed a time policy of insurance in the sum of \$3,000, for a premium of twelve per cent. net, upon the schooner B. F. Folsom, her tackle, apparel and other furniture, valued at \$35,000; in which policy it is recited that the insurance is to the plaintiff on account of whom it may concern, and in case of loss, to be paid in funds current in the city of New York; and the policy contains the clause following, to wit: "insured at and from the 1st day of January, 1869, at noon, until the 1st day of January, 1870, at noon," with liberty to the insured, if on a passage at the expiration of the term, to renew the policy for one, two or three months, at the same rate of premium, provided application be made to the company on or before the expiration of the first term. Also "privileged to cancel the policy at the expiration of six months, *pro rata* premium to be returned for time not used, no loss being claimed." Prior to the date of the policy, to wit, on the 6th of January in the same year, the schooner set sail and departed from the port of Boston, bound on a voyage to the port of

(a) Affirmed. See the next case.

(b) See the two preceding cases.

Montevideo, laden with an assorted cargo, and during the voyage she met with tempestuous weather, and on the 30th of the same month, by the force of the wind and waves, was wrecked, foundered, and sunk, and was wholly lost to the plaintiff. Seasonable notice of the loss was given to the defendants, and payment being refused the plaintiff brought an action of *assumpsit* to recover the amount insured. Service having been made the defendants appeared and pleaded the general issue, and the parties having in due form waived a trial by jury, went to trial before the court without a jury. Matters of fact were accordingly submitted to the court, and the court found that the defendants did undertake and promise the plaintiff in manner and form as he, the plaintiff, in his writ and declaration had alleged, and assessed damages for the plaintiff in the sum of \$3,348.20, and the court rendered judgment for the plaintiff for the amount so found. Exceptions were filed by the defendants, and they sued out a writ of error and removed the cause into this court.

[Here the court considered a point of practice.]

Exception is also taken by the defendants to the refusal of the court to decide that the evidence introduced by the plaintiff in the opening was not sufficient to entitle the plaintiff to a verdict.

Having introduced the policy, the plaintiff proved by the master that the schooner, on the 6th of January prior to the date of the policy, departed on her voyage and that she was lost at the time and by the means before stated. In addition to the incidents of the loss, he also proved the circumstances under which the master and crew were saved from the wreck and carried to the port of Bremerhaven by the vessel which rescued them; that the master wrote to the owner by the first mail from that place after their arrival there, and that he was unable to use the telegraph, as he had no funds to prepay a telegram. Due notice of the loss and of the interest of the plaintiff having been admitted, the plaintiff rested and the defendants moved the court to decide that the evidence was not sufficient to entitle the plaintiff to a verdict, which the court refused to do.

§ 389. *The circuit court cannot order a nonsuit against a plaintiff in invitum.*

Suppose the motion is regarded as a motion for a nonsuit, it was clearly one which could not be granted, as it is well settled law that the circuit court does not possess the power to order a peremptory nonsuit against the will of the plaintiff. *Elmore v. Grymes*, 1 Pet., 469; *Castle v. Bullard*, 23 How., 172. Power to grant a peremptory nonsuit is not vested in a circuit court, but the defendant may, if he sees fit, at the close of the plaintiff's case, move the court to instruct the jury that the evidence introduced by the plaintiff is not sufficient to warrant the jury in finding a verdict in his favor, and it is held that such a motion is not one addressed to the discretion of the court, but that it presents a question of law, and that it is as much the subject of exceptions as any other ruling of the court in the course of the trial. *Schuchardt v. Allens*, 1 Wall., 370; *Parks v. Ross*, 11 How., 362; *Bliven v. New England Screw Co.*, 23 id., 433; *Toomey v. Railway Co.*, 3 C. B., New Series, 150; *Ryder v. Wombwell*, L. R., 4 Exch., 39; *Giblin v. McMullen*, L. R., 2 Privy Council, App., 335. All things considered, the court is inclined, not without some hesitation, to regard the motion as one of the latter character, and in that view it presents the question whether, by the terms of the policy, the risk was within it, as the proofs show that the loss occurred before the policy was issued.

§ 390. "*Lost or not lost*" not necessary words to make policy retroactive if such be intent of parties.

Policies of insurance intended to have a retroactive effect usually contain the words "lost or not lost," and the defendants contend that the policy in this case, inasmuch as it does not contain those words, does not cover the loss described in the declaration; but it is well settled law that other words may be employed in such a contract which will have the same operation and legal effect, and it appears that the policy in this case, by its express terms, was to commence on the 1st day of January, 1869, and to continue until the 1st day of January, 1870. Elementary writers and the decisions of the courts make it perfectly certain that the phrase "lost or not lost" is not necessary to make a policy retroactive. It is sufficient if it appear by the description of the risk and the subject-matter of the contract that the policy was intended to cover a previous loss. Contracts of the kind are as valid as those intended to cover a subsequent loss, if it appears that the insured as well as the underwriter was ignorant of the loss at the time the contract was made. *Hammond v. Allen*, 2 Sumn., 396; 1 Phillips on Insurance, § 925; 2 Parsons on Marine Insurance, 44; 1 Arnould on Insurance, 26; 3 Kent (11th ed.), 344; *Hallock v. Insurance Co.*, 2 Dutcher, 268.

Viewed in the light of these suggestions, it is quite clear that it would have been error if the circuit court had decided as requested by the defendants, and that the decision made by the circuit court in denying the motion was correct.

Attempt was also made at the trial to set up the defense that the plaintiff concealed material facts from the defendants at the time the policy was granted, but the circuit court found that the charge was not sustained by the evidence, which is all that need be said upon the subject, as it is quite clear that the finding of the circuit court, where the trial by jury is waived, as in this case, is not the proper subject of review in the supreme court; to which it may be added, that if the rule were otherwise the court here would be compelled to come to the same conclusion as that reached by the circuit court.

Issues of fact, however, under such a submission, are to be tried and determined by the circuit court, and it is equally clear that the findings of the circuit court, even when special, cannot be reviewed by the supreme court, except for the purpose of determining whether the facts found are sufficient to support the judgment, as the express provision is that the finding of the circuit court in such a case shall have the same effect as the verdict of a jury. *Insurance Co. v. Tweed*, 7 Wall., 51 (§§ 1302-3, *infra*); *Generes v. Bonnemer*, Id., 564; *Norris v. Jackson*, 9 id., 127; *Flanders v. Tweed*, id., 428; *Dirst v. Morris*, 14 id., 490; *Richmond v. Smith*, 15 id., 437; *Bethel v. Mathews*, 13 id., 2.

Exception was also taken to the ruling of the court in refusing to admit as evidence the application for insurance when tendered by the defendants in support of the defense of concealment.

Apparently it was offered to show that it did not state where the vessel was at that time, or from what port she had sailed, or on what voyage she was bound, but the court was of the opinion, and ruled, that inasmuch as the instrument contained no statement in respect to any one of those matters, and that its terms were exactly the same as those of the policy, the contents were immaterial to the issue, as the contents could have no tendency to show that the plaintiff, when he made the application, did not communicate to the de-

fendants all the material facts and circumstances within his knowledge, and answer truly all questions put to him in regard to those several matters. Same Case, 8 Blatch., 170 (§§ 386-88, *supra*); Same Case, 9 id., 202 (§§ 833-85, *supra*). Evidently the burden of proof to establish such a defense is upon the party pleading it, and the court here is of the opinion that the ruling of the circuit court, as fully explained in the opinion given at the time, and in the opinion subsequently given denying the motion for new trial, was correct. *Vandervoort v. Columbia Ins. Co.*, 2 Caines, 160; *Insurance Co. v. Lyman*, 15 Wall., 670; *Rawls v. American Mut. L. Ins. Co.*, 27 N. Y., 297.

[Further questions of practice here considered.]

Judgment affirmed. (a)

LIVINGSTON v. MARYLAND INSURANCE COMPANY.

(6 Cranch, 274-281. 1810.)

STATEMENT OF FACTS.—Error to the circuit court for the district of Maryland, in an action of covenant upon a policy of insurance against capture only, upon goods laden on board the ship *Herkimer*, from Guayaquil, or her last port of discharge in South America, to New York; the goods were warranted to be American property, “proof of which to be required in the United States only.” The ship and cargo were captured by a British ship of war, and condemned at Halifax as prize.

The defense set up by the underwriters was, 1. That one Baruso, a Spanish subject, was interested in the cargo, and that Baruso being a subject of one of the belligerents, the warranty of neutrality was forfeited. 2. That certain Spanish papers were found on board, stating the cargo to be the property of Baruso, and although Baruso might not be interested in the cargo, yet these papers, not being necessary, according to the usual course of the trade, were the cause of the condemnation, and as this cause proceeded from the act of the insured, the underwriters were not liable. 3. That although the interest of the plaintiffs Livingston and Gilchrist was neutral, yet the concealment of the interest of Baruso vitiated the policy. 4. That the abandonment was not made in due time.

To these objections the plaintiffs answered, 1. That Baruso was not part owner of the goods; he had only a contingent interest in the profits of the voyage. That the subject insured was only the interest of the plaintiffs, which was strictly neutral property. 2. That the Spanish papers were necessary to carry on the voyage insured, according to the nature and course of the trade. 3. That the interest of Baruso was not such as they were bound to disclose.

Upon the trial of the issue of *non infregit conventionem*, the jury found a special verdict; and a bill of exceptions was taken by the plaintiffs in error to the instruction of the court to the jury, that parol evidence was not competent to prove “that, according to the uniform and long standing laws of Spain, relative to the trade of her colonies in America, and especially of Peru, no goods could, at and about the time of the making the policy in the declaration mentioned, be imported into, or exported from, the colony of Peru, from or to any other than a Spanish port in Europe, or in any other than a Spanish bot-

tom, without a special license from the king of Spain for that purpose; and that such licenses, at and about the same time, were never granted, with respect to the said colony of Peru, to any but Spanish subjects; and that, according to the constant course and usage of the trade, to and from that colony, under such licenses, it was usual and necessary for the property to appear, in the said colony, and at its departure therefrom, as the property of a Spanish subject, and of the person holding the license, to be accompanied by such Spanish papers as were necessary to give it that appearance, and to be cleared out as such from the port of departure in Peru; such licenses not being avowedly transferable; although by observing the above-mentioned formalities and precautions, American property, at and about the same time, might be, and sometimes was, imported into, and exported from, the said colony by American citizens, by virtue and under the protection of such licenses."

The order for insurance, which was supposed to amount to a representation that the whole cargo was neutral property, was contained in a letter from the plaintiff Gilchrist to Webster & Co., at Baltimore, in which he says, "on the recommendation of Messrs. Church & Demmill, I take the liberty of requesting you to effect insurance in your city on the cargo of the ship *Herkimer*, Church, master, from Guayaquil, or her last port of departure in South America, to New York, against loss by capture only, warranted American property, and free from all loss on account of seizure for illicit or prohibited trade. The owners are already insured against the dangers of the seas and all other risks except that of capture. You will please to insure to the amount of \$50,000 in valued policies. You have already had a description of the ship from Messrs. Church & Demmill, the agents of Mr. Jackson, who is the owner, and which I presume is correct. By a letter received from Mr. James Baxter, the supercargo, dated at Lima, the 23d of September, 1805, he did not expect the *Herkimer* would sail from Guayaquil until the last of February. I think proper to mention that the insurance will be on account of Mr. Brockholst Livingston and myself. Mr. Baxter and Mr. Griswold are also concerned, but the first gentleman thinks there is so little danger of capture that, in his letter from Lima, he expressly directs no insurance to be made for him against this risk, and Mr. Griswold is not here to consult. Both these gentlemen, as well as those for whom you are desired to make insurance, are native Americans."

The description of the ship, as given by Church & Demmill, and referred to in the above letter, was as follows: "She is a fine ship of about four hundred tons burden, about three years old, sheathed, and coppered to the bends, built in the state of New York, and her owner a native American citizen. She sailed from Boston on the 12th day of May last, bound for Lima, with liberty to go to one other port in South America, not west of Guayaquil, and from thence to New York. She has permission to trade there."

On the 5th of June, 1806, the plaintiff Gilchrist wrote to Webster & Co., at Baltimore, informing them of the capture of the vessel, and that the plaintiffs had sent an agent to Halifax to act in behalf of the concerned, and desiring that this information should be communicated to the underwriters, and assurances that the plaintiffs should act throughout with due regard to their respective interests. He then says, "I should like them to approbate the owners, in taking every measure they may judge best for our mutual interest, without prejudice to our right. I ought, likewise, to mention that one of the owners has also gone in her, so the underwriters will observe every measure calculated to protect their and our interest has been speedily pursued." This

letter was laid before the underwriters, who returned it with their answer indorsed thereon, "read and approved." On the 22d of August, 1806, after the condemnation in the court of vice-admiralty, the plaintiffs abandoned to the underwriters.

§ 391. *No breach of warranty of neutrality that a belligerent subject has a joint interest with the neutral.*

Opinion by MARSHALL, C. J.

In this case several questions have occurred on which the court has not yet formed an opinion. The application of rules and principles, which have been framed for an action on the case, to an action of covenant, is an operation of some difficulty. The court has not decided with precision on the extent of the plea that the defendant has not broken his covenant, nor on the testimony which may be admitted under that plea. Some difficulty, also, arises from the circumstances that the parties have gone to trial under the expectation that the whole merits of the case were open under the issue which was joined, and that such expectation was authorized by the invariable usage of the court of Maryland, and of the circuit court sitting in that state.

Upon the inspection of the special verdict in this case, it is supposed that, however these points may be decided, a *venire facias de novo* would probably be awarded; and, as the delay of a term would be a great inconvenience to the parties, it is deemed advisable to award it now. There are, however, some points which have been argued at great length on which an opinion has been formed, which will now be delivered.

It is essential, in this form of action especially, to distinguish accurately between the warranty contained in the policy and those extrinsic circumstances, such as misrepresentation or concealment, which have been deemed sufficient to discharge the underwriters. Although the effect of a breach of a warranty and of a material misrepresentation may be the same on a policy, yet they cannot be confounded together in deciding on pleadings or on a special verdict. The warranty, in this case, is in these words: "warranted by the assured to be American property, proof of which to be required in the United States only."

The interest insured is admitted to be American property, in the strictest sense of the term; but it is contended that Baruso, a Spanish subject, had an interest in the cargo, which falsifies the warranty. Whether Baruso could be considered as having an interest in the cargo or not is a question of some intricacy which the court has not decided, and which, if determined in the one way or the other, would not affect the warranty; because the assured are not understood to warrant that the whole cargo is neutral, but that the interest insured is neutral.

§ 392. *Materiality of fact misrepresented for the jury.*

If the assured represented the whole cargo to be neutral when it was not, or if they concealed the interest of a belligerent when it ought to have been disclosed, which facts this court neither affirm nor deny, the effect of the misrepresentation or concealment on the policy depends on its materiality to the risk. This must be decided by a jury under the direction of a court. In this case it has not been decided. Consequently, were it even to be admitted that, under the peculiar circumstances of this case, these facts might be taken into consideration without being specially pleaded, a *venire facias de novo* would be necessary in order to ascertain their materiality.

So, too, with respect to the Spanish papers found on board. It is said that

the verdict finds their materiality by finding that the fair premium on American property disguised as Spanish, on the voyage insured, was twenty-five per cent., whereas the premium in this case was only ten per cent. But it does not appear to the court that this property was, by these papers, disguised as Spanish. It is found to have been the constant course of the trade to have them on board, and consequently they cannot be understood to disguise the property as Spanish when there are other papers which prove it to be American. It is, too, as yet, undecided that this matter could be given in evidence on this issue. Although this verdict and these pleadings do not present the merits of the cause in such form as to enable the court to decide them, there are some insulated points from which the cause may be relieved.

§ 393. *Letter of assured not incorporated into policy not a warranty.*

The reference to the letter of Churchill & Demmill, which was made by the assured in their letter of the 26th of March to Alexander Webster & Co., has been treated both as a representation and as a warranty, which is falsified by the sentence of condemnation. There is no color for this opinion. Most clearly it is not a warranty, for it is not introduced into the policy; and if it were a representation, it only goes to the actual state of the ship at the time, not to her future conduct. But it is not even a representation. Marshall, 336, is full and clear on this point.

§ 394. *Right to abandon may be kept in suspense by mutual consent.*

The letter of the assured, of the 5th of June, is understood to ask the permission of the underwriters to keep their right to abandon in a state of suspense, and the note made by the president and directors, on that letter, is understood as granting that permission. It is difficult to ascribe this letter to any other motive. It has been asked, for how long a time is this permission given? The answer is obvious. It is, at least, to continue while the property continued in its then situation, unless it should be sooner determined by one of the parties. The assured might abandon previous to the sentence, or immediately afterwards; and the underwriters might at any time require the assured to elect immediately, either to abandon or to waive the right so to do. Since they have not made this communication, their original permission continued in force. But the jury have not found that the abandonment was or was not in due time.

It is also the opinion of the court that as the laws and regulations by which this trade was regulated are not proved to have been in writing, as public edicts, but may have depended on instructions to the governor, they may be proved by parol. The judgment is to be reversed, because the special verdict is defective; and the cause remanded, with directions to award a *venire facias de novo*.

In the second case it is ordered to be certified that if the jury should be of opinion that the Spanish papers mentioned in this case were material to the risk, and that it was not the regular usage of the trade insured to take such papers on board, the non-disclosure of the fact that they would be on board would vitiate the policy; but if the jury should be of opinion that they were not material to the risk, or that it was the regular usage of the trade to take such papers on board, that they would not vitiate the policy. (a)

(a) See the next case.

LIVINGSTON v. MARYLAND INSURANCE COMPANY. (a)

(7 Cranch, 506-548. 1818.)

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.— Error to the circuit court of the district of Maryland, in an action of covenant upon a policy of insurance (against capture only) upon the cargo of the ship *Herkimer*, “from Guayaquil, or her last port of departure in South America, to New York,” “warranted American property, proof of which is to be required in the United States only,” “and warranted free from seizure for illicit trade.” The declaration was on a loss by capture.

Julian Hernandez Baruso, a Spanish subject, having obtained from the crown of Spain a license to import from Boston into the Spanish provinces of Peru and Buenos Ayres, in South America, in foreign vessels, a certain quantity of goods in the license mentioned and to take back the proceeds in produce on payment of half duties, came to New York in September, 1803 (Spain being then at peace with Great Britain), for the purpose of carrying on trade under his said license.

On the 24th of August, 1804, he entered into a contract with a certain Anthony Carroll, for the transportation of a certain quantity of goods to Lima, in Peru, under the said license. Carroll died without carrying the contract into full effect. On the 25th of January, 1805, war having then broke out between Great Britain and Spain, B. Livingston, who had been bound as Carroll's surety for the performance of the contract, entered into a new contract with Baruso for the transportation of the same goods.

The preamble recites the license, and says: The said Baruso has agreed with the said B. Livingston to make an adventure to Lima, on the conditions and stipulations following, to wit:

1. In consideration, etc., he agrees to the following partnership with the said B. Livingston, in virtue of which he transfers to the said firm all his powers, etc. (under the license), of sending an American vessel belonging to the said Livingston, or chartered, in which vessel shall be embarked goods to the amount of \$50,000, the funds and vessel to be furnished and advanced by said Livingston.

2. Baruso to obtain the necessary papers from the Spanish consul, and B. Livingston to pay the duties; Baruso answerable for detention or confiscation by the Spanish government or vessels, on account of any defect or right to send under said license, etc.

3. Livingston agrees in four months to embark the goods on board a vessel to Lima, to proceed thither, and to return to the United States with a cargo.

4. Livingston to choose the supercargo and instruct him; and as the adventure will appear on the face of the papers to belong to Baruso, he shall give the supercargo a power, and recognize him the master of the cargo, so that the consignees at Lima shall follow literally his orders. The consignees, who were partners of Baruso, to receive a commission.

6. The said Livingston and Baruso agree to divide equally, and part and part alike, the profits of the adventure; Livingston to have commissions on sale.

7. Optional in Livingston to sell in United States or convey the return cargo to Europe. If he sells in the United States, Baruso may take out, at the price of sales, as much as will be equal to his rights.

(a) See the preceding case.

8. If Livingston sends the cargo to Europe, he is to choose the supercargo, but the consignees to be chosen jointly.

9. In case of loss Baruso to claim nothing, as his share in the profits only accrues on the safe return of the vessel to the United States. Option with Livingston to insure or not. Livingston not to be allowed for risk, if no insurance, more than fifteen per cent. No insurance to be on the risks of the Spanish government.

10. If any loss accrues from causes not stipulated, Baruso to lose only his privilege. If loss on sale of return cargo, Baruso to sustain half.

Livingston soon afterwards chartered the ship *Herkimer* for the voyage, and entered into a contract with the other plaintiff, Gilchrist, one James Baxter, and Edward Griswold, for jointly carrying on with them the said voyage. The cargo was purchased with their joint funds, and was shipped to Lima, where, and at Guayaquil, a return cargo was received, purchased with the proceeds of the original cargo.

On the 25th of March, 1806, Mr. Gilchrist addressed to Alexander Webster & Co., at Baltimore, a letter containing an order for insurance on the cargo of the ship *Herkimer*, from Guayaquil, or her last port of departure in South America, to New York, against loss by capture only, warranted American property and free from all loss on account of seizure for illicit or prohibited trade. It says, "the owners are already insured against the dangers of the seas and all other risks except that of capture." "You have already had a description of the ship from Messrs. Church and Demmill, the agents of Mr. Jackson, and which I presume is correct." "I think proper to mention that the insurance will be on account of Mr. Brockholst Livingston and myself. Mr. Baxter and Mr. Griswold are also concerned, but the first gentleman thinks there is so little danger of capture, that in his letter from Lima he expressly directs no insurance to be made for him against this risk, and Mr. Griswold is not here to consult. Both these gentlemen, as well as those for whom you are desired to make insurance, are native Americans."

The letter of Church and Demmill was dated 13th February, 1806, and after describing the ship, adds, "she sailed from Boston the 12th of May last for Lima, with liberty to go to one other port in South America, not west of Guayaquil, and from thence to New York. She has permission to trade there." This letter was laid before the board of directors, and the application at that time rejected. The letter from Gilchrist to Webster & Co. was afterwards laid before the board, and the company made the insurance for the plaintiffs at ten per cent.

The *Herkimer*, on her return voyage, was captured near the port of New York, by the *Leander*, a British ship of war, and sent to Halifax, where she was condemned.

The plaintiffs gave the underwriters notice of the capture, and obtained their permission to prosecute a claim for restoration without prejudice to their right to abandon. On receiving notice of the condemnation, they wrote a letter of abandonment, which was delivered to the underwriters, who refused to pay for the loss, whereupon this suit was brought.

On the return voyage, just after doubling Cape Horn, Baxter, who was supercargo and part owner, gave to Edward Giles, the third mate, a bundle of papers, partly in Spanish, telling him, at the same time, that in all probability they might fall in with privateers, who might overhaul the trunk in the cabin, and if they found the papers, it was probable the vessel might be detained, as

the papers were in Spanish, and they might not be able to translate them. Giles put the papers in his trunk.

After the capture, Giles was taken out of the *Herkimer* into the *Leander*, and on being asked if he had any objection to have his trunk searched, replied that he had not. The trunk was then searched and this bundle discovered. It contained papers, covering the cargo as the property of Baruso, mixed with others which showed that in fact it was the property of the plaintiffs, and of Baxter and Griswold. Evidence was given to prove that the usage of the trade made these papers necessary. There was also an estimate of the probable value of the cargo, if shipped to Europe.

The *Herkimer* arrived before the *Leander*; and Baxter, upon his examination on the standing interrogatories, described truly the character of the voyage, and stated correctly the property in the cargo, but denied his knowledge of any papers other than those which were exhibited, as belonging to the ship.

Issue was joined on the plea that the defendants had not broken their covenant, and the jury found a verdict in their favor.

On the trial, twenty-eight bills of exception were taken, partly by the plaintiffs and partly by the defendants. Only those taken by the plaintiffs are now before the court.

The plaintiffs prayed the court below to instruct the jury that the letter ordering the insurance does not contain a representation that no person other than the said Livingston, Gilchrist, Griswold and Baxter was interested in the return cargo of the *Herkimer*; nor that all the persons interested therein were native Americans. The judges were divided on this point, and the instruction was not given.

The fifth bill of exceptions stated that the plaintiffs prayed the court to instruct the jury that, if they believed the testimony offered by them, then there was no such concealment of the said papers as can affect the right of the plaintiffs to recover in this action, which instruction the court refused to give, but directed the jury that if they should be of opinion that, from the usage and course of trade, it was necessary to have the Spanish and other papers delivered by Baxter to Giles, the third mate, as aforesaid, then the delivery by Baxter to Giles, and the finding and taking of the said papers by the officers of the *Leander*, was not such a concealment as affects the right of the plaintiffs to recover.

The sixth bill of exceptions states that the plaintiffs then prayed the court to instruct the jury that Baruso having removed to New York, in the United States, while Spain was neutral, for the purpose of carrying on trade, and having continued to reside in New York until after the capture of the *Herkimer*, the said Baruso could not, at the time of the voyage, be considered as a belligerent. This instruction the court also refused to give, but did instruct the jury that if they should be of opinion that the said Baruso settled in New York before the war between Spain and Great Britain, and remained there domiciliated and carrying on trade generally until the capture of the *Herkimer*, he is to be considered as a neutral; but if they should be satisfied from the testimony that he went to New York for no other purpose but to carry on trade as a Spanish subject, which he could not engage in as a neutral, and that he was not engaged in any other trade than as a Spanish subject, he cannot be considered as a neutral.

The seventh bill of exceptions states that the court then, on the prayer of

the defendants, gave to the jury the following opinion: "The court having already given an opinion that Baruso was not a joint owner with the plaintiffs and Griswold and Baxter, in the return cargo of the *Herkimer*, do, in compliance with the opinion of the supreme court, leave it to the jury to determine whether Baruso had an interest in the return cargo which increased the risk of the said voyage, and if the risk was increased, that the policy was thereby vitiated." This opinion was given on the prayer of the defendants to instruct the jury that the non-communication to the underwriters of papers showing Baruso to have an interest, and to be a Spanish subject, vitiated the policy.

The eighth bill of exceptions stated that the defendants then prayed the court to instruct the jury that if they should be of opinion that the papers which were delivered to Giles by Baxter, or any of them, increased the risk, and that if any of the papers which did so increase the risk were not necessary by the laws and usages of Spain, or the course and usage of trade between the United States and Lima, and that it was not communicated to the defendants that such papers would accompany the cargo, then the plaintiffs were not entitled to recover. The court gave the opinion.

The ninth bill of exceptions stated that the plaintiffs prayed an instruction to the jury, that, in estimating the increase of risk on the return voyage of the *Herkimer*, they were to consider it as a voyage which the defendants were informed, in and by the letter of Church and Demmill, was carried on under a license from the Spanish government; and the question for them to decide was, whether the risk of such a voyage, carried on under such a license, was increased by any of the circumstances relied on by the defendants to show an increase of risk in this case. This opinion the court refused to give.

The eleventh bill of exceptions stated that the plaintiffs produced a witness to prove the usage of the trade, who said that by the laws, regulations and usages of the trade, it was necessary that the property imported into, or exported from, the colony, by a foreigner, should be under a Spanish license, and appear to be Spanish property. Whereupon the defendants moved the court to instruct the jury that this evidence is not competent to prove the municipal laws of Spain, or the usage and custom of trade established by their municipal laws. The opinion of the court was that "no parol evidence is admissible to the jury, or, if given, can be regarded by them, to prove the legislative edicts or acts of the Spanish government, or to prove any usage, custom, or course of trade conformable to such edicts or acts; but that such evidence is admissible to prove the general usage and course of trade that may depend on instructions to the government of Peru."

The thirteenth bill of exceptions stated that the plaintiffs produced witnesses, ignorant of the laws of Spain, to prove their understanding of the usage of the trade, and the defendants produced counter testimony on the usage; whereupon the defendants moved the court to instruct the jury that the testimony of the plaintiffs, if believed, was not competent to show the usage or course of trade that the *Herkimer*, on her return voyage, should be accompanied with papers giving the cargo the appearance of Spanish property. The court refused to give this opinion, but instructed the jury that if they were of opinion that the usage or course of trade from or to the province of Peru, by foreigners, was to have a license from the king of Spain to trade, and to have Spanish papers on board, to show or give color that the cargo was Spanish property, the defendants were bound to take notice of such course of trade;

but if the jury should be of opinion that the trade was prohibited by the laws of Spain, the plaintiffs must prove that the defendants had notice or information of such prohibition.

The twentieth bill of exceptions is to an opinion of the court that whether the abandonment was in reasonable time or not is not a fact to be exclusively left to the jury, but to be decided by them under the direction of the court.

The twenty-fourth bill of exceptions stated that the defendants moved the court to instruct the jury that the insurers are not liable for any increase of risk, in consequence of any acts done by the insured to avoid seizure and confiscation under the laws and regulations of the Spanish government; which instruction the court gave.

The twenty-fifth bill of exceptions stated that the counsel for the plaintiffs then moved the court to instruct the jury that the right of the plaintiffs would not be affected by any increase of risk produced by such acts as were stated in the preceding exception, if such acts were according to the course and usage of trade on the voyage insured. This opinion the court refused to give.

The twenty-eighth bill of exceptions stated that the plaintiffs moved the court to instruct the jury that the increase of risk by which alone the right of the plaintiffs to recover in this action can be effected, is an increase (by reason of some act or omission of the plaintiffs or their agents) of the danger of rightful capture or condemnation under the law of nations. The court refused to give this opinion.

The verdict and judgment being against the plaintiffs they sued out their writ of error.

This perplexed and intricate case, which is rendered still more so by the manner in which it has been conducted at the circuits, has been considered by the court. Their opinion on the various points it presents will now be given.

§ 395. *Letter in the case not to be construed as a representation.*

If the question on which the court was divided be considered literally, the answer must undoubtedly be that the letter of the 25th of March, 1806, contains no averment that no person other than Livingston, Gilchrist, Griswold and Baxter were interested in the return cargo of the *Herkimer*, nor that all the persons interested therein were native Americans. This would be perceived from an inspection of the letter itself, and there would be no occasion for an application to the court concerning its contents. But the real import of the question is this: Is the language of the letter such as to be equivalent to an averment that the owners named in it are the sole persons who were interested in the return cargo? If it does amount to such an averment, then it is a representation, and if it be untrue, its materiality to the risk must determine its influence on the policy. A false representation, though no breach of the contract, if material, avoids the policy on the ground of fraud, or because the insurer has been misled by it.

Upon reading the letter on which this insurance was made, the impression would probably be that the four persons named in it were the sole owners of the return cargo of the *Herkimer*. The inference may fairly be drawn from the expressions employed. Such was probably the idea of the writer at the time. The writer, however, might have, and probably had, other motives for his allusion to other owners, than to convey the idea that there were no others. The premium might in his opinion be affected in some measure by stating the little apprehension from capture which was entertained by others, and especially by that owner who was the supercargo. If, however, it was not supposed

by Mr. Gilchrist that the persons named in his letter were the sole owners of the cargo, or if in fact they were not the sole owners, he has expressed himself in so careless a manner as to leave his letter open to misconstruction, and, in the opinion of some of the judges, to expose his contract to hazard in consequence of it.

But that part of the court which entertains this opinion is also of opinion that the letter ought not to be construed into a representation of any interest to grow out of the voyage distinct from actual ownership of the cargo. "The owners," says Mr. Gilchrist, "are already insured against the dangers of the seas," etc. His application was for the owners; and when he proceeds to state that others were concerned, he must be understood to say that they were concerned as owners. Consequently, if the letter implies an averment that he has named all the owners, it implies nothing further, and ought not to be construed into a representation that there were no other persons interested in the safe return of the cargo.

Others are of opinion that to constitute a representation there should be an affirmation or denial of some fact, or an allegation which would plainly lead the mind to the same conclusion. If the expressions are ambiguous, the insurer ought to ask an explanation, and not substitute his own conjectures for an alleged representation. In this opinion the majority of the court is understood to concur. The instruction then applied for by the counsel for the plaintiffs, on which the circuit judges were divided, ought to have been given.

§ 396. *Concealment of papers necessary to the legality of a voyage, not fatal to insurance.*

5th. A majority of the court is also of opinion that the instruction prayed for as stated in the fifth exception ought to have been given. If the jury believed the facts offered in evidence by the plaintiffs, which were that, by the usage of the trade to Peru from any foreign port, it was necessary for the ship to have on board, on her return voyage, the Spanish and other material papers delivered by Baxter to Giles, then there was no such concealment of said papers as can affect the right of the plaintiff to recover in this action. In general, concealment of papers amounts to a breach of warranty. But when the underwriters know, or, by the usage and course of the trade insured, ought to know, that certain papers ought to be on board for the purpose of protection in one event, which, in another, might endanger the property, they tacitly consent that the papers shall be so used as to protect the property. The use of the Spanish papers was to give a Spanish character to the property in the Spanish ports; and, of the American papers, to prove the American character of the property to other belligerents. But to have exhibited the Spanish papers to a British cruiser, and thus to induce a suspicion that the property was belligerent, would have been not less improper than to have exhibited the proofs of American property in a port of Peru, and thus to defeat the sole object for which Spanish papers were necessarily taken on board.

§ 397. *Spaniard trading here before breaking out of war between England and Spain, and continuing here afterwards in trade, treated as an American merchant.*

6th. A majority of the court is also of opinion, that, under all the evidence in the cause, Baruso was to be considered as an American merchant, whether he carried on trade generally, or confined himself to a trade from the United States to the Spanish provinces. The circuit court, therefore, erred in making

the neutral character of Baruso to depend on the kind of trade in which he was engaged, instead of its depending on residence and trade, whether general or limited.

7th. The instruction of the circuit court to which the seventh exception was taken is obviously formed on a plain and total misconstruction of the former opinion of this court. In no part of that opinion has the idea been indicated that the interest of Baruso was a question solely for the consideration of the jury unaided by the judge. It is certainly a question on which it was proper for the judge to instruct the jury. The opinion given by this court was, that "if the jury should be of opinion that the Spanish papers, mentioned in the case, were material to the risk, and that it was not the regular usage of trade to take such papers on board, the non-disclosure of the fact that they would be on board would vitiate the policy; but if the jury should be of opinion that they were not material to the risk, or that it was the regular usage of the trade to take such papers on board, that they would not vitiate the policy." The instruction of the circuit court to the jury ought to have conformed to this direction. Instead of doing so, those instructions were to exclude entirely from the consideration of the jury the regular usage of trade. They refuse to allow any influence to a fact to which this court attached much importance. It is the unanimous opinion of this court that in giving this instruction the circuit court erred.

8th. The circuit court seem also to have varied from the directions formerly given by this court in the opinion to which the eighth exception is taken. This court placed the innocence or guilt of having on board the Spanish papers, mentioned in the case, on the regular usage of trade; the circuit court has made their innocence to depend on their being necessary.

The counsel for the defendants contends that this is a distinction without a difference; but it is impossible to say what difference this distinction might make with the jury. It is also the opinion of this court that in estimating the materiality of the papers to the risk, their effect, taken together, should be considered, not the effect of any one of them taken by itself.

§ 398. *Statements of one letter referred to in another laid before underwriters are notice.*

9th. The opinion which the court refused to give, to which refusal the ninth exception is taken, depends on several distinct propositions which must be separately considered.

The letter on which this insurance was made contains a direct reference to a previous letter written by Church and Demmill, which was laid before the company for a description of the ship. The first question to be considered is, did this reference make it the duty of the directors to see that letter, and are they, without further proof, to be considered as having read it. The letter was addressed to, and it is to be presumed remained in the possession of, the agent who made this insurance.

It is a general rule that a paper which expressly refers to another paper within the power of the party gives notice of the contents of that other paper. No reason is perceived for excepting this case from the rule. It is fairly to be presumed that, on reading the letter of Gilchrist, the board of directors required the agent of the plaintiffs to produce the letter of Church and Demmill, unless they retained a recollection of it. In that letter they were informed that the vessel had sailed for Lima, with liberty to go to

one other port in South America, and that "she had permission to trade there." What was the amount of the information communicated by this letter?

The permission to trade was unquestionably a permission granted by the authority of the country. It was a permission from the Spanish government. But whether this permission was evidenced by a license, or by other means, was to be decided by other testimony; whether it conveyed notice to the underwriters that such a license was on board the ship, depends, in the opinion of part of the court, on the usage of the trade. Those who entertain this opinion think that, as this was submitted to the jury, the court committed no error in refusing to say that the defendants were to be considered as knowing that the *Herkimer* sailed with a Spanish license on board. In estimating the increase of risk, it was certainly the duty of the jury to consider it as a voyage known to the underwriters to be carried on for the purpose of trading to Lima, and that the *Herkimer* had such papers on board as were usual in such a trade, but whether the license be such a paper or not, the jury were to judge as of other facts.

A majority of the court, however, is of a different opinion. The underwriters, having full notice that the voyage was permitted, might fairly infer that it was licensed by the Spanish government; because in no other way would it be permitted. The whole question turned upon the construction of a written document which it belonged to the court to make.

§ 399. *Usage provable by parol, though documentary.*

11th and 13th. The eleventh and thirteenth exceptions may properly be considered together, since they are taken to opinions given on the same subject, and do not essentially vary from each other. The circuit court appears to have supposed that the general usage and course of trade could not be given in evidence, or, if given in evidence, ought to be disregarded if the jury should be of opinion that such usage was founded on the laws or edicts of the government of the country where the usage prevailed. That is not the opinion of this court. The usage may be proved by parol, and the effect of the usage remains the same, whether it originated in an edict or in instructions given by the government to its officers. Any conjectures which the jury or the witnesses may make on this subject can be of no importance, and ought to have no influence on the case. Neither can it be more necessary to give notice of a usage founded upon statute, than of a usage founded on instructions. The circuit court, therefore, erred in directing the jury that the underwriters were not bound to take notice of the usage of trade, if they should be of opinion that the trade was prohibited by the law of Spain.

20th. The opinion of the circuit court to which the twentieth exception was taken appears to be entirely correct.

§ 400. *Acts done under usage, to avoid confiscation, do not avoid policy.*

24th and 25th. The twenty-fourth and twenty-fifth exceptions are to the same opinion, somewhat varied in form, and rendered more explicit, on the application of the plaintiffs, than it had been in the instruction given on the motion of the defendants. It is essentially the same with that to which the seventh exception was taken, and appears to have been founded on a total misapprehension of the former opinion given by this court. In that opinion it was expressly stated that such papers as, conformably to the regular usage of trade, were to be taken on board a vessel, would not vitiate the policy. "The acts done by the insured to avoid seizure and confiscation under the

laws and regulations of the Spanish government," which are mentioned in the application made to the court by the counsel for the defendants, comprehend these papers. This question, therefore, was decided by this court on the former argument of this cause, and the court is now unanimously of opinion that the circuit court erred, both in granting the prayer of the defendants and refusing that of the plaintiffs.

§ 401. *Increase of risk of capture may avoid policy.*

28th. In the opinion to which the twenty-eighth exception was taken this court concurs with the circuit court. The direction asked by the counsel for the plaintiffs ought not to have been given. It is expressed in terms which, if assented to, might misguide the jury. Rightful capture, according to the law of nations, might be construed to mean capture for a cause which would justify condemnation, according to the law of nations as construed in the United States. But capture will always be made on suspicion of what the belligerent construes to be cause of forfeiture, and capture authorizes abandonment. Such acts or missions, therefore, of the plaintiffs, as would induce a capture and detention according to the common practice of the belligerents, are proper for the consideration of the jury in estimating the risk.

This court is of opinion that there is error in the proceedings of the circuit court in this cause, in refusing to give the opinion on which that court was divided; and also in the opinions to which the fifth, sixth, seventh, eighth, ninth, eleventh, thirteenth, twenty-fourth and twenty-fifth exceptions are taken. This court doth therefore reverse and annul the judgment rendered by the circuit court, and doth remand the cause to the said court, that a *venire facias de novo* may be awarded, and other proceedings had therein according to law.

Opinion by MR. JUSTICE STORY.

I concur in the judgment of reversal which has just been pronounced. But as in some instances I differ from the opinions expressed by the majority, and in others I concur upon grounds somewhat variant, I have ventured to express my own views at large upon the important points which have been so fully and ably argued.

§ 402. *What constitutes a representation.*

The first question which presents itself is on the certificate of division. To constitute a representation there should be an explicit affirmation or denial of a fact, or such an allegation as would irresistibly lead the mind to the same conclusion. If the expressions are ambiguous, or such as the parties might fairly use without intending to authorize a particular conclusion, the insured ought not to be bound by the conjectures, or calculations of probability, of the underwriter. The latter, if in such case he deems the facts material, ought to make further inquiries. In the letter of the 26th of March, 1806, there are no words negating the existence of other interests than those of the plaintiffs and Messrs. Griswold and Baxter.

The negative, if any, is to be made out by mere inference or probable conjecture, and as there is no reason to suppose that the statement was made with that intent, I am satisfied that it did not amount to a representation negating the existence of such interests. The court below ought, therefore, to have given the direction prayed for by the plaintiff's counsel.

But, even admitting that the letter did contain the representation contended for, I am well satisfied that it was substantially true. It is not pretended that any other person except Baruso had any interest in the cargo; and it is very

clear that, whatever might be his contingent interest in the possible profits of the voyage, he had no vested interest in the cargo itself. He was not a partner, for he wanted one of the essential characteristics of partnership, a direct vested interest in the joint funds. He possessed a mere possibility, which, in the successful termination of the voyage, might entitle him to a right of action for a proportion of the profits; or, in a specified case of election, to take a proportion of the property itself. But it was not such an interest as was liable to capture, or such as could be claimed or condemned in a prize court. It was less certain than even a *respondentia* or bottomry interest, which have not been allowed to be asserted before the prize jurisdiction. The commissions of a supercargo upon the sales might, with as much propriety, be deemed a vested interest in the cargo consigned to his care.

I pass over, for the present, the fifth exception.

The sixth exception points to the national character of Baruso. As Baruso emigrated from Spain to the United States during a time of peace, no question arises as to the ability of a belligerent subject to change his national character *flagrante bello*.

§ 403. *National character of person depends on domicile.*

It is clear, by the law of nations, that the national character of a person, for commercial purposes, depends upon his domicile. But this must be carefully distinguished from the national character of his trade. For the party may be a belligerent subject and yet engaged in neutral trade; or he may be a neutral subject and yet engaged in hostile trade. Some of the cases respecting the colonial and coasting trade of enemies have turned upon this distinction.

But whenever a person is *bona fide* domiciled in a particular country, the character of the country irresistibly attaches to him. The rule has been applied with equal impartiality in favor of and against neutrals and belligerents. It is perfectly immaterial what is the trade in which the party is engaged, or whether he be engaged in any. If he be settled *bona fide* in a country with the intention of indefinite residence, he is, as to all foreign countries, to be deemed a subject of that country. Without doubt, in order to ascertain this domicile, it is proper to take into consideration the situation, the employment, and the character of the individual. The trade in which he is engaged, the family that he possesses, and the transitory or fixed character of his business, are ingredients which may properly be weighed in deciding on the nature of an equivocal residence or domicile. But when once that domicile is fixed and ascertained, all other circumstances become immaterial.

The prayer of the plaintiffs, which was refused by the court, in effect asked that if Baruso was *bona fide* settled in New York, and had no domicile elsewhere, he was not to be considered as a belligerent. The court in effect declared that the character of his trade, and not his mere domicile, fixed his national character. There was, therefore, error both in the refusal and in the direction of the court.

§ 404. *Increase of risk.*

The seventh exception arose from a misconception of the opinion of the supreme court. The court did not mean to intimate that whether an interest increased the risk or not was a mere question of fact for the jury. On the contrary, the court considered that it was a mixed question of law and fact, on which the court was bound to direct the jury as to the law. As the court below were of opinion that Baruso was not a joint owner of the cargo, in which opinion I concur, the question ought not to have been left to the jury

in the broad and unqualified terms which are used. Strictly and legally speaking, Baruso had no interest in the cargo; and therefore "his interest could not be material to the risk;" and if the point, meant to have been left to the jury, was, whether the concealment of the name or the possibility of interest of Baruso increased the risk, it should have been left with proper directions as to the effect of the usage of trade and neutral character of Baruso, in settling that question. If the usage of trade allowed or required such cover, or if Baruso were a neutral, I am not prepared to say that, in point of law, the risk could thereby have been increased. It would have been a mere inquiry into the possible hazards from the rapacity of belligerents, or the possible effects of one Spanish name instead of another. Men reason differently upon such speculations.

Nor am I prepared to say that it is ever necessary for the assured to declare the national character of other distinct interests engaged in the same adventure, unless called for by the underwriter. If such interests are not warranted or represented to be neutral, the underwriter must be considered as calculating upon the possible existence of belligerent interests, or as waiving any inquiry.

§ 405. *Concealment of papers.*

The fifth and eighth exceptions may be considered together as they are founded upon the legal effect of the taking on board and the concealment of the papers, by Baxter, from the belligerent cruiser. The prayer of the plaintiffs in the fifth exception was for a direction that, under all the circumstances of the case, there was no such concealment as would avoid the plaintiff's right to recover. And if, in point of law, the plaintiffs were entitled to such direction, the court erred in their refusal, although the direction afterwards given by the court might, by inference and argument, in the opinion of this court, be pressed to the same extent. For the party has a right to a direct and positive instruction; and the jury are not to be left to believe in distinctions where none exist, or to reconcile propositions by mere argument and inference. It would be a dangerous practice, and tend to mislead instead of enlightening a jury.

The opinion of the court in effect was, that the concealment of any papers, which were necessary to be on board by the usage and course of the trade, did not affect the plaintiff's right to recover. But in conformity with the prayer of the defendants in the eighth exception, that if any of the papers increased the risk, and were not necessary by the usage and course of trade, and the fact that such papers would accompany the cargo was not disclosed to the underwriters, the plaintiffs were not entitled to recover.

It is undoubtedly true that the warranty of neutrality extends, not barely to the fact of the property being neutral, but that the conduct of the voyage shall be such as to protect and preserve its neutral character. It must also be conceded that the acknowledged belligerent right of search draws after it a right to the production and examination of the ship's papers. And if these be denied, and the property is thrown into jeopardy thereby, there can be no reasonable doubt that such conduct constitutes a breach of the warranty.

Concealment and even spoliation of papers do not ordinarily induce a condemnation of the property; but they always afford cause of suspicion, and justify capture and detention. In many cases the penal effects extend in reality, though indirectly, to confiscation. For if the cause labor under heavy doubts, if the conduct be not perfectly fair, or the character of the parties is not fully disclosed upon the papers before the court, the concealment or spoli-

ation of papers is made the ground of refusing further proof to relieve the obscurity of the cause, and all the fatal consequences of a hostile taint follow on the denial.

But the question must always be whether there be a concealment of papers material to the preservation of the neutral character. It would be too much to contend that every idle and accidental or even meditated concealment of papers, manifestly unimportant in every view before the prize tribunal, should dissolve the obligation of the policy. And if by the usage and course of trade it be necessary or allowable to have on board spurious papers covered with a belligerent character, whatever effect it may have upon the rights of the searching cruiser, it would be difficult to sustain the position that the concealment of such papers, which, if disclosed, would completely compromise or destroy the neutral character, would be a breach of the warranty. In such case, the disclosure of the papers produces the same inflamed suspicions, the same legal right of capture and detention, the same claim for further proof, and the same right to deny it, as the concealment would. If the concealment would induce the conclusion that the interest was enemy's, covered with a fictitious neutral garb, the disclosure would not in such a case less authorize the same conclusion. In such case, it would depend upon the sound discretion of the court, under all the circumstances of the case, to allow the veil to be drawn aside, and admit or deny the claimant to assume his real character. Whenever, therefore, the underwriter has knowledge and assents to the cover of neutral property under belligerent papers, as he does in all cases where the usage of the trade demands it, he necessarily waives his rights under the warranty so far as the visiting cruiser may demand the disclosure of such papers. In other words, he authorizes the concealment in all cases where it is not necessary to assume the belligerent national character for the purpose of protection.

If this view be correct, it is clear that the court ought to have given the direction prayed for by the plaintiffs. Sitting here under a clause in the policy which enables us to look behind the sentence of condemnation, we see that the property was really neutral; and if the jury believed the evidence, the concealment was of papers which were authorized by the course of trade for the voyage, and so far from giving a hostile character, was the only means of preventing a strong presumption of that character. If we but consider the known course of decisions in the British courts on questions of this nature, we shall find that, independent of the question of the neutral or hostile character of the ostensible owner, the trade between the belligerent mother country and its colony affects with condemnation the property engaged in it, although such property be neutral, and there be an interposition of a neutral port in the course of the voyage. On examining the papers in this case, it will be found that they point, though obscurely, to such an ultimate destination. And at all events the existence of contradictory papers, one set American, the other Spanish, would, in a Spanish trade, afford an almost irresistible inference in a prize court that the property was really Spanish. *Noscitur ab origine*. It would take its character from its origin.

But it is immaterial, in my view, whether a prize court would, under such circumstances, acquit or condemn. When the cover of a Spanish character was allowed, it was allowed for the purposes of protection, and the disclosure of it was not required elsewhere than in the Spanish dominions. One of the risks against which the insured meant to guard himself was, in my judgment,

a loss on account of the use of the Spanish character, a loss which might have been more plausibly resisted if there had been a disclosure instead of a concealment of it.

The court also erred in declaring, in the eighth exception, that the taking on board of any of the papers which were not necessary by the usage of the trade, if the risk thereby were increased, avoided the plaintiff's right to recover. The effect of the whole papers should have been taken together. The evidence did not authorize the court to consider and separate the effect of each single paper. If one unnecessary paper might have increased the risk, if singly considered, and yet, if accompanied by the others, it would not have had that effect; certainly the existence of that paper with the others would not have destroyed the right of the plaintiffs. Yet the opinion of the court would have authorized the jury to draw a different conclusion.

The court should have directed the jury that if the papers were authorized by the usage and course of the trade, the concealment of them, under the circumstances, did not vitiate the policy; and that if some were authorized and others not, yet the possession or concealment of the latter with the former did not vitiate the policy unless the unauthorized, so connected with the authorized, papers increased the risk.

§ 406. *Notice.*

The question presented by the ninth exception is whether the defendants are to be considered as having notice that the voyage insured was to be pursued under a Spanish license. The letter of the 26th March, 1806, expressly refers to the letter of 17th of February, 1806, which had been laid before the underwriters, and they must, therefore, be deemed conversant of all the facts therein stated. A party shall be taken to have notice of all facts of which he has the means of knowledge in his own possession, or is put directly upon inquiry by reference to documents submitted to his inspection. In the letter of the 17th February, the ship is declared to have a permission for the voyage, which, in this trade, can be understood in no other sense than a license. The court ought, therefore, to have given the direction prayed for by the plaintiffs.

§ 407. *Usage.*

The court erred in the opinion expressed in the eleventh exception. The course and usage of trade may in all cases be proved by parol, whether such course and usage of trade arise out of the edicts or out of the instructions of the government, and whether the trade be allowed or prohibited by such edicts or instructions.

The court erred also in the latter part of their direction to the jury under the thirteenth exception. It was immaterial whether the trade was or was not prohibited by the laws of Spain. In either case the underwriters were bound to take notice of the usage and course of the trade. The public laws of a country, affecting the course of the trade with that country, are considered to be equally within the knowledge and notice of all the parties to a policy on a voyage to such country.

The twentieth exception cannot be supported. The opinion of the court was entirely correct.

The twenty-fourth and twenty-fifth exceptions ought to be considered together in order to present the opinion of the court below with its full effect. It is clear that any acts done by the assured in the voyage according to the course and usage of the trade, although such acts may increase the risk, do not vitiate the policy. This opinion was pronounced by this court on the

former argument of this case, in reference to the Spanish papers to which the present application of the defendants obviously pointed. The court, therefore, erred in granting the prayer of the defendants and in refusing that of the plaintiffs.

§ 408. *Enhancement of danger of capture.*

The last (the twenty-eighth) exception cannot be sustained. The proposition is conceived in too general terms, and might mislead the jury. Any acts or omissions of the insured or his agents which, according to the known edicts or decisions of the belligerents, though not according to the law of nations, would enhance the danger of capture or condemnation, might, if such acts or omissions were unreasonable, unnecessary or wanton, form a sound objection to the right of recovery. The insured can have no right to jeopardize the property by any conduct which the fair objects of the voyage or the usage of the trade do not justify.

OHL v. EAGLE INSURANCE COMPANY.

(Circuit Court for Massachusetts: 4 Mason, 390-396. 1827.)

Opinion by STORY, J.

STATEMENT OF FACTS.—The points now made, on the motion for a new trial, do not substantially differ from those made at the former trial, although the form in which they are presented gives them a broader aspect than the ruling of the court would warrant. I do not go over the facts, because they are to be found in the report of the trial [4 Mason, 172]; and nothing material now turns upon them. The ship sailed on the voyage insured, with every document on board, proving a joint title in Ohl (the plaintiff) and Remington, the master. The bill of sale was in their joint names; the ship's register, and the oath taken by Ohl at the custom-house, all establish the same fact. There was no attempt made to prove, by any writing or otherwise, that the ownership was not in equal moieties in Ohl and Remington, if Remington had any title at all. The object of the testimony was to establish an exclusive title in Ohl, by parol, unwritten evidence, in opposition to the ship's papers and the bill of sale; to prove that the whole purchase money was paid by Ohl; that the bill of sale was in their joint names by mistake; and that the register was taken out, and the oath taken by Ohl by mistake. That, under such circumstances, there was an exclusive, legal, proprietary interest of the whole ship in Ohl; or that, at all events, there was a constructive trust as to the moiety in the name of Remington, which, though existing only in personal confidence, and to be established only by parol proof, was yet sufficient to entitle Ohl to recover the value of the whole ship, as an equitable interest.

§ 409. *Evidence of the ship's papers as to title not to be affected by parol.*

At the trial I thought, and still think, that such proof of interest was wholly inadmissible to establish the plaintiff's title, in opposition to the ship's papers under which she was navigating for the voyage. The legal title must be deemed, so far as underwriters are concerned, to be truly exhibited on the ship's papers; and it appears to me that it would introduce the most loose and inconvenient practice to suffer any person to set up a parol title, as a ground of recovery against underwriters, without any prior notice of the nature of the interest intended to be insured.

First, it is said that a sale of a ship is good by parol contract, without any writing to evidence the transfer; and that it is sufficient if there be a deliv-

ery to, and possession by, the vendee. If this be so, it may well be doubted if it can apply to a case where there is a bill of sale, and the possession and navigation of the ship is precisely in conformity to the bill of sale; for there the parol contract contradicts and controls the documentary evidence of title.

But I am not prepared to admit that a transfer of a ship is good without a bill of sale, or some written contract of sale, at least as to third persons. It is true that a ship is personalty, and ordinarily personal property may pass by delivery. But the proposition itself is not, or perhaps may not be, universally true, under all circumstances. In respect to ships a different course has, from the earliest times, prevailed. The general practice, I believe, of all civilized nations, has been to evidence the title to them by a bill of sale, or other written document. The nature of the vehicle, the interests of trade and navigation, and the necessity of furnishing, in foreign ports and upon the ocean, some proofs of property beyond mere possession, have probably led to the adoption of this practice. I have not been able to find a single case in English jurisprudence in which it has been held that a ship might pass, by mere delivery, without any document in writing of actual ownership. In *Rolleston v. Hibbert*, 3 T. R., 406, the very point was made by counsel. Lord Kenyon, on that occasion, said: "It was first contended that it is not necessary that the property in a ship should pass by a written instrument. On that point I give no opinion, because it is not necessary. But certainly, if the parties choose to convey by a written instrument, that shows what the intention and the rights of the parties are; and they shall not afterwards be permitted to refer to any other agreement." The strong application of this language to the facts of the present case cannot escape observation. Mr. Chief Justice Abbott, in his excellent work on Shipping (part 1, ch. 1), says: "This species of property (that is, *ships*) appears, from very early times, to have been evidenced by written documents, *and at present always is so*, which other movable goods rarely are;" and he thus confirms the doctrine of Lord Stowell in *The Sisters*, 5 Rob., 138. Mr. Jacobsen deduces the same as the general maritime usage of commercial nations, and adds, that "at all times the property in vessels was only known by such written evidence as is not required of other movable property in market overt." Jacobsen, *Sea Laws*, B. 1, ch. 2, p. 21. See, also, *Ex parte Hallcett*, 19 Ves., 474. I own, therefore, that I am not yet satisfied that the doctrine that a bill of sale is necessary to pass a title is either new or unfounded in principle. In the case of *Lamb v. Durant*, 12 Mass., 54, there is indeed a *dictum* to the contrary; but the case itself turned entirely upon a different point—the right of one partner to convey a good title to a ship owned by the firm. A like *dictum* is found in *Taggard v. Irving*, 16 Mass., 336; but there again the question before the court did not turn upon any such consideration; for the only point was, whether barratry could be committed by the master, who had hired the vessel for the voyage. The court very properly decided that it could not. In *Oliver v. Greene*, 3 Mass., 133, there was a charter-party, which constituted the part owner the sole owner for the voyage. The same fact existed in *Bartlet v. Walter*, 13 Mass., 267. If this were a case depending upon the local law of Massachusetts, the doctrine, asserted by the state court, even incidentally, would doubtless be entitled to very great respect. But the present case either turns upon the law of Pennsylvania or, as may be fairly presumed, upon principles of general, if not universal, jurisprudence.

The New York cases relied on at the bar are distinguishable. In *Kenny*

v. Clarkson, 1 Johns., 385, there was a written contract of sale, and the ship's papers were, by the consent of the parties, to remain until all the purchase money was paid. *Wendover v. Hogeboom*, 7 Johns., 308; *Leonard v. Huntingdon*, 15 Johns., 298; *Champlin v. Butler*, 18 Johns., 169, are disposed of by the single remark that the sole question was whether the party in possession as owner, ordering repairs, or engaging mariners, was liable for compensation, or the mere registered owner, who had neither expressly nor impliedly made the contract, nor authorized the expense. Upon the plainest principles of justice, the former was held exclusively liable. The case of *Murgatrod v. Crawford*, 3 Dall., 491, cannot be deemed an authority, for it was overruled in *Duncanson v. McLure*, 4 Dall., 308. The case of *United States v. Willing*, 4 Cranch, 48, turned upon the construction of a statute of the United States; and no point was made as to the sufficiency of what is called the parol sale, in that case, to transfer the title of part of a ship while at sea. Without a more clear and decisive course of authority to the contrary, I confess myself unwilling to desert the opinion held by Lord Stowell, and recognized at the trial, that a written document is the proper and necessary evidence of the title of transfer of a ship which navigates the ocean.

But the present case does not turn upon that point. For here there was a written transfer, and the attempt is to set up a parol title to control the written documents. I think such evidence inadmissible. In *Carroll v. The Boston Marine Insurance Company*, 8 Mass., 515, the court rejected proof of title of ownership, inconsistent with the ship's papers and bill of sale. The court said, "every document proves an absolute transfer; and these documents must be conclusive in establishing the property of the vessel between the parties." A doctrine somewhat analogous was held by the court in *Robinson v. McDonnell*, 2 Barn. & Ald., 134. My opinion is that it stands upon a principle commended by the soundest policy and justice.

§ 410. *Notice of equitable interest required.*

I agree that an equitable interest is an insurable interest. Whether it binds the underwriter to answer for any loss, when its peculiar nature is not disclosed, and the terms of the insurance are strictly applicable to legal interests; and whether there would be any difference in such case, if the disclosure were not material to the risk, are questions upon which I give no opinion. I am not unaware of the bearing of some of the cases cited at the bar on these points (13 Mass., 61; *id.*, 267; 3 Mass., 133; 1 Johns., 385); but I shall be scrupulous in avoiding any decision on them until they constitute the very point in judgment. Whatever may be the general rule on this subject, in ordinary cases, I am of opinion that an insurance on a ship is to be deemed, unless a special explanation is given, to be an insurance on the legal interest, and not on a mere equitable interest, as contradistinguished from the legal interest of the ship; and at all events not an insurance upon a mere private, verbal trust, in opposition to the ship's papers and the overt acts of the parties. If such an interest is to be insured, it ought to be disclosed. The nature of such a title must ordinarily be material to the risk; and if by possibility it be not so, still it cannot be fairly presumed to be within the intention of the underwriter upon the common terms of a policy on a ship. In the absence of all explanation I think those terms must be understood to apply to a legal interest, and not to a mere parol trust or equity.

§ 411. *Ship's papers are according to legal ownership.*

I confess myself also to be strongly of opinion that there is, in every case of

this nature, an implied representation that the ship's papers are according to the real legal ownership. No one has a right to say that the true character of the ship and the representation of the genuine interest of the parties to the insurance are not, or may not be, material to the underwriter in estimating his risk. No one has a right to suppose that in case of loss the underwriter is to be responsible, not according to the legal import of the ship's papers, but to verbal engagements and parol trusts, which are susceptible of being shaped according to events. In what manner could the underwriters, in this very case, assert an exclusive ownership upon an abandonment against Remington? The effect of the acts of the master, being a part-owner, might be very important in the consideration, not only of questions of peril and revenue, but of the general conduct of the voyage. If the underwriter is not put upon any inquiries of this nature by any disclosure of a special interest or special ownership, he has a right to suppose that the parties deal with him upon the naked avowal of legal titles.

My judgment accordingly is, that there is no ground for a new trial; that the legal title in the ship is not, and cannot be, varied by any parol evidence; and that the plaintiff must be deemed the owner of a moiety of the ship only, there being no document, contract, or writing, which in any shape controls the ordinary presumption of ownership arising upon the bill of sale.

Motion overruled.

§ 412. **Seaworthiness.**—There is a warranty of seaworthiness of a vessel for such a voyage as the vessel was engaged in at the time of the disaster. *Adderly v. American Ins. Co.*,* Taney, 126.

§ 413. But such seaworthiness is presumed until the contrary is shown. *Ibid.*; *Bullard v. Roger Williams Ins. Co.*,* 1 Curt., 148.

§ 414. In a libel by the owners on a charter-party for refusing to furnish a cargo, on the pretext that the ship was unseaworthy, the burden of proving the seaworthiness is upon the owners. *White v. Jones*,* 21 Law Rep., 616.

§ 415. **Same—Time policy.**—In a time policy of marine insurance, effected on a vessel then in port, and to be employed at sea during the continuance of the policy, there is an implied warranty that the vessel shall be seaworthy when she commences the voyages in which she is to be employed. *Rouse v. The Insurance Co.*,* 25 Law Rep., 523.

§ 416. A vessel insured by a time policy must, under California law, be seaworthy when the voyage insured begins. *Pope v. Swiss Lloyds Ins. Co.*,* 6 Saw., 533. Where a vessel is seaworthy at the time the voyage commences, the policy is valid though she was not seaworthy at the time the risk commenced. If the vessel is not sufficiently manned she may supply the want after the risk commences, if she can do so without a deviation. *Cruder v. Pennsylvania Ins. Co.*,* 2 Wash., 339.

417. **Same.**—The law does not require a vessel to be so strong as not to receive injury from any state of the winds and sea which may ordinarily be expected in the voyage for which she is insured. *Bullard v. Roger Williams Ins. Co.*,* 1 Curt., 148.

§ 418. For a ship to be seaworthy for the voyage she must be manned by a competent master and crew. *White v. Jones*,* 21 Law Rep., 616.

§ 419. It is a breach of the warranty of seaworthiness for a vessel to leave her port of lading abroad, or any intermediate return port, with a crew inadequate to man or sail her. The act is not justified if it be exceedingly difficult, or even impossible, to procure competent hands to man her. The obligation to supply a sufficient crew is absolute on the owner and master, and continues during the voyage. *The Bark Gentleman, Olc.*, 110. *The Gentleman*, 1 Blatch., 196, reverses the case, but not specifically this point.

§ 420. **Same—Pilot.**—That a United States vessel has not a licensed pilot does not render her unseaworthy. *Hathaway v. St. Paul Ins. Co.*,* 1 McC., 26.

§ 421. **Same—Subsequent facts.**—If a vessel, after she begins her voyage, becomes unfit to prosecute it, without having been exposed to any extraordinary peril, this may afford so strong a presumption of want of seaworthiness at her departure as to require strong evidence to repel the presumption. *Cort v. Delaware Ins. Co.*,* 2 Wash., 375.

§ 422. **Same.**—Where, without having encountered any tempestuous weather, a vessel suddenly sprung a leak within less than twenty-four hours after leaving port, so that her officers

were compelled, in order to save her from sinking, to throw over more than one-third of her cargo, the presumption arose that she was unseaworthy when she started, and threw on the claimants the burden of proof that she was seaworthy. *The Planter*, 2 Woodg., 490.

§ 423. The unseaworthiness of a vessel at a particular time does not prove her unseaworthiness three weeks or more before. *Marine Ins. Co. v. Wilson*,* 3 Cranch, 187.

§ 424. When the question of seaworthiness is in issue, evidence of the performance of voyages immediately before or after that contemplated is inadmissible, except so far as it may afford just inferences as to her actual condition at the time. *White v. Jones*,* 21 Law Rep., 616.

§ 425. Same.—The necessity of repairs for wear and tear in the course of a voyage does not impair the warranty of seaworthiness. *Donnell v. Columbian Ins. Co.*,* 2 Sumn., 366.

§ 426. Same—Premium.—If a vessel insured was not seaworthy when the risk began, the premium, if paid, cannot be retained. *Scriba v. Insurance Co.*,* 2 Wash., 107.

§ 427. Same—Acts of master—Survey.—If the master, being part owner, invites and acquiesces in a survey and irregular condemnation of his vessel as unseaworthy, the act is binding upon the owners. *Janney v. Columbian Ins. Co.*,* 10 Wheat., 411.

§ 428. A finding by a survey that the vessel is not worth repairing falls within the meaning of the "rotten" stipulation. *Ibid.*

§ 429. Same—Survey.—A policy upon a vessel declared that if the vessel, "upon a regular survey, should be thereby declared unseaworthy, by reason of her being unsound or rotten, or incapable of prosecuting her voyage on account of being unsound or rotten," the underwriter should not be liable. Held, that the provision contemplated two objects: first, that a state of rottenness ascertained at any period of the voyage insured should be conclusive evidence of original unsoundness; secondly, that the determination of that fact by means of a regular survey should be received as conclusive evidence between the parties. *Dorr v. Pacific Ins. Co.*,* 7 Wheat., 581.

§ 430. Duty of barge—Carrier.—It is the duty of a carrier by barge to see that his barge is capable of resisting, without subjecting the cargo to injury by the external forces to which she is subjected in the ordinary course of navigation in the shallow waters, crooked channels and narrow currents of the river, constantly varying, as they are, in course and depth, as well as the frequent collisions which must take place with the sides of the towing steamboat. She must be so tight that the water will not reach the cargo, so strong that these ordinary applications of external force will not spring a leak or sink her, so sound that she will safely carry the cargo in bulk through these ordinary shocks to which she must every day be subjected. If she is capable of this she is seaworthy; if she is not, she is unfit for the navigation of the river. No other test can be given, and this must be determined by the facts in each particular case. *The Northern Belle*, 9 Wall., 526; *S. C., Steamboat Keokuk v. Home Ins. Co.*,* 2 Ch. Leg. N., 247.

§ 431. A warranty to sail under a particular license can be fulfilled only by showing the existence of a real operative license of the character warranted. *Craig v. United States Ins. Co.*,* Pet. C. C., 410.

§ 432. Neutrality.—The meaning of the warranty of neutrality is, that the property is neutral in fact, and shall be so in appearance and conduct, that the property shall belong to neutrals, that it shall be so documented as to prove its neutrality, and that no act of the assured or his agents shall be done which can legally compromise its neutrality. *Schwartz v. Insurance Co.*,* 3 Wash., 117.

§ 433. Same.—The laws of nations do not prohibit carrying enemies' goods in neutral vessels; so far from that, the vessel is entitled to freight upon the condemnation of the goods. *Ibid.*

§ 434. But if a neutral endeavors, by false appearances, to cover the property of a belligerent from seizure, such conduct identifies the neutral with the belligerent; and the increase of risk of being carried in for adjudication is produced by a fraud on the neutrality of the party's own government and upon the rights of the belligerent. *Ibid.*

§ 435. Same.—It is a breach of warranty of neutrality that a vessel and cargo, warranted American property, shall be navigated and claimed as Spanish property, and that all the evidence to prove the neutrality is concealed from the captors. *Calbreth v. Gracy*,* 1 Wash., 219.

§ 436. It is not enough in such case that the property should in fact be neutral; it is bound to the conduct of a neutral. *Ibid.*

§ 437. Same—Disclosure.—If the owner of belligerent goods desire insurance thereon, he must disclose the fact that they are belligerent. *Marshall v. Union Ins. Co.*,* 2 Wash., 452.

§ 438. Same.—The carrying of belligerent goods uninsured increases the risk of seizure of neutral goods insured, and hence the fact should be disclosed. *Ibid.*; *Bauduy v. Union Ins. Co.*,* 2 Wash., 391.

§ 439. Same—False papers.—Contracts made with underwriters in relation to property of belligerents, covered as neutral, have always been enforced in the courts of a neutral country,

where the true character of the property, and the means taken to protect it from capture, have been fairly represented to the insurers. The same doctrine has always been held where false papers have been used to cover the property, provided the underwriter knew, or was bound to know, that such stratagems were always resorted to by the persons engaged in that trade. So of the continuation of the same disguise after capture, in order to prevent the condemnation of the property, or to procure compensation for it, where it has been lost by reason of the capture. Such contracts have always been held lawful in the courts of a neutral country. *De Valengin v. Duffy*, 14 Pet., 282.

§ 440. Same—"Under cover."—A representation that cargo is to be "under cover" as American is complied with by its becoming actually American. In such case the disguise may be removed. *Hughes v. Union Ins. Co.*,* 8 Wheat., 294.

§ 441. Same—Construction of warranty.—Plaintiffs were insured for whom it might concern, as follows: "\$10,000, viz., \$2,326 on the cargo, \$1,860 on the freight, and \$5,814 on the profits, on board the brig *Dick*, freight valued at \$30,000, and profits at \$25,000, premium included, at and from her port or ports of loading in Europe to, at, and from any port or ports. . . . Warranted American property. It is understood that the assured are owners of the cargo, but the valuation of freight and profits hereby agreed to shall be binding, whether the lading of the vessel is the property of the assured or of others, or whether, at the time of the loss, there shall be any cargo on board or not." Held, that the warranty extended to all the cargo put on board, on which the policy was to attach. *Quære*, whether it did not apply to all the subjects insured. *Bayard v. Massachusetts Ins. Co.*,* 4 Mason, 256.

§ 442. Same—Registry.—Where the policy contains no warranty of the national character of the insured vessel, and she has been newly registered, the certificate of registry is only evidence of her ownership. *Ocean Insurance Co. v. Polleys*, 13 Pet., 157.

§ 443. Same.—The register of a vessel is the only document which need be on board during a period of universal peace, in compliance with the warranty of national character. *Catlett v. Pacific Ins. Co.*,* 1 Paine, 594.

§ 444. Same—Increase of risk.—It seems that if a vessel be described in the policy to be a prize vessel, and afterwards her national character be changed so as to increase the risk, the underwriter is discharged. *Seamans v. Loring*, 1 Mason, 127 (§§ 664-69).

§ 445. Same—Foreign judgment.—The stipulation in a policy of marine insurance where proof is to be made of the warranty of nationality is not set aside by the sentence of a foreign court against the truth of the warranty but the same may be vindicated here notwithstanding. *Sperry v. Delaware Ins. Co.*,* 2 Wash. 243.

§ 446. False information given an underwriter by the assured will, if material, avoid the contract, though it was volunteered, where it would have been the subject of an implied warranty had it not been given. *Bulkley v. Protection Ins. Co.*, 2 Paine, 83 (§§ 735-88).

§ 447. Materiality.—Everything which concerns the state of the vessel at any particular period of the voyage is material to the risk. *Coles v. Marine Ins. Co.*,* 3 Wash., 159. A misrepresentation in a valued policy, as to the age and size of the vessel, is not material. *Straas v. Marine Ins. Co.*,* 1 Cr. C. C., 343.

§ 448. A fraudulent overvaluation and misrepresentation of the subject-matter of insurance will avoid a policy of insurance, and although the overvaluation and misrepresentation afford no conclusive proof of fraud, they afford a very strong presumption of it. *Ocean Ins. Co. v. Fields*, 2 Story, 59.

§ 449. An innocent overvaluation of property in a policy will not avoid the contract. *Hodgson v. Marine Ins. Co.*,* 5 Cr., 100.

§ 450. Time of sailing.—Certain evidence as to the time of the sailing of a vessel held to show a misrepresentation such as would avoid the policy, and this whether innocent or not. *Baxter v. New England Ins. Co.*,* 3 Mason, 96.

§ 451. Misrepresentation of the age and tonnage of a vessel made in procuring the insurance is a defense at law in an action on the policy, and if the underwriter failed to set it up, he cannot for that reason have an injunction to restrain the execution of the judgment. *Marine Insurance Co. v. Hodgson*, 7 Cr., 332.

§ 452. Return of premium.—Fraud is an answer to an action for the return of premium, not from the merit of the defendant, but from the demerit of the plaintiff. *Schwartz v. United States Ins. Co.*,* 3 Wash., 170.

§ 453. If the assured, by deception, induces others to take a risk which, had the truth been disclosed, they would have refused, or taken only on other terms, it is such a fraud as will defeat an action for the return of the premium paid. *Ibid.*

§ 453a. Good faith required.—In contracts of insurance, good faith, a fair, open and candid conduct on the side of both parties is essential; a concealment of facts material to the risk, and within the knowledge of the insured, and which the insurer is not bound to know, vitiates the policy. *Vale v. Phoenix Ins. Co.*,* 1 Wash., 283.

§ 453b. It is the duty of the assured to represent truly to the underwriter every fact within his knowledge or power material to the risk, and if he omit to do so the policy is void. If he communicates all the information which he has honestly obtained he cannot be charged with misrepresentation or concealment if it should afterwards turn out that his informant knew more than he had disclosed, or had stated it untruly. If, for fraudulent purposes, he avoided obtaining a full and true disclosure, the consequence would be the same as if he had misrepresented the information given to him. *Biays v. Union Ins. Co.*, * 1 Wash., 506.

§ 453c. The burden is on the insurers to show that the insured had knowledge of the loss of his property before obtaining the insurance. If they claim that he was notified by letter they must show that the letter was sent and received. Knowledge of the loss by an agent of the insured, who was not an agent for any purpose connected with procuring insurance on the property, is not notice to the insured. (*Proudfoot v. Montefiore*, 2 Eng. L. R., Q. B., 511, distinguished.) *Clement v. Phoenix Ins. Co.*, * 6 Blatch., 482.

§ 454. The effect of a concealment depends upon its materiality, and that is a question for the jury. *Maryland Ins. Co. v. Ruden*, * 6 Cr., 388.

§ 455. It is material concealment not to disclose a letter communicating the time when a voyage begins. *Johnson v. Phoenix Ins. Co.*, * 1 Wash., 378.

§ 456. Concealment — Spanish supercargo. — Whether it was according to the course of trade to employ a Spanish supercargo, with Spanish papers and colors, in a particular case is for the jury; if it was, the underwriters cannot object that the fact was concealed. *Calbreath v. Gracy*, * 1 Wash., 219.

§ 457. Same — Prior insurance. — It is not necessary to give notice of prior insurance (unless the policy require). *Murray v. Insurance Co.*, * 2 Wash., 186.

§ 458. Same — Nature of risk. — The assured should disclose the nature of his interest to the underwriter. *Russel v. Union Ins. Co.*, 4 Dal., 421.

§ 459. Same. — Non-disclosure of the true nature of a risk to be re-insured or the property to be covered is a good defense to a policy of re-insurance. *Ocean Ins. Co. v. Sun Ins. Co.*, * 8 Ben., 272.

IV. SUBJECT OF INSURANCE: FREIGHT AND CARGO.

SUMMARY — *Ballast and dunnage*, §§ 460, 461. — *Round voyage*, § 462. — *Unearned freight*, §§ 463, 464. — *Delay to repack*, § 465. — *Substituted freight earned*, § 466. — *Duty of master to sell cargo*, § 467. — *Demand of cargo at intermediate port*, § 468. — *Freight pro rata itineris*, §§ 469, 470. — *"Outfits and catchings" in whale fishery*, §§ 471, 472. — *Trading and change of cargo*, §§ 473, 474.

§ 460. Ballast and dunnage are not cargo in contracts regulating the loading of a vessel. *Insurance Co. v. Thwing*, §§ 475-76.

§ 461. Any merchandise used as ballast or dunnage is, if freight be paid upon it, considered cargo. *Ibid.*

§ 462. Insurance of freight for a round voyage is insurance of the freight at risk at any time, either outward or homeward. *Insurance Co. v. Mordecai*, § 477.

§ 463. In an action upon a policy insuring freight of a steamer and barge against total loss of any part thereof, at and from St. Louis to New Orleans, the contract covers freight that would have been earned but for the loss of the barge. *Stillwell v. Home Ins. Co.*, § 478.

§ 464. Freight is not earned unless there is a right delivery, or a due and proper offer to deliver, the goods being in a condition to deliver. Hence in such cases there can be no lien for freight, available against an underwriter who has paid for a total loss of the goods. *Taylor v. Insurance Co.*, § 479.

§ 465. Insurance on freight on a voyage at and from New Orleans to Havana. The vessel was compelled to put back to New Orleans in consequence of an accident. The cargo, consisting principally of cotton, was so badly damaged that it would require several months to repack it in condition to be shipped, and it was sold by consent of the masters and shippers; and the vessel, having taken another cargo on board, proceeded on a different voyage. *Held*, that the underwriters were not liable. *Jordan v. Warren Ins. Co.*, §§ 480-87.

§ 466. Underwriters cannot avail themselves of freight earned in a new voyage, which they have not insured, by way of recompense for losses on another voyage which they have insured and which has already terminated. Hence where freight was insured at and from New Orleans to Havre, and the ship, meeting with an accident, put back, and another cargo to England was substituted, on which freight was earned, *held*, that the underwriters were not entitled to the freight of the substituted voyage as in the nature of salvage freight. *Ibid.*

§ 467. Where a cargo is so much injured as to endanger the ship and all, the master should

land and sell the cargo at the place where the necessity arises (if he can), though it might have been carried forward to the port of destination. *Ibid.*

§ 468. The shipper has no right to demand the cargo at an intermediate port without paying full freight, whether the property is damaged or not. *Ibid.*

§ 469. The underwriters upon a cargo are not liable for freight *pro rata itineris* to the owner of the vessel, who is also owner of the cargo insured, where the vessel and cargo are captured, the cargo abandoned to the underwriters and accepted as a total loss, the loss paid, the cargo condemned, restored on appeal, and the proceeds paid over to the underwriters. *Cage v. Baltimore Ins. Co.*, §§ 488-89.

§ 470. Freight *pro rata itineris* is not due unless the owner of the cargo voluntarily agree to receive it at a place short of its destination. *Ibid.*

§ 471. A policy of insurance upon "outfits," and upon "catchings" substituted for the outfits, in a whaling voyage, protects the blubber or pieces of whale fish cut from the whale and on deck. *Rogers v. Mechanics' Ins. Co.*, §§ 490-92.

§ 472. *Quære*, whether the blubber stowed on deck or stowed in the proper place below deck would be covered by a policy of insurance on "cargo." *Ibid.*

§ 473. A vessel had in an unlimited voyage policy permission to proceed to and trade at the Isle of France and any other port or ports in the Indian seas, and at and from the ports she might go to, back to New York. *Held*, the assured, if not restrained by usage, was not limited to taking in a return cargo at any of the ports at which he stopped, but that he had a right to dispose of his cargo at such ports, and to re-invest the proceeds in other cargo, and then to resell the latter, though the voyage might thereby be prolonged. *Winthrop v. Union Ins. Co.*, §§ 493-97.

§ 474. Changing a cargo insured for another cargo terminates the policy, and this not because of increase of risk, but because it is no longer the risk insured. If, however, the changing of the insured cargo was not attributable to the assured, by being done by himself or by his agents, the case may be different. Thus, where all the officers of an American vessel having died, the vessel was taken into a port by one of the seamen, where her insured cargo was disposed of by the American consul, the vessel thence dispatched homewards by him under an English captain, and lost on the way, *held*, that the assured was entitled to recover. *Ibid.*

[NOTES.— See §§ 498-510.]

INSURANCE COMPANY v. THWING.

(18 Wallace, 672-679. 1871.)

ERROR to U. S. Circuit Court, District of Massachusetts.

STATEMENT OF FACTS.—The defendant issued a policy on Thwing's ship on a voyage from Liverpool to San Francisco. In the policy the assured warranted not to carry more than her registered tonnage. There was, however, an excess of thirty-eight tons (on which freight was paid) above the registered tonnage. There was a partial loss, which the insurer paid, and brought this suit to recover the money back as paid under a mistake of fact. The defense was that a lot of cannel coal on board was taken as dunnage, but freight was paid upon it. There was a judgment for the defendant.

§ 475. *What is dunnage and what ballast.*

Opinion by MR. JUSTICE BRADLEY.

There is considerable analogy between dunnage and ballast. The latter is used for trimming the ship, and bringing it down to a draft of water proper and safe for sailing. Dunnage is placed under the cargo to keep it from being wetted by water getting into the hold, or between the different parcels to keep them from bruising and injuring each other. Webster's definition of dunnage is "fagots, boughs, or loose materials of any kind, laid on the bottom of a ship to raise heavy goods above the bottom, to prevent injury by water in the hold; also, loose articles of merchandise wedged between parts of the cargo to prevent rubbing, and to hold them steady." Lord Tenterden says: "It is, in all cases, the duty of the master to provide ropes, etc., proper for the actual reception of the goods in the ship. . . . The ship must also be furnished

with proper dunnage (pieces of wood placed against the sides and bottom of the hold) to preserve the cargo from the effects of leakage, according to its nature and quality." Abbott on Shipping, Pt. IV, ch. 5, § 1.

§ 476. *Ballast and dunnage are not considered cargo, unless they are merchandise.*

It seems to be conceded by the plaintiffs that if the cannel coal can be regarded as dunnage, there was no breach of the warranty. In other words, it is conceded that when the assured warranted "not to load more than her registered tonnage," ballast and dunnage were not included in the warranty. And it is not pretended that the cannel coal used on this occasion was more than was proper for dunnage. Had some useless articles been employed for that purpose, such as chips or blocks of wood, though weighing precisely what this coal weighed, and had no freight been paid for it, the insurance company could not have complained.

It is the master's duty to provide both ballast and dunnage when necessary for the safe and proper transportation of his cargo. And it has been held that, in selecting materials for these purposes, even when he has chartered the entire capacity of his ship for articles which require ballast or dunnage, he is not precluded from taking articles on which he can realize freight. Thus, in the case of *Towse v. Henderson*, 4 Exch., 890, where, upon a charter-party, it was agreed that the vessel should proceed from Singapore to Whampoa and there load from the agents of the affreighters a full and complete cargo of tea, and the master took in as ballast eighty tons of antimony ore for which he received freight as merchandise, it was held that, if it occupied no more space than ballast would have done, he was entitled to do it. In that case, a full cargo of tea (which was all that the charterer stipulated for) still needed ballast, which it was the duty of the shipmaster to supply. Hence it could make no difference to the charterer what material was used for ballast, if it did not encroach upon the loading capacity of the vessel for tea.

The question still recurs, however, whether merchandise used for the purpose of ballasting a ship, or for the purpose of dunnage, and paying freight as merchandise, can be considered as part of the ship's loading within the meaning of a warranty against an excess of loading beyond a limited amount, it being conceded that an equal quantity of ballast or dunnage proper would not be so regarded? Has the court a right to import into the contract an implied qualification that a reasonable amount of merchandise proper for ballast or dunnage shall not be reckoned as loading within the meaning of the contract? It is clear that the law does make the implied qualification that ballast and dunnage shall not be regarded as loading, within the contract. Is it reasonable to extend that qualification to merchandise used as ballast or dunnage? If so, then, in the case of a cargo consisting of only one article, which needed no ballast or dunnage, the ship-owner would be entitled to deduct a reasonable amount for those purposes; and if there were a government regulation that no ship should carry more cargo in weight than the amount of her registered tonnage, she would on the same principle be entitled not only to carry ballast and dunnage (properly such) in addition to her legal amount of cargo, but where ballast and dunnage could be dispensed with she would be entitled to carry an additional amount of cargo, beyond the legal allowance, equivalent to reasonable ballast and dunnage.

Such a construction could not be a sound one. It would be an arbitrary modification of the words of a law or contract. If the legislature, in the one

case, or the parties, in the other, were willing that such a qualification should be made, it would always be very easy to make it in express terms. It would seem to be a dangerous practice for the court to make it for them.

It is not every cargo that requires ballast. Many cargoes will themselves sufficiently ballast the ship. Cargo may be so assorted that certain portions of it may act as ballast. And where a ship is doing a miscellaneous carrying business, it would seem to be the dictate of sound business judgment so to assort and arrange the cargo (if practicable) as to dispense with the use of ballast, properly so called. For by this means the whole carrying capacity of the ship is saved for cargo. And when this idea is acted on, those portions of the cargo which are selected and used for trimming and settling the ship may, in a loose and popular sense, be called ballast. But, nevertheless, they are not ballast in a legal or proper sense. They remain cargo.

Precisely the same may be said in regard to dunnage. Many kinds of cargo require no dunnage whatever. They are composed of articles which will not be injured by water, nor by contact with each other. A cargo may be so assorted that some portions of it may be placed so as to keep the other portions dry, or prevent them from coming into mutual collision. It is manifest in this case, as in that of ballast, that a prudent and skilful master of a vessel will (if practicable) so assort and arrange his cargo as to dispense with dunnage proper. And yet, in a loose sense, the articles of merchandise which he uses to perform the office of dunnage, may be called dunnage. Still they are not legally nor properly such. If they are merchandise, they are cargo, and form part of the vessel's lading. They will be subject to duties, and they will be covered by insurance on the cargo.

It is true that ballast or dunnage, even when clearly such, as shingle from the beach, wooden slabs, chips or brush, may be sold for some small sum after the voyage is ended; but that will not make it any the less ballast or dunnage as contradistinguished from merchandise. No person of ordinary intelligence would find any difficulty in making the distinction. Had such articles been used in the case before us, though of the same weight as the cannel coal, the insurance company could not have complained; for it would not have been cargo. But when merchandise is used in lieu of dunnage, or to perform the office of dunnage, it does not lose its character as cargo; and the insurance company have the right to treat it as cargo. And it is evident that no form of words which the captain and the charterer might use on the subject can affect the rights of the insurance company. It would be *res inter alios acta*.

In view of these considerations it seems to us that the charge of the court was calculated to mislead the jury on the question at issue. It was "that if they believed that the coal was *received and used as dunnage, and not as cargo*, it would not amount to a loading under the warranty of the policy." The evidence justified and required the instruction asked by the plaintiffs, namely, that if freight was received and paid for the coal, it *was* cargo, and came within the warranty. Here was an admitted fact, which gave character to the article, stamping it as merchandise. Freight is never paid for mere dunnage, any more than for the sails and rigging of the ship.

The argument that it made no difference to the insurance company whether coal or any other article was used as dunnage is unsound. It does make this difference: if coal paying freight is merchandise, it is within the warranty; if mere dunnage were used, it would not be within the warranty. And the company were entitled to the benefit of those results which the mutual self-

interest of the parties would lead them to adopt. The company made their contract in view and in anticipation of all these considerations.

Our attention has been called to another case between the same parties on the same policy of insurance, decided by the supreme court of Massachusetts, and reported in 103 Massachusetts Reports, p. 401, in which a decision was made adverse to the views which we have expressed. With all due respect for that intelligent and learned tribunal, and after giving full consideration to the views presented in the opinion given in that case, we cannot bring ourselves to a different conclusion from that to which we have come.

Judgment reversed, with instructions to issue a *venire de novo*.

MR. JUSTICE CLIFFORD, in a brief dissenting opinion, stated his views as follows (CHASE, C. J., and MR. JUSTICE SWAYNE concurring):

"Beyond doubt the ship-owner, in ballasting his chartered vessel, may take freight-paying merchandise for that purpose, provided the merchandise occupies no more space than the ballast would have done if ordinary ballast had been used instead of merchandise paying freight, and I am of the opinion that the same rule should be applied in respect to the dunnage used in stowing the cargo."

INSURANCE COMPANY v. MORDECAL

(22 Howard, 111-118. 1859.)

Opinion by MR. JUSTICE NELSON.

STATEMENT OF FACTS.—This is a writ of error to the circuit court of the United States for the district of South Carolina. The suit was brought in the court below on a policy of insurance, for \$4,000, on the freight of the barque Susan, on a voyage from Charleston to Rio Janeiro, and from thence to a port of discharge in the United States. The vessel sailed with a full cargo on the 11th June, 1855, when she was stanch and strong, and arrived at the port of Rio Janeiro, where she discharged her outward lading, and took in a return cargo, and on the 10th October, 1855, started on her return voyage, but was compelled, for want of strength and soundness, to put back to the port of departure, where she was condemned as unseaworthy, and sold, and the whole freight of the return voyage lost.

The counsel upon this state of facts, which is all that appears in the bill of exceptions, insisted that the policy was an open one, and the insurers liable for only \$1,000; but the court instructed the jury that the agreement proved was for a valued policy. The counsel then insisted that the \$4,000 having been insured on the round voyage, the insurers, from the evidence, were liable only for one-half the sum insured—the other half being covered by the freight of the outward voyage; but the court charged that the loss of the freight on the return voyage was a total loss, and that, upon the case as it appeared, the plaintiff was entitled to the whole amount underwritten. To this last instruction the counsel for defendants excepted.

The counsel for the plaintiff in error, on the argument, referred to the clause in the policy by which "it is also agreed, that if the above-named vessel, upon a regular survey, shall be declared unseaworthy, by reason of her being unsound or rotten, or incapable of prosecuting her voyage on account of her being unsound or rotten, then the assurers shall not be responsible on this policy;" and insisted that the condemnation of the vessel as unseaworthy, after returning back to the port of Rio Janeiro, brought the case within it.

But the answer to this position is, that no such question was made on the trial, or presented to the court for decision, and therefore cannot be entertained here; neither does the evidence in the case enable the counsel to raise any such question, as it does not appear that the condemnation proceeded from the causes specified in this clause of the policy. 7 Wheat., 610; 10 id., 418. It is enough, however, to say that the question, for aught that appears in the bill of exceptions, was not raised on the trial.

As it respects the question whether the policy was an open or valued one, no exception was taken to the ruling that it was a valued one. The point was not pressed, probably; as we see, from a memorandum of the agents of the company in the case, that it was intended by the agreement to be a valued policy.

§ 477. *Policy held to cover freight at risk at any time.*

The remaining question, and indeed the only one presented in the bill of exceptions, is, whether the voyage insured is one entire voyage from Charleston to Rio Janeiro and back to the port of discharge in the United States, and consequently the underwriters entitled to a deduction of the freight earned on the outward voyage. The court is of opinion, upon the true construction of the policy, the insurance was upon the freight of each successive voyage, and is to be applied to the freight at risk at any time, whether on the outward or homeward voyage, to the amount of the valuation. The case, in this respect, is not distinguishable from *Hugg v. Augusta Insurance and Banking Co.*, 7 How., 595 (§§ 898-901, *infra*). See, also, 3 Caines, 16; 7 Gill & John., 293; 2 Phillips on Insurance, 31, 34. Judgment of the court below affirmed.

STILLWELL v. HOME INSURANCE COMPANY.

(Circuit Court for Missouri: 8 Dillon, 80-82. 1874.)

Opinion by Dillon, J.

STATEMENT OF FACTS.—The action is upon a freight policy, which is a contract by the insurer to indemnify the owners of the vessel against loss by reason of the failure of the vessel to carry freight, in consequence of a peril insured against. The contract here was for "insurance upon the freight of the steamer and barge, against the total loss of any part of the steamer or barge's freight, at and from St. Louis to New Orleans," etc. The insurance company contends that the policy covers only the freight list for the goods on board at St. Louis, when the voyage was begun; and this is really the decisive question in the case.

§ 478. *Freight that would have been earned, covered.*

In construing these brief and informal contracts, the courts must keep in mind the peculiarities of inland river carriage. This was a general cargo, and it is the almost invariable usage of boats in the Mississippi trade to touch at intermediate ports to receive additions to their cargo; and such additions are covered by a contract such as was made in this instance.

It is contended by the insurance company that there was no loss on the freight list because all the cargo on both boat and barge was, after the disaster to the barge, carried by the boat to New Orleans and the freight earned. But the other facts show that there was an actual loss of freight which would have been earned if the barge had not been lost. The loss is not conjectural, but plainly established by the proofs. Goods to the full carrying capacity of both the boat and barge had actually been engaged by the boat for the trip

in question, and she was only prevented from carrying them by having received a transfer of the barge's cargo. No other barge could be obtained. It would be an illiberal construction of the contract to hold that it did not cover the goods engaged and the freight which would have been earned thereon but for the loss of the barge by a peril insured against.

Affirmed.

TAYLOR v. INSURANCE COMPANY OF NORTH AMERICA.

(Circuit Court for Massachusetts: 6 Federal Reporter, 410-418. 1881.)

Opinion by LOWELL, J.

STATEMENT OF FACTS.—The libelants insured certain consignments of goods shipped by Laforme & Frothingham and H. C. Peabody & Co. in the bark *Almira Coombs*, on a voyage from Boston to Port Elizabeth, Algoa bay, South Africa. All these goods were stowed in the lower hold. The bills of lading contain this clause: "To be landed in ship's lighters at risk and expense of consignees." The vessel arrived at Port Elizabeth on Sunday afternoon, July 14, 1878, and on Monday the master reported his arrival, entered his bark at the custom-house, and made arrangements for lighters. On the morning of the 16th there was a very severe gale from the southeast, and the ship was driven on shore and bilged. On the 17th a survey was called and the surveyors reported the vessel a complete wreck, water flowing in and out with the tide, and seven feet of water in the hold at low tide. They recommended that every reasonable measure should be taken to land the cargo. All the cargo between decks was landed, delivered, and freight paid for it by the consignees concerned. A few tons of goods were taken out of the lower hold, among which were some of those insured by the libelants, but not the whole of any one consignment. July 20th, upon a second survey, the surveyors reported that some goods had been discharged, and that no more could be recovered without great expense, the hold being full of water, and that the attempt ought not to be made because the value was insufficient to justify the expense of recovering them, and the risk that must thereby be incurred, and they advised a prompt sale of the ship and cargo as they then lay.

The captain tendered to the consignees the goods which had been landed, and offered to deliver those still on board upon payment of landing charges and freight. The consignees, who were also the absolute owners of the cargo, refused to receive their cargo on these terms, and made no objection to the sale, which was duly made by auction, and the proceeds have come into the hands of the respondents,—the owners of the ship,—and the libelants sue for so much of the proceeds as represent the consignments insured by them. They have paid a total loss upon the goods, and have received from the insured assignments of the bills of lading, and of all their rights of salvage. The district court decreed for the libelants, and an assessment was made, which I do not understand to be objected to, if the principle of the decree was right. No question is made that the libelant corporation has the right to receive whatever the consignees might have recovered; but it is insisted by the respondents that the freight of these goods was earned, and was a first lien upon them, and, of course, upon their proceeds. The conclusion is sound if the premises are sound.

§ 479. *When freight is earned. Offer, that cannot be performed, to deliver goods.*

Had the ship earned her freight? To earn freight there must, of course, be

either a right delivery, or a due and proper offer to deliver the goods to the consignees. There was no delivery, and therefore the only question is whether the master's offer to deliver the goods was one which the consignees were bound to accept. I assume that the goods remained *in specie*, somewhat damaged, but not destroyed. The few tons of goods which had been landed did not fill any one bill of lading, and the consignees were not bound to receive them unless they were equally bound for all the others.

Was the offer to deliver the whole a good offer? It seems from the second report of the surveyors that there is very great reason to doubt whether the master would have been able to fulfill such an offer. I understand it to have been made merely as a matter of form, for what it might be worth. A tender is good for nothing if the party making it is not in a condition to carry it out. But the theory of the offer was unsound. It was that, as the ship was in the port of delivery, and as the consignees were to pay the expense of the lighters, therefore, whatever it might cost to fish up the goods from the bottom of the sea and put them on board the lighters was to be paid by the consignees. The survey proves that the work would have been in the nature of salvage, and of course must be paid for at extraordinary rates. This is not the meaning of the contract. The ship's lighters were to land the goods in the way usual at that port, and all usual expenses of the landing by the lighters were to be payable by the consignees. A very good test of the point is whether the arrangement which the master had made on Monday with a company owning several lighters would hold good on Tuesday, and bind the company to land the goods from the wreck at the agreed price. Obviously it would not.

The consignees were not bound to accept or decline an offer made under these circumstances. If they declined it the master had no greater right or interest in the goods by reason of this refusal. There is no evidence that the consignees abandoned the goods to the master for the freight. The sale was simply and very properly made for the benefit of all persons interested, and was conducted in good faith, and, for all that appears, was the best thing possible. The master had no more earned his freight than if he had sold the goods for cause at a port of necessity. Affirmed.

JORDAN v. WARREN INSURANCE COMPANY.

(Circuit Court for Massachusetts: 1 Story, 342-359. 1840.)

STATEMENT OF FACTS.—*Assumpsit* on a policy of insurance. The policy was underwritten by the Warren Insurance Company, and thereby they caused Oliver Jordan, for whom it concerns, to be insured, lost or not lost, \$7,000 on the freight of the ship Franklin, at and from New Orleans to Havre. The declaration alleged that the ship sailed on the voyage on the 6th of June, with a cargo on board, and was, during the voyage, driven by the violence of the waves and currents upon a bank in the river Mississippi, where the vessel remained hard and fast in the mud, and while lying upon the said bank was violently struck by a steamboat called the Tyger, by which disasters the vessel was so injured and broken that the cargo of the vessel was destroyed and the vessel prevented from performing her voyage and the freight was totally lost. Plea, the general issue.

The facts, as they were agreed by the parties or proved in the case, were, that the plaintiffs were the owners of the ship. That she took on board a

cargo at New Orleans, on freight for Havre, consisting of cotton, worth about \$60,000; tobacco, worth \$10,500; and woods and wax, about \$500; in the whole, worth about \$71,000. The freight bill was about \$9,916. While the ship was proceeding down the river Mississippi, on the voyage on the 7th of June, 1838, being in tow of the steamboat Tyger, towards the bar, the current of the river running with great rapidity, caused the ship to sheer and surge so violently on the tow line that the steamboat lost her steerage way, and before she could recover her position, the ship took ground and remained hard and fast. The eddy current then taking the steamboat, she swung round, and driving stern foremost, struck the ship with great violence on the larboard side, and thereby did considerable damage to her. The ship was then found to have considerable water in her hold, increasing from six feet to thirteen feet. The cargo was thereupon taken out to lighten the ship and save the cargo; and it was carried back in steamboats, etc., to New Orleans. The ship, being lightened by taking out her cargo, was also carried back to New Orleans; and was repaired and fitted again for sea before the 21st of July following. After the cargo arrived at New Orleans it was surveyed by experts, and being found wet and damaged, a large portion of it was, by their advice, sold at public auction. The damaged part of the cargo sold for about \$19,774.22. The residue, amounting in value to about \$2,210, being in a sound state, was shipped for Havre in another vessel.

It further appeared in the case that the cotton, if shipped again in the ship in its wetted and damaged state, would have been very liable to spontaneous ignition; but it could, by a process of drying, sorting and repacking, be put in a state for reshipment for commercial purposes, and that there were conveniences for the purpose. But the process was slow, and would occupy a considerable length of time to be perfected, as long, as some of the witnesses thought, as six months. But it did not appear that the cotton might not have been dried so as to be safe for transportation against ignition in a shorter period. After the Franklin was repaired, she took another cargo on board for England, the freight of which was worth \$10,000, and sailed therewith on the 21st of July, and safely landed that cargo and earned the freight.

Opinion by STORR, J.

Two questions of law have been presented for the consideration of the court by the counsel for the defendants. (1) That, under the circumstances of the present case, there has been no loss of the freight for the voyage for which the underwriters are liable under the policy. (2) If there has been, then the underwriters are entitled to the freight of the substituted voyage to England, as in the nature of a salvage of freight. The latter ground is maintained upon the footing of the authority of the case of *Everth v. Smith*, 2 Maule & Sel., 278, and that of *M'Carthy v. Abel*, 5 East, 388. In both of those cases the voyage insured was actually performed and freight was earned. In the case in 5 East, 388, the very freight insured was earned; but the owner of the ship had abandoned it to the underwriters on freight, while the vessel was held under a hostile embargo in a foreign port, from which she was afterwards released and earned her freight; and the court held that the loss of freight, if any, was by the abandonment, and not by any peril insured against. In the case in 2 Maule & Sel., 278, freight was earned on the very voyage insured (at and from Riga, and any other ports in the Baltic, to any ports in the United Kingdom); but it was not the very freight stipulated in the charter-party, under which the ship sailed on the original outward voyage, but a

freight from Riga to London, obtained from other persons, and thus a substituted freight was earned, which was properly treated by the court as a salvage freight. The court said that this was an insurance on freight generally and not on any specific freight. The underwriter did not insure that any particular freight should be brought home; but if any freight is brought home, a loss has not happened for which he undertook to indemnify the assured. There seems no reason to doubt the authority or correctness of either of these decisions. But they are founded altogether upon a consideration which has no existence in the present case.

§ 480. *Underwriters who have insured freight on a particular voyage cannot escape liability for loss thereof by showing freight earned on another voyage.*

There, the voyage on which freight was earned, was the very voyage insured, and which had not then terminated. Here, the voyage was entirely new, to a new port. The terminus of the old voyage was Havre; of the new voyage was England. The old voyage to Havre was terminated; and the new voyage had not the slightest connection with it. I know of no principle or authority upon which the court can say that the underwriters have a right to avail themselves of a freight earned in a new voyage, which they have not insured, by way of recompense for losses on another voyage which they have insured, and which has already terminated.

§ 481. *If ship and cargo are in fit condition for a voyage, freight of which is insured, master must proceed with cargo, or underwriter discharged.*

The real question, then, and the only one before the court, is that first stated. The question is not whether the freight insured has been lost (although the circumstances of the case are so imperfectly stated that there is great obscurity as to the manner of settling the controversy between the owners and the freighters), but whether it has been lost by any peril insured against, so as to make the underwriters liable therefor. The ship was duly refitted for the voyage, and capable of resuming it within a reasonable time; and if the condition of the cargo had been such that it could have been reshipped for the voyage, the master had a right to require it to be shipped, and was bound to proceed with it on the voyage; or, if he did not, the freight, if lost, would be lost by his default, and not by any peril insured against. It has been suggested that the time of the detention of the ship to refit was longer than the actual voyage to Havre; and, therefore, that the master might reasonably refuse to proceed on the voyage. But the underwriters take upon themselves no risk whatsoever, as to the length or duration of the voyage insured. What they undertake is, that, notwithstanding any of the perils insured against, the ship shall be capable of performing the voyage, so as to earn the freight insured; not that the voyage shall be performed in a longer or a shorter period. The owner takes upon himself the chances of a short or of a protracted passage. This doctrine was fully recognized in *Anderson v. Wallis*, 2 Maule & Sel., 240, and applied to the very case of an insurance on freight in *Everth v. Smith*, 2 Maule & Sel., 278. In the latter case the court held that the underwriter had nothing to do with the temporary retardation, or protraction, or interruption of the voyage if it was ultimately resumed, or capable of being resumed and performed. And upon that occasion, Lord Ellenborough alluded to the doctrine in the former case, and repeated the question: "What case has ever yet decided that such a temporary retardation (not going, as he added afterwards, to a destruction of the contemplated adventure) is a good cause of abandon-

ment, so as to amount to a total loss? Disappointment of arrival is a new head of abandonment in insurance law."

§ 482. *Master should sell cargo if safety require.*

The jury have, indeed, found that the master, in delivering up the cargo and allowing the sale thereof at New Orleans, performed his absolute duty to the owners of the cargo, and ought not to have undertaken to carry it forward to its destination in its then damaged state. And I think that the jury were well warranted in this finding; for when a cargo on freight is so much injured, that, though capable of being carried to the port of destination and there landed, yet, from its present state, it will endanger the safety, as well of the ship as of the cargo, or it will become utterly worthless on arrival at the port of destination, it is the duty of the master, exercising a sound discretion for the benefit of all concerned, and especially of the shippers of the cargo, to land and sell the same at the place where the necessity arises, whether it be the original port of the shipment to which the ship returns, or any intermediate port at which the ship arrives in the course of the voyage. It would be contrary to common sense and common justice to him to sacrifice the cargo for the benefit of another party in interest, or to elect the party upon whom the ruin, caused by a common calamity, should fall.

§ 483. — *master, in such case, agent of all concerned.*

In a case of necessity or of unexpected and pressing calamity, emergent in the course of the voyage, the master is by law created an agent from necessity for the benefit of all concerned, and what he fairly and reasonably does under such circumstances, in the exercise of a sound discretion, binds all the parties in interest in the voyage, whether owners, or shippers, or underwriters. But then the question still remains, upon whom is any given loss to fall? And it by no means follows because a sale of the goods has taken place at a port short of the port of destination by reason of a damage sustained by the cargo, the cargo specifically remaining, and capable of being carried to its destination, that there is no freight due thereon by the shippers, but that the whole loss is to be borne by the underwriters on freight. That is assuming the very point in controversy.

§ 484. *Shipper bound to pay freight if cargo is carried to destination, though rendered worthless by sea damage.*

Let us see, then, how upon principle the case stands as between the shippers of the cargo and the owners of the ship. We must take it in the present case that the sale was with the entire consent and approbation of the shippers, as well as the master, and for the benefit of the former. Now, nothing is better founded in the law on this subject than that the shippers are bound to pay the full freight for the voyage if the cargo is carried to the port of destination, and specifically remains, notwithstanding at its arrival it is, by reason of sea damage, utterly ruined and worthless. This doctrine, although formerly a matter of some doubt, is now firmly established, and indeed must be manifestly correct upon principle. See Abbott on Shipping, Pt. 3, ch. 7, §§ 7-9, and notes to American edition of 1829; *Griswold v. New York Ins. Co.*, 3 John., 321. It is as clear that after the shipment of the cargo on the voyage the shippers have no right to demand it at any intermediate port short of the port of destination, without payment of the full freight for the voyage, whether the cargo arrive there in a damaged or in an undamaged state. The reason is obvious. The master has a right to carry on the cargo to the port of destination, and if his ship be capable, either then or within a reasonable

time, of carrying the cargo to the port of destination, there is no ground to say that he is not entitled to earn a full freight, and the shippers of the cargo cannot insist upon changing the original contract *in invitum*, and cut him off from all freight, or dismiss him with a *pro rata* freight. The contract of the ship-owner is to carry the cargo to the port of destination; but he by no means warrants the state in which it shall arrive, as it may be affected by the perils of the seas or other perils against which his contract does not bind him. It is no answer to say that, if the cargo is carried on in a damaged state, it will be ruined. The true reply is, that the ship-owner has nothing to do with that, and that the shippers have no right to throw the loss of freight upon him because the cargo is in danger of ruin by a calamity against which he did not warrant them. Stevens & Benecke on Average, by W. Phillips, 286, note (1); id., pp. 357-360, edition of 1833; 3 Kent, Com., L. 47, p. 225, 4th edition.

§ 485. *Underwriter not liable for loss of freight of damaged cargo removed at intermediate port, and not returned and taken on when it might have been, though after long delay.*

How, then, do these principles apply to the circumstances of the present case? The ship was repaired and capable again of taking on board the cargo at New Orleans, within a reasonable time. The master had a right to require that it should be so taken on board and carried on the voyage, as soon as it should be in a condition to be safely reshipped. He had a right to wait until the cargo could be dried, sorted, repacked, and prepared for reshipment. The delay, arising thereby, would be a mere retardation or temporary interruption or suspension of the voyage, and not an utter prostration or destruction of it. If, then, the freight has been lost, it has been lost by his own voluntary act, and not by the necessary operation of any of the perils insured against. The whole evidence shows that the cargo could have been dried, sorted and repacked safely for the voyage, and at the farthest, within six months. Mere delay in the voyage, or disappointment as to the time of arrival, constitutes, as we have seen, no ground for an abandonment of the voyage. So that, here, the loss of freight has been by a voluntary abandonment of the voyage by the master; and not from necessity, superinduced by any perils insured against.

§ 486. — *though the ship-owner may in such case be entitled to full freight from shipper.*

Then, how stands the case as to the shippers of cargo? They could not require the cargo to be redelivered to them without the payment of freight for the voyage; and if they did not choose to pay the freight, the master had a right to retain the cargo for the payment thereof, or to prepare it again for reshipment, as soon as it could be safely done, unless the owners refused to allow it to be again shipped on the voyage. If they did so refuse, then the contract for full freight would have been complete on the part of the ship-owner, from the default on the other side. But we must take the case here to be, what in reality it was, a mutual voluntary agreement on the part of the master and the shippers, that the damaged cargo should be sold. The sale must, therefore, be treated as a sale reserving all the rights of the respective parties. And, in my judgment, the ship-owner was, for the reasons already stated, upon principle, entitled, under all the circumstances, to a full freight for the voyage, upon all the goods so sold or relinquished. He has, therefore, not lost his freight for the voyage from any perils insured against; but it

is a clear right now existing against the shippers of the cargo, or, if lost, it has been lost by the voluntary relinquishment of the master and owner, by their own act or default. So far, I think, the principles of law would conduct us, in my judgment, upon general reasoning, independent of authority.

§ 487. *Authorities reviewed.*

But let us see how the case stands upon the footing of authority. And, in this case, in my judgment, there is not only no authority adverse to the doctrine already stated, but there are authorities positively in its favor, and which, in effect, if admitted to prevail, decide the very case before this court.

The case of *Herbert v. Hallett*, 3 John. Cas., 93, very nearly approaches the present. There the insurance was upon freight on a voyage from New York to Havana. The ship was stranded on the voyage, in a gale of wind at Sandy Hook, the cargo was unladen, being undoubtedly damaged, and was brought back to New York and delivered back to the shippers. The ship was repaired in a fortnight, and was soon afterwards sent on a different voyage. The court held that the underwriters on freight were not liable on the policy; that the ship-owner ought to have insisted on carrying on the cargo, after the ship was repaired; and that he had, by his negligence or folly, and not by any peril insured against, lost the freight. The court said that if the ship be injured by the perils of the sea, but is repaired within a reasonable time, and the goods are damaged, the owner will be entitled to his freight, if he offers to carry on the goods, although damaged, on the voyage, and the shippers refuse. Nothing but a physical destruction thereof will exempt the shipper from payment of freight in such a case. It did not appear in this case that the cargo was incapable of being reshipped. The case of *Griswold v. New York Ins. Co.*, 1 John., 204, was an insurance on freight at and from New York to Barcelona, with liberty to touch at Gibraltar. In proceeding on the voyage, the ship was stranded on Long Island, and the cargo (flour) was, with a small exception, damaged. The cargo was taken out and the ship got off, and repaired in six days. The cargo was received by the shippers and sold at auction, at a loss of twenty-seven per cent. The ship-owner abandoned to the underwriters on freight, and brought an action on the policy for the loss. The court affirmed the doctrine of the former case, holding that the ship-owner ought to have insisted on carrying on the cargo to the port of destination, so as to entitle himself to a full freight; and that there was no ground for the abandonment. Here the cargo was perishable; and upon the new trial ordered by the court it appeared that, if it had been carried to the port of destination, it would not have been worth the freight. But notwithstanding this fact, the court adhered to their former opinion that the ship-owner was not entitled to recover. *Griswold v. New York Ins. Co.*, 3 John., 321. In *Saltus v. Ocean Ins. Co.*, 14 John., 138, there was an insurance on the ship, freight and cargo (rye, flour and corn), and the vessel, in the course of the voyage, was obliged to put into a port of necessity to repair; and there the cargo was found to be greatly deteriorated and in a state not fit to be reshipped, and it was accordingly sold. The vessel was repaired, so as to be able to resume the voyage. The court held that the ship-owner could not recover on the policy on freight, as the cargo, though damaged, still remained *in specie*; and the authority of *Griswold v. New York Ins. Co.* was fully recognized. The case of *Whitney v. New York Ins. Co.*, 18 John., 208, is supposed to trench upon the principles of the former cases. It strikes me that it is entirely consistent with those principles; and that the decision turned upon peculiar circumstances. It was a

policy on freight. The cargo was hemp, which was wetted, and the master could neither dry the hemp nor ship it on board another vessel for the voyage, in the wet and perishing condition in which it was, there being great danger of ignition. His own ship was disabled and could not be repaired for half her value; nor could the hemp be reshipped in another vessel to the port of destination for one-half of the value of the freight, as valued in the policy. The master therefore broke up the voyage. The court held that the voyage was rightfully broken up, and the ship-owner having abandoned on the policy was entitled to recover for a total loss of the freight. The case of *M'Gaw v. Ocean Ins. Co.*, 2 Chand. Law Rep., 363, manifestly proceeded upon similar principles. Thus far the American authorities have gone, and they uniformly sustain the same doctrine.

The question has also arisen in England, and has there received a similar determination. In *Mordy v. Jones*, 4 Barn. & Cress., 394, there was a policy on freight of the ship at and from Kingston, in Jamaica, to Liverpool. The vessel sailed on the voyage with a cargo of cotton, coffee, sugar, hides and other goods, belonging to various shippers. The ship having started a plank was obliged to put back to Kingston to repair, and was there repaired. The cargo was landed, and was found so wetted by the sea water that it could not be reshipped without danger from ignition to the rest of the ship and cargo, unless it underwent a process of drying, which would detain the ship six weeks, and this would have been attended with an expense equal to the freight. Under these circumstances, the shippers refusing to interfere, but approving of a sale by the master, the master sold the damaged goods and sailed with the proceeds thereof to Liverpool, and safely arrived there. The master's proceedings at Kingston were found to be such as a prudent man uninsured would have adopted. The master, at Liverpool, paid over the proceeds of the goods to the parties interested without any deduction of freight. The question was whether, under these circumstances, there was such a loss of the freight of the goods so sold as entitled the ship-owner to recover under the policy. The court held that he was not. The reasoning of the court is certainly not very full or satisfactory. But it is plainly in coincidence with what has been already stated as the just result of the principles of law on the subject of the earning of freight. It may be added that the same doctrine may be fairly deducible (although the very case is not put) from the reasoning of Pothier on the point where full freight is due (*Pothier, Traité de la Chartie-Partie*, n. 70 to n. 77; *id.*, n. 121); and it is not unimportant to remark that Mr. Stevens and Mr. Benecke, both of them gentlemen of great practical experience in this branch of the law, assert the same doctrine as one well established. Stevens on Average, 81, n. 6, edit. 1817; *id.*, edited by Phillips, 286, note (1), edit. 1833; Benecke on Insur., 447 to 449, edit. 1824; *id.*, by Phillips, pp. 357 to 367, edit. 1833.

Upon the whole, my opinion, upon a deliberate survey of the whole matter, is, that the plaintiffs are not entitled to recover in the present case for a total loss of the freight insured. But that their claim is limited to the general average, and the loss of the freight of such of the goods as were physically lost and destroyed by the perils of the seas.

CAZE v. BALTIMORE INSURANCE COMPANY.

(7 Cranch, 358-363. 1813.)

ERROR to U. S. Circuit Court, District of Maryland.

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—The present action is brought to recover freight *pro rata itineris*, under the following circumstances: The plaintiffs were the owners of the ship Hamilton and cargo, and effected insurance of her cargo on a voyage from Bordeaux to New York. The sum of \$11,000 was underwritten by the defendants—the sum of \$10,000 at Philadelphia, and the residue of the value of the cargo (\$1,986) was left uninsured. During the voyage the ship and cargo were captured, carried into Halifax and there condemned. The plaintiffs abandoned to the underwriters and received payment for a total loss. An appeal from the sentence of condemnation was interposed and the sentence finally reversed, and the proceeds of the cargo, which had been previously sold by order of court, were paid over to the underwriters in proportion to the sums underwritten by them respectively. We are all of opinion that the plaintiffs are not entitled to recover in the present action.

§ 488. *Underwriter on cargo not liable for freight.*

In the first place the court are satisfied that as between the insured and the underwriter on the cargo of a ship the latter is in no case responsible for the payment of freight, whether there be an abandonment or not. It is a charge on the cargo against which he does not undertake to indemnify the owner; and if authority be necessary to support the position, it is fully borne out by the doctrine of Lord Mansfield in *Baillie v. Modigliani*, Marshall, 728.

§ 489. *Freight pro rata itineris due when.*

In the next place we are all of opinion that no freight whatsoever was, under the circumstances of this case, due. Freight, in general, is not due unless the voyage be performed. Here the ship and cargo never arrived at their port of destination, and of course the whole freight could not be due. Was a *pro rata* freight due? We think not. The whole class of cases resting on the authority of *Luke v. Lyde*, 2 Burr., 882, proceed on the ground that there is a voluntary acceptance of the goods themselves at an intermediate port; and not, as in the present case, a compulsive receipt from the hands of the admiralty after capture and condemnation, and ultimate restoration upon the appeal. There is, in our judgment, no equity to support such a claim; and although it receive countenance from some remarks incidentally thrown out in *Baillie v. Modigliani*, the current of more recent authority, as well as of principle, clearly points the other way.

It may be further added that, as between the insured and the underwriter, the existence of a lien on the cargo for freight does not vary the legal responsibility of the underwriter on such cargo after an abandonment. The judgment of the circuit court is affirmed, with costs.

ROGERS v. MECHANICS' INSURANCE COMPANY.

(Circuit Court for Massachusetts: 1 Story, 608-610. 1841.)

STATEMENT OF FACTS.—This was an action of *assumpsit* on a policy of insurance, whereby the Mechanics' Insurance Company, of New Bedford, insured \$10,000 on the bark America and outfits, from Bristol, Rhode Island, on a whaling voyage, until her return to Bristol, with liberty to touch at all

ports and places for refreshments, and to sell catchings. The policy also contained a stipulation that one-fourth of the catchings should replace the outfits consumed; except that catchings, shipped from the Cape de Verds, or this side, should be at the risk of the assured without diminution of value. The declaration alleged that during the voyage the vessel, having on board at the time a large quantity of blubber in the blubber-room, encountered a violent hurricane, during which the shifting boards in the blubber-room gave way, and the blubber all went to leeward; that in order to preserve the ship from sinking, it was necessary to throw the blubber overboard, and to cut away some masts; that afterwards the vessel was obliged to put away for the Isle of Mauritius to repair the damages of cutting away; that the expense of going there, making repairs, etc., together with the value of the blubber thrown overboard, constituted a general average loss; and that the defendants, as insurers, were bound to pay to the plaintiffs the sums which the vessel and outfits ought to contribute toward that loss. Plea, the general issue. At the trial the facts were proved as set forth in the declaration, and also that the blubber thrown over was equal to sixty-five or seventy barrels of sperm oil.

It was admitted that the underwriters were liable for the general average occasioned by the repairs and expenses in going into the Isle of France. And the principal question was, whether the blubber, thrown overboard in the storm, was a subject of general average, covered by the policy, under all the circumstances.

§ 490. "*Catchings*" and "*outfits*," in *whale fishery*, construed. *Blubber*.

Opinion by STORY, J.

It does not strike me that, upon the evidence produced by the defendants, it is possible to maintain the doctrine contended for by their counsel. Nearly every witness whose deposition is in the case has testified that the blubber in the present case is, in his opinion, "*catchings*," in the sense of that word, as it is understood in the whaling business. Most of the witnesses have added that they should have considered the blanket pieces (as they are called) of the whale, when cut from the whale and put on the deck of the ship, also as "*catchings*." And some of them have gone further, and asserted that according to their understanding, a dead whale, when fastened alongside the ship, for the purpose of being cut up, falls within the same denomination. Now, the question in this case is not what in the sense of a policy of insurance on "*cargo*" would be treated as cargo, whether such goods only as are stowed under deck, or whether other goods, which are insured and are ordinarily and properly stowed upon deck, under the usage of a particular trade, are not also to be deemed cargo, with reference to a policy of insurance in that trade; for the word "*cargo*" does not occur in the present policy. The insurance is upon "*outfits*," and upon the "*catchings*" substituted for the outfits in the course of the voyage. Now, the construction of the words "*outfits*" and "*catchings*" is, in the absence of any peculiar technical meaning thereof by the usage of trade, a matter of law for the decision of the court; and these words must have the ordinary meaning belonging to them in the language of common life and common sense, in the absence of any such technical meaning. So far as I am able to perceive, the testimony of the principal witnesses completely establishes that when the blubber or pieces of whale flesh are cut from the whale, and are on the deck, or at least when they are stowed under deck, they are, in the sense of the trade, "*catchings*;" and certainly they are so in the import attributed to the word in common life. What other meaning can we

properly apply to "catchings," unless it be that they are things caught, and in the possession, custody, power and dominion of the party, with a present capacity to use them for his own purposes? I cannot find, then, from the testimony, that there is any technical meaning to the word in the whale fishery, which is not coincident with the ordinary meaning of the word. Whether the blubber, when stowed on deck, or at all events when stowed in its proper place below deck, would not also be covered by a policy of insurance on "cargo," I do not decide; for it is unnecessary in the present case. That is a point which might deserve consideration under other circumstances, and would be governed by the analogies of the law and the usages of the particular trade.

§ 491. *Usage in a particular port as to matter of general mercantile law, e. g., insurable interest in blubber, bad.*

Then as to the point that by the usage or custom of trade, in whaling voyages, blubber, in this condition, is not deemed an insurable interest, or entitled to or liable for contribution; there is no evidence whatsoever, in the cause, which, in a legal view, establishes any such usage or custom, even in the port of New Bedford. Even if such a usage or custom were shown to exist in New Bedford, that would not be sufficient. The usage or custom of a particular port, in a particular trade, is not such a custom as the law contemplates to limit or control, or qualify, the language of contracts of insurance. It must be some known general usage or custom in the trade applicable and applied to all the ports of the state where it exists; and from its character and extent so notorious, that all such contracts of insurance in that trade must be presumed to be entered into by the parties with reference to it as a part of the policy. If the usage or custom be not so notorious; if it be partial or local in its existence or adoption; if it be a mere matter of private and personal opinion of a few persons engaged therein, it would be most dangerous to allow it to control the solemn contracts of parties, who are not or cannot be presumed to know it or to adopt it as a rule to govern their own rights or interests. Indeed, in the present case, as has been suggested at the bar, the policy in its printed form refers not to the usages and customs of New Bedford, but to those of Boston. But not a single witness has spoken of his knowledge of any such general custom or usage, even in New Bedford. On the contrary, all of them deny any knowledge of such usage or custom, and only speak of their own opinions, how the interpretation of the language of the policy ought to be and is understood by them personally. But this court has nothing to do with the private opinions of witnesses, however respectable, upon matters which respect the interpretation of contracts. That is matter of law which the court itself is bound to expound in the absence of any usage or custom which impresses upon the words a peculiar and technical meaning.

I own myself to be no friend to the indiscriminate admission of evidence of supposed usages and customs in a peculiar trade and business, and of the understanding of witnesses relative thereto, which has been in former times so freely resorted to, but which is now subjected by our courts to more exact and well defined restrictions. Such evidence is often, very often, of a loose and indeterminate nature, founded upon very vague and imperfect notions of the subject; and, therefore, it should, as I think, be admitted with a cautious reluctance and scrupulous jealousy, as it may shift the whole grounds of the ordinary interpretation of policies of insurance and other contracts.

§ 492. *Blubber jettisoned, a general average.*

As to the other point, I cannot entertain any doubt that this blubber was as much entitled to and liable to contribution, in cases of a jettison, as any other property on board. It is property; and if it is of any, the slightest, assignable value, and is sacrificed for the common benefit, it constitutes a claim for general average. It is said that it is difficult, and indeed impracticable, to ascertain its true and exact value when thrown overboard. There may be difficulty and perhaps an impossibility to ascertain its exact and minute value, for we have no means of weighing it in scales, or fixing its positive price. But the same difficulty occurs in many other cases of insurance; as in cases of injuries to sails, or rigging, or spars by tempest, or by cutting them away in cases of jettison; and yet no one doubts that they must be contributed for according to their value, ascertained by a jury, in the exercise of a sound discretion, upon proper evidence. Suppose that fruit is insured and the vessel has a long passage, in which, by ordinary waste and decay, it must suffer some deterioration, and then a storm occurs, in which it suffers other positive damage and injury, or there is a jettison thereof; how are we to ascertain what diminution is to be attributed to natural waste and decay and what to the perils of the seas? or what was its true value at the time of the jettison? There can be no positive and absolute certainty. The most that can be done is to ascertain, by the exercise of a sound judgment, what, under all the circumstances, may reasonably be attributed to one cause and what to the other. Absolute certainty in cases of this sort is unattainable. All that we can arrive at is by an approximation thereto; and yet no man ever doubted that such a loss must be paid for if it is covered by the policy.

If, indeed, this blubber at the time when it was thrown overboard was entirely worthless, and had no assignable value, it certainly cannot be brought into general average; for, under such circumstances, nothing has been sacrificed, and of course nothing is to be contributed for. But this is a matter which will most properly come before the assessor, who, by the agreement of the parties, is to be appointed to ascertain the amount of the general average, and also of the contributory interests.

WINTHROP v. UNION INSURANCE COMPANY.

(Circuit Court for Pennsylvania: 2 Washington, 7-28. 1807.)

STATEMENT OF FACTS.— Action on a policy of the 4th of January, 1804, entered into by the Union Insurance Company, on goods on board the *Maryland*, lost or not lost, at and from New York to the Cape of Good Hope, with liberty to proceed to and trade at the Isle of France, and any other port or ports in the Indian seas, and at and from the ports she might go to, back to New York; with liberty to touch and trade, as usual, for refreshments on the outward and homeward voyage. The policy was open and \$20,000 were insured. The ship sailed from New York on the voyage about the latter end of December, 1803, and touched at the Cape of Good Hope; whence she departed, and touched at the Isle of France, and went thence to Trincomala, in the island of Ceylon. It did not appear that she traded at any of the above ports. From Trincomala she went to Madras, where she sold a part of her cargo, and received in return an order on Tranquebar, a Danish port on the Coromandel coast, where she took in goods purchased with the above order,

and then proceeded to Batavia; there she sold the residue of her American cargo, as well as that part taken in at Tranquebar, and invested the proceeds in a return cargo, and about \$10,000 in specie, on account of the plaintiff, and \$4,000 belonging to the captain.

The crew were generally sick at Batavia, and the first officer died there, or shortly after she sailed on her return voyage. Before the ship had left the Straits of Sunda, the second officer, in a state of delirium, shot the master, Captain Wickham, and shortly after died. The master appointed an officer in his room, and being himself seized with a lock-jaw, and sensible of his danger, he called to him one of the seamen, Beardsley, a young man on board, and asked him if he could lay the ship's course for the Isle of France; and being answered in the affirmative, he directed him to conduct her to that island, and deliver her to the American consul at that place. The master shortly after died, before the ship had cleared the Straits, and before any course had been laid. A council of the crew being called, they determined in their situation that it was best to go to the Isle of France; and, accordingly, Beardsley conducted her there in safety, and delivered her to Mr. Buchannan, the American consul. Mr. Sauliera (the correspondent of the plaintiff, and to whom the captain, who was also the sole consignee, was recommended by his owner, in case he should want his assistance on the outward voyage) claimed the right of taking the vessel and cargo; which being resisted by Buchannan, the American consul, the question was brought before the court of admiralty of the island, where the possession and management of the vessel was decreed in favor of Buchannan. Buchannan obtained an order of the court for a survey of the vessel, and either upon the report made by the surveyors, or for some other reason, he thought the vessel was overloaded; and in order to lighten her, he sold a part of her cargo of sugar, and invested the proceeds, as well as the \$14,000, and about \$1,600 received from passengers, in a lighter load, consisting of indigo, etc. He employed a Mr. Adamson, a British subject, then in the island, to command and navigate the ship to New York; and permitted some Englishmen, who had been prisoners in the island, to take their passage in the ship to New York. The ship sailed from the Isle of France, and was lost on the American coast, within a day's sail of New York. On notice of loss a regular abandonment was made. The property of the plaintiff was admitted.

The defendants offered to prove by witnesses a usage, in voyages like the present, which prevented the selling on board of any part of the cargo at any intermediate port at which the vessel was permitted to call.

§ 493. *Under what circumstances proof of usage is admissible.*

By the COURT. A usage to explain some clause in a policy is proper. If the construction be doubtful, it is the safest guide, because most likely to accord with the intention of the parties, who, it is to be presumed, had a view to the usage when they contracted. But usage can only be resorted to where the law is doubtful and unsettled; and even then the construction must be determined by the usage, and not by the opinions of the witnesses, however respectable they may be. In this case, the usage which the defendant expects to prove will not contradict, though it may qualify and explain, the permission which is granted by trading at the ports in the Indian seas; and it will contradict no settled principle of law on that subject. The evidence, therefore, is proper.

[The case now proceeded, but it is not necessary to state it further.]

Charge by WASHINGTON, J.

The plaintiff has proved everything necessary to his right of recovery; and the question is, whether by any act, inconsistent with his contract, he has discharged the underwriters from the obligation to indemnify him for the loss which has happened.

The claim is resisted on account of three distinct acts of deviation; first, on the outward voyage, in buying and selling a cargo in the ports at which she was permitted to touch; second, in calling at the Isle of France on her return voyage; and, thirdly, in changing her cargo there, and the taking in a new cargo purchased with the specie brought from Batavia. Another objection is made to the recovery, upon the ground of the risk having been increased by taking on board, at the Isle of France, an English captain to command the ship home.

To understand the first objection under the head of deviation, we must attend to the nature of the voyage insured. What was it? From New York to the Cape, with liberty to proceed to and trade at the Isle of France, and thence to any port or ports in the Indian seas; and at and from the ports she might go to, back to New York, etc. It is contended by the counsel for the defendants that the permission to trade beyond the Isle of France is merely constructive, and cannot be more extensive than the express permission to trade at the Isle of France; that though the plaintiff might have touched at as many ports as he pleased, in order to dispose of his outward cargo, yet he could only take in a return cargo at those ports, and had no right to dispose of any part of it at any port on the voyage; that a more extensive construction would be highly unreasonable by prolonging and increasing the risk beyond the time and measure which could properly have been contemplated by the underwriters.

§ 494. *What are the privileges of the party insured for a "trading" voyage.*

It may be well doubted whether this increase of risk to the extent supposed is not in a great degree imaginary. The buying and selling would be nothing more than a change of cargo, and it must always be the interest of the insured to terminate the voyage as soon as possible. But be this as it may, it is always in the power of the insurers to prevent the consequences of a protracted voyage beyond the period they may be willing to insure, by limiting the duration of the risk. Insurances upon time seem to be peculiarly fitted to trading voyages, and in most cases accompany them. The only two instances mentioned by the witness called to prove a usage, as to voyages like the present, were insurances upon time. It is impossible for the underwriter to calculate the period when a trading voyage will terminate; and it may, therefore, be prudent for him to say that he will not take the risk longer than a fixed number of months, etc. But it is unnecessary to consider the extreme case mentioned by the defendant's counsel. It will be more prudent to confine our inquiries to the very case before us. Does the policy protect the selling at Madras? the investment of the proceeds of that sale in a cargo at Tranquebar, and the resale of it at Batavia? The first consideration is, do the words of the policy, properly construed by the rules of law, protect such a trading? If they do, then, secondly, is there any usage of trade which restrains the construction? First, the permission to trade at the Isle of France ought, upon every principle of construction, to be carried forward so as to ap-

ply to the ports in the Indian seas; for, otherwise, the permission to go there would be a mere mockery. Indulgences granted by the underwriter ought to be and certainly are always paid for by the insured; that of going to any port in the Indian seas was no doubt considered in the present policy. But the insured would never avail himself of the permission to go to ports in the Indian seas unless for the purpose of trading. If, then, the policy is to be so construed, what does it amount to? A license to trade at the Isle of France and at any port or ports in the Indian seas. If the insured might trade at those ports, he might buy and sell at them, not in the limited manner contended for by the defendant's counsel, but by repeated acts; for I state it, that buying and selling to this extent is the very essence of trade. It is by repeated acts of buying and selling and taking in barter that trade is carried on; and, therefore, the words used in this policy are broad enough in their general import to cover such a trading, unless they be restrained by usage or other expressions used in the policy.

The words used in this policy describe the risk in its utmost latitude, both as to the course of the voyage and as to the trading outward. As to the voyage, the termination not being stated, the vessel was unfettered as to its course, and this is an additional proof of the great latitude intended to be given to the insured. Second, is this construction opposed by any well established usage of trade? An attempt was made by the defendants to prove such a usage; but, so far as usage was proved at all, it was directly against the defendant, and in support of the construction given to the policy.

§ 495. *What will excuse a deviation.*

The calling at the Isle of France on the return voyage. It is in proof by the testimony of a witness, that the Isle of France is out of the direct course of the voyage from Batavia to New York; and without a stoppage there, would protract the voyage about twenty days. Permission to call at the Isle of France on the home voyage is not granted by the policy, and consequently the going thither was clearly a deviation. But a deviation, if committed against the will of the master, or even voluntarily, for the purpose of saving the property, is excused upon the ground that all the parties to the contract impliedly consent to it for their mutual benefit. But then it must appear that the master, in making the deviation, acted *bona fide*, according to the best of his judgment, for the general benefit of all the parties concerned; and in estimating the fairness of the measure, it is proper to attend to his motives, to the end he had in view, and to the consequences. He may err in judgment; the necessity may not have been extreme; but a necessity or justifiable cause must exist, and must be satisfactorily proved. His real motive ought to correspond with the one assigned, or he will furnish strong ground of suspicion that he has not acted *bona fide*.

The instances of necessity which are generally met with are stress of weather; injury sustained by the ship, which requires to be repaired; to avoid an enemy, going to join convoy, and the like. But these are only examples, which serve to illustrate the principle. There may be many other instances, where the necessity will be equally great, and equally valid, to excuse the deviation. Our inquiries will then be directed to the following points: What was the asserted object in calling at the Isle of France? Was it the real one?

The first officer on board, then the second, and lastly the captain, all died before the vessel left the Straits of Sunda, and before the vessel's course had

been shaped. Upon the death of the first officer the captain had appointed another; but he seems never to have acted, and we never hear anything further of him. The captain, previous to his death, but after he was seized with a lock-jaw, and when he was certain of dying in a short time, inquired of Beardsley, a young man, and a common seaman, if he could shape the course of the vessel to the Isle of France. Upon being answered in the affirmative, he directed him to conduct her thither, and deliver her to the American consul. Unless a deviation had been previously meditated by the captain, it is strongly to be inferred from his conduct on this occasion, that he thought Beardsley the most competent of the crew to navigate the vessel; but yet, that he had not sufficient confidence in his skill to intrust him with the command further than the Isle of France, which was not much more than half the distance they had to run to the Cape of Good Hope. This opinion of the captain seems to have been confirmed by that of the crew, who, in a council called after the melancholy fate of the captain, determined that in their situation it was proper to go to the Isle of France. One of the witnesses has deposed that, if the crew had not been extremely good, he doubted if Beardsley could have conducted the vessel even to the Isle of France.

This, then, was the situation of the vessel. What was the end proposed by going to the Isle of France? If the witnesses are to be believed, it was to be relieved from the danger to which the vessel and crew were exposed, by the unfortunate loss of all the officers who could be depended upon. But was this the real purpose for going there? It is denied by the defendant's counsel, who contend that it was a mere pretext to conceal a previously formed plan of Captain Wickham, to go from Batavia to the Isle of France. If this should be made out to your satisfaction, it will be difficult to give credit to the necessity resulting from the loss of officers, which is assigned as an excuse for the deviation.

The evidence relied upon by the defendant is, first, a letter from the American consul to the plaintiff, in which he states as coming from Beardsley, that the vessel had come in on her voyage from Batavia to that island in consequence of her being overloaded. It is strange that Beardsley should have assigned that as a reason, when it is admitted on all hands that she was not overloaded; and Beardsley in his deposition declared that he never heard of an intention to go to the Isle of France from any of the officers, and that she was not overloaded. Second, the reports of the persons appointed at the Isle of France to inspect the vessel, who state that she required repairs and lightening. This, however, is strongly opposed by other evidence taken in the cause. Third, a letter from Adamson to the plaintiff, after the loss, in which he states that the vessel sailed from Batavia to the Isle of France. But it is to be remarked that Adamson was picked up at the Isle of France, after the arrival of the vessel; and, therefore, could not have known anything which had previously taken place. Fourth, the journal of Beardsley, which is headed, "Journal of a voyage from Batavia to the Isle of France." You will judge what weight ought to be given to this evidence. Lastly, the protest of Beardsley, and of some of the crew, made at the Isle of France.

On this evidence it is proper to remark that the court allowed it to be read for the purpose of discrediting the witnesses who had signed the protest, and given evidence in the cause, but not to establish any one fact. If it has the effect for which it was permitted to be read, then you will consider whether there is evidence sufficient, without the depositions of those persons, to prove

the case and to justify the motives of the deviation, but not whether the protest establishes the contrary; and in presenting this inquiry, it may be proper to attend to what all these witnesses have deposed; that they did not understand the paper as it was interpreted to them; if they had, they would not have signed it. Though I should be very cautious in crediting such testimony, in contradiction of the certificate of a foreign competent consul, yet the certificate in this case goes no farther than to say that the protest was interpreted and sworn to, which might be, and yet might not have been, understood.

On the other side, you have heard the following evidence: First. Two letters from Captain Wickham shortly before he left Batavia, in which he speaks of sailing on his return to New York, and to touch at the Cape of Good Hope, in order to settle some business there. Whether he could have any motive to conceal from his owners his intent to go to the Isle of France, if he entertained it, you must judge. Second. The evidence of Beardsley, of the boatswain, and of one of the crew; who depose that they never heard of any intention to touch at the Isle of France, until after the captain was sick and sensible of his danger. The boatswain states that he was told by the captain and mates that they were to return to New York and to touch at the Cape. These witnesses, as well as Captain Lacher, give the reasons for their belief that the Isle of France was not in the contemplation of Captain Wickham. But what seems most strongly to corroborate the evidence of these witnesses is the order given by Wickham to Beardsley, shortly before his death. The diffidence he manifestly indicated of Beardsley's skill to navigate the vessel, even as far as the Isle of France; his directions to deliver her, not to Mr. Sauliera, the correspondent of his owners, but to the *American consul*; not by name, for probably he knew neither his name nor character, but as distinguished by his official station, as the commercial agent of the United States; without a single direction what this public character was to do, after he had received possession. These circumstances seem strongly to persuade the mind that the order to deviate grew out of the necessity of the case, and could not be the result of any previously formed intention. As to this, however, you are the proper judges.

§ 496. *Change of cargo terminates insurance, when.*

Third. The changing of and adding to the cargo at the Isle of France; trading, except for refreshments, not being permitted on the homeward voyage. The changing of the cargo was sufficient to avoid the policy, if, under the circumstances of the case, it was imputable to the plaintiff. The reason is, not that the risk insured is *increased*, but that it is not the risk insured; and, therefore, it could be no excuse to say that the load was lightened by the change. If a necessity existed to throw overboard or to land a part of the cargo, the act of doing so may be excused; but in this case there is no evidence of any necessity to lighten the vessel. She is proved to have been tight, and fit to perform any voyage.

The next inquiry is, Were the transactions at the Isle of France imputable to the insured? Was the result varied by the act of any person representing him, and acting, constructively, as his agent? The affirmative is asserted by the defendants. Or did they result from a misfortune occurring in the voyage, which, for a time, took the property out of his possession, and afforded an occasion for the interference of a third person, acting for the benefit of all concerned. This is contended for on the part of the plaintiff.

This is a question which, in point of law, presents the greatest difficulty in the cause. Let us go by steps. Had Captain Wickham lived, and done these things, the defendants would have been discharged. Had he authorized or permitted the American consul or any other person to do them, the consequences would have been the same. Had Beardsley been appointed by Captain Wickham his successor, generally, and had he done, authorized or permitted the doing of these things, still the policy would have been avoided. But who was Beardsley, and what were his powers? He was a sailor, taken from the crew of the vessel, clothed by the captain with a limited authority to conduct the vessel to the Isle of France, and there to deliver her and the cargo to the American consul. The moment he executed this order, all his authority ceased, and he returned to his former situation of a common seaman. He gave and could give no power or authority whatever to the American consul.

§ 497. *Owner not bound by acts of consul into whose hands a ship bereft of officers has, with cargo, been delivered.*

Who was Buchannan? Not the consignee or agent of the owners, either so appointed by them, or by the substitution of the captain, who was, whilst living, both master and consignee. The captain clothed him with no special powers whatever; and if he possessed any, they were such as flowed from the necessity of the case, and from his official character as the commercial agent of the country he represented and to which the vessel belonged. The vessel came to the Isle of France in distress—if you think, from the evidence, there existed a necessity strong enough to justify her going there, and in such a situation as required the American consul to take care of the vessel and cargo, and to afford his assistance to both. Wickham gave no directions to that officer; and, therefore, seems to have had nothing in view but to call upon him to perform his duty as consul. He is no more to be considered as the agent of the plaintiff than he would have been had the captain died without giving a direction, or if she had floated into the Isle of France, without officers, or without a crew. In addition to the circumstances of the case which threw her under his care, he states that he acted for the benefit of all concerned, and he acted, too, under the sentence of a competent tribunal, who vested him with the possession of the property.

The question of law, then, upon this point is, Is the insured responsible for the conduct of third persons, done in consequence of a misfortune occurring in the voyage, from which misfortune alone, and not from any act of the owner or his agents, such third persons derived their power to interfere? The court is of opinion that he is not. The decision of this point settles the only remaining one, the putting an English captain on board. Let this have been right or wrong, it was not the act of the assured, expressly or constructively.

To conclude. The first question is purely a question of law, as the defendant admits that a usage such as was stated in the opening is not proved, and the law is in favor of the plaintiff. The second is a mixed question of law and fact. If you are of opinion, upon the whole of the evidence, that the going to the Isle of France was a measure of necessity, produced by the loss of officers; that the captain, who gave the order, and Beardsley, who executed it, acting according to their best judgment, were actuated by honest motives to promote the general benefit of all concerned, and did not assign this motive as a mere cover to a previously formed plan to go there, then this point is also in favor of the plaintiff; if your opinion upon the evidence should be otherwise, then it is in favor of the defendant. If your sense of the evidence

upon the second point should be in favor of the plaintiff, and that the authority given to Beardsley was such as I have considered it, then the next question, in point of law, is also with the plaintiff. (Verdict for plaintiff.)

§ 498. **Inchoate right to freight.**—If the insured, in virtue of a contract with a third person, has an inchoate right to freight as soon as the voyage begins, though before the cargo is taken, there the risk begins, and the policy attaches as soon as the voyage begins. *Hart v. Delaware Ins. Co.*, 2 Wash., 346 (§§ 841-44).

§ 499. Generally an inchoate right to freight does not begin until the cargo is put on board, but if freight is insured in a valued policy, the right to indemnity attaches if any part of the cargo is shipped. *Ibid.*

§ 500. **Freight.**—A policy insured the plaintiffs on freight on the barque H., at and from Baltimore to Rio Janeiro and back to Havana or Matanzas, beginning the adventure from the lading at Baltimore and continuing the same until the goods should be safely landed at the port of destination. Assuming that the plaintiffs were entitled to recover, *held*, that the defendant was not entitled to deduct the freight earned on the voyage, from Baltimore to Rio Janeiro upon the outward cargo. *Hugg v. Augusta Ins. Co.*, 7 How., 595 (§§ 898-901).

§ 501. **Same—"Cargo."**—In an insurance on "cargo" composed chiefly of lemons and oranges, if all the oranges are lost by perils insured against, and the lemons are saved and arrive, the underwriter is not liable for the loss of the oranges under the usual memorandum warranting the underwriter free from particular average on "fruit." *Humphreys v. Union Ins. Co.*, 3 Mason, 429 (§§ 845-50).

§ 502. **Same.—To release performance for a less sum than stipulated under a charter-party,** at an intermediate port, before the end of the voyage, and after the unlading and sale of the cargo originally shipped, gives no claim to an underwriter who has insured freight for the entire voyage that the whole freight money capable of being earned on the rest of the voyage has been received. The true construction of such a compromise and release under the circumstances is that the shipper buys a release from the obligation to procure a cargo for the rest of the voyage, leaving the master of the ship at the risk of finding such cargo. *Hughes v. Marine Ins. Co.*, 8 Wheat., 294.

§ 503. **Same—Pro rata itineris.**—An underwriter insured a cargo of wheat to be shipped from Chicago to Buffalo. The vessel was lost about midway of the voyage, and the greater part of the wheat much damaged. The wheat was abandoned for a total loss, and the underwriters accepted and sold the damaged part. The rest was carried on to Buffalo. *Held*, that the underwriters were liable for freight *pro rata itineris* on the damaged wheat. *The Mohawk*, 8 Wall., 153.

§ 504. **The carrier must be prevented from earning his compensation or freight money before he can recover its value from an insurance company which has insured it to him.** *Murray v. Aetna Ins. Co.*, 4 Biss., 417.

§ 505. **Freight is not a charge upon the salvage of cargo in the hands of underwriters, whether the assured own the ship or not.** *Columbian Ins. Co. v. Catlett*, 12 Wheat., 883 (§§ 657-63).

§ 506. **Profits.**—Proof that profits would have arisen on a voyage is not required, in order to recover on a policy on profits, if the cargo has been lost. *Patapeco Ins. Co. v. Coulter*, 3 Pet., 222 (§§ 563-65).

§ 507. **Bottomry.**—In cases of partial loss, where money is taken upon bottomry to defray expense of repairs, the underwriters have nothing to do with the bottomry, but are simply bound to pay the partial loss, including their share of the extra expense of obtaining the money that way. *Bradlie v. Maryland Ins. Co.*, 12 Pet., 378 (§§ 822-29).

§ 508. Where a bottomry bond, executed at Hamburg, was given at a premium of twelve and a half per cent., and the bottomry holder agreed to give it up if the sum advanced and common interest were promptly paid, and the agent of the bottomry holder received a draft from the owners on Hamburg for the amount, and common interest, and charged a commission for indorsing the draft, and the bond was thus taken up, *held*, that the underwriters were liable for the interest and commission, as part of the loss. *Held*, also, that one of the owners who transacted the business, and gave the draft and took up the bottomry bond, as agent for all the owners, was not entitled to claim against the underwriters any commission on his disbursements or for his services. *Peters v. Warren Ins. Co.*, 1 Story, 463 (§§ 990-94).

§ 509. **Custom.**—It is (1806) the custom in Philadelphia that if an order be given to insure a given sum, the agent should insure a greater sum, in order to cover the amount to be insured. By the custom, he cannot insure to cover premium, in the same policy with that to cover the value. *Barton v. Anthony*, 1 Wash., 317.

§ 510. *Cost of survey.*—Where a survey is made at a foreign port, the underwriters are liable for the cost thereof if the damage for which the survey was made was caused by a peril insured against. *Potter v. Ocean Ins. Co.*, 3 Sumn., 27 (§§ 995-1002).

V. RISK INSURED.

1. *Perils of the Sea.*

SUMMARY.—*Negligent or improper conduct of master*, § 511.—*Extraordinary accidents*, § 512.—*Grounding*, §§ 513, 514.—*Memorandum clause*, § 515.—*Stranding*, § 516.—*Ebbing of tide*, § 517.—*Collision*, § 518.—*Sea worms*, § 519.

§ 511. *Quere*, if underwriters are liable for a loss, within the terms of a policy, caused by the negligent or improper conduct of the master or owners. *Potter v. Suffolk Ins. Co.*, §§ 520-21. See §§ 540-546.

§ 512. The underwriters of a common policy are liable for all accidents arising from any extraordinary circumstances, and not from the inherent weakness of the vessel. *Ibid.*

§ 513. Where an accident occurs in the ordinary course of grounding a vessel in a harbor, and there is no proof of inherent weakness, the loss must be attributed to some extraordinary cause, as the striking on some hard substance, or malposition, or overlaying the dock, which would be a peril of the sea. *Ibid.*

§ 514. A ship stoutly built, and between two and three years old, and without any circumstance to lead to the supposition that she was rotten, or had at any previous period met with any calamity, having a small cargo, in a harbor and at a wharf usually safe for vessels of her tonnage, after taking the ground was discovered to be leaking so badly that survey was made and the return of the damage reported as "sustained by the vessel lying badly on the ground." *Held*, that the loss could not be attributed to any weakness of the vessel, but to some extraordinary cause, being a peril of the sea. *Ibid.*

§ 515. The effect of the memorandum clause in policies is not to enlarge the perils underwritten against, but to exempt the underwriters from certain losses within those perils. *Ibid.*

§ 516. To constitute a stranding within the policy the vessel must be on the strand under extraordinary circumstances. *Ibid.*

§ 517. A loss by the ebbing of the tide is a loss by the perils of the sea, if it be not wear and tear, but extraordinary in its nature or mode. *Ibid.*

§ 518. A loss by collision, without fault on either side, is a loss by perils of the seas; and where, in such a case, by decree of a foreign court, the vessel insured is condemned to pay, as under a general average loss, half the value of the other colliding vessel, which was sunk by the collision, *held*, that this loss was covered by the policy. (a) *Peters v. Warren Ins. Co.*, §§ 522-26.

§ 519. If, in a particular sea, worms ordinarily assail and enter the bottom of vessels, the loss of a vessel there by worms is not a loss insured against by a marine policy. (b) *Hazard v. New England Ins. Co.*, §§ 527-31.

[NOTES.—See §§ 611-647.]

POTTER v. SUFFOLK INSURANCE COMPANY.

(Circuit Court for Massachusetts: 2 Sumner, 197-206. 1835.)

STATEMENT OF FACTS.—Action on a policy of insurance for a year on the brig "Benjamin Ruggles," valued at \$15,000. The declaration, besides the money counts, contained one for general average and one for a total loss. Plea, the general issue. While in the harbor of Newport, in England, she was found to be leaking very badly, and it was ascertained that in grounding when the tide fell in the harbor her bottom had been seriously injured. Having been repaired, she took on her cargo and performed her voyage.

(a) *Acc. Hale v. Washington Ins. Co.*, 2 Story, 176. But see *contra*, *De Vaux v. Salvador*, 4 Ad. & E., 420; *Mathews v. Howard Ins. Co.*, 11 N. Y., 9, 19. See, also, *General Interest Ins. Co. v. Sherwood*, 14 How., 351, 367; *Street v. Augusta Ins. Co.*, 12 Rich., 13, 22.

(b) Compare *Pandorf v. Hamilton*, 17 Q. B. D., 670, reversing 16 Q. B. D., 629.

Opinion by STORY, J.

The principal claim now in controversy is for the repairs made at Newport. And the question is, whether, under all the circumstances in the case, they are a loss within the perils in the policy; or rather, as the declaration is framed, whether it is a loss by the perils of the seas, for which the underwriters are responsible. The brig was built in Newport (Rhode Island), in 1827, of oak and spruce of the first quality, and quite strong and stout. And no evidence exists to show that she had, during the present or any former voyage, sustained any such injuries as would materially impair her structure or strength. She had, in a previous voyage, carried a cargo of four hundred tons of railroad iron from the neighboring port of Cardiff, in Wales, to Philadelphia, and the loading was under circumstances not materially different from these on the present occasion, so far as the harbor and fall of the tide are concerned.

§ 520. *Quære, as to loss by negligence of master or owner.*

That the loss on the present occasion arose from severe straining of the vessel cannot well be doubted. But the important inquiry is as to the cause or manner in which it was occasioned. Was it from the ordinary manner of the ship's taking the ground in such a harbor? It is hardly to be presumed that such could be the fact; for under such circumstances, the harbor or wharf would not be a fit place for vessels of such a burthen under any circumstances; which is not pretended, and indeed is refuted by the evidence. If the harbor or wharf was an improper one for such a ship and the loss was occasioned by the negligent or improper conduct of the master, then, indeed, the underwriters would not be liable for the loss, unless in those cases in which, upon the doctrine *causa proxima, non remota spectatur*, underwriters are held responsible for losses. Perhaps it may be thought that the doctrine maintained in Massachusetts (contrary to what has been maintained in England and in the supreme court of the United States) (see *Bush v. Royal Exchange Ins. Co.*, 2 B. & Ald., 72; *Walker v. Maitland*, 5 B. & Ald., 171; *Bishop v. Pentland*, 7 B. & Cres., 219; *Patapsco Ins. Co. v. Coulter*, 3 Pet., 222; §§ 563-65, *infra*) is, that no recovery can be had for a loss of this sort, caused by the negligence of the owner or the master. I do not say that it has been definitely so adjudged in Massachusetts; but such has been the course of opinion in the state. See *Brazier v. Clap*, 6 Mass., 1; *Cleaveland v. Union Ins. Co.*, 8 Mass., 321; *Elbery v. New England Ins. Co.*, 8 Pick., 14, 22. But it is unnecessary to decide this point; because it cannot be doubted from the evidence that in the ordinary course of taking the ground in this harbor, or at this wharf, the present loss would not have occurred. It must, then, have arisen either from the inherent weakness of the vessel or from some extraordinary accident or casualty. There is no doubt, from the evidence, that such a loss might be occasioned by the vessel striking on some hard substance, or from the vessel overlaying her dock, or from some malposition. Some of the witnesses assert that accidents of the like sort have occurred in this very harbor from such overlaying the dock or malposition. The captain of the brig, however, attributes this very loss to another circumstance, viz., the striking upon some hard substance.

§ 521. *Underwriter liable for loss arising from extraordinary accident, not for loss arising from ordinary course of things, or inherent weakness of vessel.*

But, whether it was occasioned in the one way or in the other, or in any other unknown manner, if it was not such a loss as would ordinarily occur in taking the ground at that wharf on the ebbing of the tide, and it was not in truth occasioned by the inherent weakness of the vessel itself, it is not mate-

rial; for the underwriters are responsible for all accidents of this sort occasioned by the recess of the tide, where they arise from extraordinary and extraneous circumstances and not from such inherent weakness. Striking on a hard substance would be such an extraordinary accident. But it is only one instance, illustrative of the rule, and not itself of the essence of the rule. Any other accident, not in the usual course of grounding on the recess of the tide, but arising from some unexpected and unusual cause, would be equally within the rule. There is no doubt that any injury, which must arise in the ordinary course of grounding at every tide in the tide harbor, is not a loss within the policy; but it is treated as the ordinary wear and tear of the voyage. There must be some extraordinary injury not arising from the ordinary course of the navigation to make the underwriters responsible.

It appears to me that this view of the matter is fully borne out by the authorities. The case of *Fletcher v. Inglis*, 2 B. & Ald., 315, is directly in point. There, a transport in the government service, insured on time, was moored in the harbor of Boulogne, near one of the quays. The harbor of Boulogne is a dry harbor, with a hard uneven bottom, and upon the recess of the tide the ship took the ground and struck hard, and received some injury in several of her knees, for which the suit was brought. The question was, whether the loss was a loss by the perils of the sea within the meaning of the policy. The argument was that it was a mere taking of the ground under ordinary circumstances, and, therefore, the injury was but ordinary wear and tear; and that it did not arise from any extraordinary accident, which would be a peril of the sea. But the court were of opinion that the loss was by the perils of the sea. Now, the sole ground of this determination must have been that the loss was not such as would naturally and commonly occur by the ordinary grounding, for then it would be mere wear and tear; but that it was unusual and extraordinary in character and degree. The case of *Thompson v. Whitmore*, 3 Taunt., 227, is clearly distinguishable. There, the loss was while the vessel was hauled down on the beach to be cleaned and calked; and, when the tide fell, some of the planks of the side on which she lay gave way, and some of her foot-hooks were broken; and it was held that, as the damage happened on land, it was not a loss by the perils of the sea, which was the only loss declared on. *Bancroft v. Dunmore*, there cited, was decided on the same ground. In *Phillips v. Barker*, 5 B. & Ald., 161, the loss under like circumstances was held not to be by perils of the sea, but still that it was a loss within that policy.

The cases on the memorandum clause, in the common policies, so far from impugning, fortify the doctrine. They all proceed upon the definition of what constitutes a stranding in the sense of the policy,—so as to let in all losses by the ordinary perils within the policy. Now, if the losses in those cases, supposing there were no memorandum clause, would not be within the policy, it would be wholly unnecessary to consider whether there was a stranding or not; for the underwriters would not be liable either way for the loss. The memorandum clause does not operate as an enlargement of the perils underwritten against, but it operates to exempt the underwriters from certain losses within those perils. It seems to me that those cases are founded in entire good sense. They decide this general principle, that where the vessel, in a tide harbor, takes the ground in the ordinary way upon the ebbing of the tide, it is not a stranding within the policy, although, in common language, the vessel is on the strand. But, to constitute “stranding,” she must be on

the strand under extraordinary circumstances, or from extraneous causes. I do not go over the cases. They are commented on with great ability and clearness in *Wells v. Hopwood*, 3 B. & Adol., 20, and *Kingsford v. Marshall*, 8 Bing., 458, which contain all the learning upon the subject. But in none of those cases was there any doubt that the loss itself, except for the memorandum clause, would have been a loss within the policy. In *Kingsford v. Marshall*, 8 Bing., 462, Lord Chief Justice Tindal prefaced his able opinion by saying, "That the injury done to the ship or goods by settling on a hard substance at the bottom of the harbor (which was the case before the court), would be a damage recoverable on a policy on a ship, or a policy on goods, not included in the memorandum, as an injury occasioned by perils of the sea, is beyond all doubt." It thus affirms the principle that the loss by the ebbing of the tide is a loss by the perils of the sea, if it be not mere wear and tear, but extraordinary in its nature or mode. If a ship should, in taking the ground, fall over, and thereby bilge (which would be no ordinary injury, but an unusual accident), it would be a loss by perils of the sea, just as much as it would be if done by striking on a hard substance. This seems also to have been the doctrine in *Carruthers v. Sydenbotham*, 4 M. & Selw., 77, as it certainly was in *Wells v. Hopwood*, 4 B. & Adol., 20, and *Bishop v. Pentland*, 7 B. & Cresw., 219. The case of *Fletcher v. Inglis*, 2 Barn. & Ald., 314, did not turn upon any distinction whether the injury was by a hard or by a soft substance, but upon the point whether it was an ordinary injury, or an extraordinary accident. Unless, therefore, that case is to be overturned, and it has nowhere been questioned or denied, it governs the present, if the present injury was not from the inherent debility of the ship; for no person pretends that it was the ordinary wear and tear in grounding in the harbor of Newport. The only case which can, as I think, be deemed to lead in the opposite direction upon this point, is *Hearne v. Edmunds*, 1 Brod. & Bing., 388. That case, however, turned, not upon any question as to the loss being a loss by the perils of the sea, but whether it was a case of stranding. So it has been understood in all subsequent discussions on the same subject; and if otherwise understood, it would be irreconcilable with other decisions.

The present case is, therefore, after all, narrowed down to the consideration whether the loss was from the inherent weakness of the vessel; for if it was not from such weakness, it was occasioned by an unusual and extraordinary accident in grounding, upon the ebbing of the tide, which would be a peril of the sea. Upon examining the testimony, it does not strike me that there is any sufficient proof of such weakness. So far as the proof goes, it seems to me to be, if not altogether, at least by a great preponderance of weight, the other way. In the first place, the original build and age of the vessel will not justify any such conclusion. She is proved to have been strongly and stoutly built. She was only between two and three years old, and there is nothing in the whole evidence to lead to the slightest supposition that she was rotten, or had at any previous period met with any calamity which could render her either infirm or incapable of carrying such a cargo. On the contrary, in a prior voyage, she had taken on board a cargo of railroad iron of four hundred tons, at the neighboring port of Cardiff, where the tide ebbs and flows in the like manner, without the slightest complaint or injury. In the next place, she was not, at the time of this accident, heavily laden. She had on board only about two hundred and ninety tons of iron, which no one now pretends was either a burthensome or overloaded cargo for her in such a harbor; and the

wharf where she lay was a safe wharf for vessels of her tonnage. The principal foundation upon which the argument of her inherent weakness rests is that she was so greatly strained and injured that it could not have arisen from the ordinary wear and tear of grounding in her local position or from her cargo, which was not a heavy cargo, and, therefore, it must have arisen from her inherent weakness. Now there is this difficulty in the very structure of the argument, that it does not provide for certain other events, either of which was capable of producing the same effects, viz.: striking on a hard substance in grounding, or overlaying her dock, or accidentally taking the ground in a malposition or at an unsuitable point, so as to throw an unusual and extraordinary strain upon the parts of the vessel which sustained so much injury. Besides, this supposed inherent weakness is not only not established by the antecedent history of the vessel in other voyages, but it is in apparent opposition to her subsequent history. In this very voyage, after the repairs were made upon her (which were not great), she took on board a cargo of four hundred and fifty tons of iron, and brought it safely home, and in other voyages she has carried cargoes equally burthensome. It seems to me exceedingly difficult to maintain that under such circumstances there is any just ground to attribute the injury to any inherent incapacity of the vessel to bear such a cargo in the ordinary way in such a harbor at the ebb of the tide. It is no answer to say that, in fact, she proved too weak to bear it. It is necessary to show that such inability was the result of her intrinsic weakness, and not of any extraordinary or extraneous cause.

My opinion, upon a full survey of the evidence, is that the loss is not attributable to any inherent weakness of the vessel, but is attributable to other extraneous and extraordinary causes, such as striking some hard substance, or malposition, or bad taking of the ground, or overlaying the dock. If attributable to any such extraneous and extraordinary cause taking effect by reason of the ebbing of the tide, it is, in my judgment, a loss by perils of the sea, for which the underwriters are responsible. The verdict for the plaintiff is, therefore, correct in principle, and the cause will be referred to an auditor to ascertain the amount to which the plaintiff is entitled.

PETERS v. WARREN INSURANCE COMPANY.

(14 Peters, 99-113. 1840.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This is the case of a division of opinion certified to this court by the judges of the circuit court for the district of Massachusetts.

The defendant, by a policy of insurance dated the 1st of April, 1836, insured the plaintiffs, for whom it may concern, payable to them \$8,000, on the ship *Paragon*, for the term of one year, commencing the risk on the 13th of March, 1836, at noon, at five per cent. The policy contained the usual risks, and, among others, that of perils of the sea. The declaration alleged a loss, by collision with another vessel, without any fault of the master or crew of the *Paragon*; and also insisted on a general average and contribution. The parties at the trial agreed upon a statement of facts, by which it appeared that the *Paragon* was owned by the plaintiffs, and was in part insured by the defendants by the policy above mentioned. On the 10th of November, 1836, the *Paragon* sailed from Hamburg, in ballast, for Gottenburgh, to procure a cargo of iron for the United States. While proceeding down the Elbe, with

a pilot on board, she came in contact with a galliot, called the Frau Anna, and sunk her. By this accident the Paragon lost her bowsprit, jib-boom and anchor, and sustained other damage, which obliged her to put into Cuxhaven, a port at the mouth of the Elbe, and subject to the jurisdiction of Hamburg, for repairs. Whilst lying there the captain of the galliot libeled the Paragon in the marine court, alleging that the loss of the vessel was caused by the carelessness or fault of those on board of the Paragon. The ship was arrested, but was subsequently released on security being given by the agents of the owners to respond to such damages as should be awarded by the court. Upon the hearing of the cause, the court decided that the collision was not the result of fault or carelessness on either side, and that, therefore, according to the marine law of Hamburg, the loss was a general average loss, and to be borne equally by each party; that is to say, that the Paragon was to bear one-half of the expenses of her own repairs, and to pay one-half of the value of the galliot; and that the galliot was to bear the loss of one-half of her own value, and to pay one-half of the repairs of the Paragon; the result of which was, that the Paragon was to pay the sum of \$2,600, being one-half of the value of the galliot (\$3,000), after deducting one-half of her own repairs (\$400). The owners of the Paragon having no funds in Hamburg, the captain was obliged to raise the money on bottomry. There being no cargo on board of the Paragon, and no freight earned, the Paragon was obliged to bear the whole loss.

Upon this state of facts the question arose, whether in this case the contributory amount paid by the Paragon on account of the collision was a direct, positive and proximate effect from the accident, in such sense as to render the defendants liable therefor. Upon this question the judges were opposed in opinion, and it has accordingly been certified to this court for a final decision.

§ 522. *Loss by collision without fault a peril of the sea.*

That a loss by collision, without any fault on either side, is a loss by the perils of the sea, within the protection of the policy of insurance, is not doubted. So far as the injury and repairs done to the Paragon itself extend, it is admitted that the underwriters are liable for all the damages. The only point is, whether the underwriters are liable for the contribution actually paid on account of the loss of the galliot.

§ 523. *Underwriter liable for contribution to be made to the other colliding vessel by vessel insured.*

This point does not appear ever to have been decided in any of the American courts. It is proper, therefore, to examine it upon principle, and to ascertain what is the true bearing of the foreign authorities upon it. And first upon principle: that the owners of the Paragon have been compelled to pay this contribution without any fault on their side is admitted; that it constituted a proper subject of recognizance by the marine court of Hamburg, the collision having occurred within the territorial jurisdiction of that city, is also admitted; and that the claim constituted a charge or lien upon the Paragon, according to the local law, capable of being enforced by a proceeding *in rem*, is equally clear. Why, then, should not the loss be borne by the underwriters, since it was an unavoidable incident or consequence resulting from the collision?

§ 524. *Causa proxima.*

The argument is, that in the law of insurance which governs the present

contract, it is a settled rule that underwriters are liable only for losses arising from the proximate cause of the loss, and not for losses arising from a remote cause not immediately connected with the peril. *Causa proxima non remota spectatur*. The rule is correct, when it is understood and applied in its true sense; and, as such, it has been repeatedly recognized in this court. But the question, in all cases of this sort, is, what, in a just sense, is the proximate cause of the loss?

The argument in the present case, on the part of the defendants, is, that the law of Hamburg is the immediate or proximate cause of the loss now claimed, and the collision is but the remote cause. But surely this is an over-refinement, and savors more of metaphysical than of legal reason. If the argument were to be followed out, it might be said, with more exactness, that the decree of the court was the proximate cause, and the law of Hamburg the remote cause of this loss. But law, as a practical science, does not indulge in such niceties. It seeks to administer justice according to the fair interpretation of the intention of the parties, and deems that to be a loss within the policy which is a natural or necessary consequence of the peril insured against. In a just view of the matter, the collision was the sole proximate cause of the loss, and the decree of the court did but ascertain and fix the amount chargeable upon the Paragon, and attached thereto at the very moment of the collision. The contribution was a consequence of the collision and not a cause. It was an incident inseparably connected, in contemplation of law, with the sinking of the galliot, and a damage immediate, direct and positive from the collision. In the common case of an action for damages for a tort done by the defendant, no one is accustomed to call the verdict of the jury, and the judgment of the court thereon, the cause of the loss to the defendant. It is properly attributed to the original tort, which gave the right to damages consequent thereon, which damages the verdict and judgment ascertained but did not cause.

§ 525. *Special cases within the rule of causa proxima.*

But let us see how the doctrine is applied in other analogous cases of insurance, to which, as much as to the present case, the same maxim ought to apply, if there is any just foundation for it here. If there be any commercial contract which, more than any other, requires the application of sound common sense and practical reasoning in the exposition of it, and in the uniformity of the application of rules to it, it is certainly a policy of insurance, for it deals with the business and interests of common men, who are unused to deal with abstractions and refined distinctions. Take the case of a jettison at sea, to avoid a peril insured against. It is a voluntary sacrifice and may be caused by the perils of the sea; but it is ascertained long afterwards, and that ascertainment, whether made by a court of justice or by an agreement of the parties, would, in the sense of the maxim contended for in the argument, be the immediate cause of the contribution, and the jettison but a remote cause, and the violence of the winds and waves a still more remote cause of the jettison. Yet all such niceties are disregarded and the underwriters are held liable for the loss thus sustained by the jettison, as a general average. It is no answer to say that this is now the admitted doctrine of the law, and therefore it is treated as a loss within the policy. The true question to be asked is, Why is it so treated? General average, as such, is not, *eo nomine*, insured against in our policies. It is only payable when it is a consequence, or result, or incident (call it which we may) of some peril positively insured against, as, for example,

of the perils of the sea. The case of a ransom after capture stands upon similar grounds. The ransom is, in a strict metaphysical sense, no natural consequence of the capture. It may be agreed upon long afterwards; and if we were to look to the immediate cause, it might be said that the voluntary act of the party in the payment was the cause of the loss. But the law treats it as far otherwise, and deems the ransom a necessary means of deliverance from a peril insured against and acting directly upon the property. The expenses consequent upon a capture, where restitution is decreed by a court of admiralty upon the payment of all the costs and expenses of the captors, fall under a similar consideration. In such cases, the decree of the court allowing the costs and expenses may be truly said to be the immediate cause of the loss; but courts of justice treat it also as the natural consequence of the capture.

A still more striking illustration will be found in the case of salvage decreed by a court of admiralty for services rendered to a vessel in distress. The vessel may have been long before dismasted or otherwise injured, or abandoned by her crew in consequence of the perils of the winds and waves; and the salvage decreed in such a case would seem, at the first view, far removed from the original peril and disconnected from it; and yet, in the law of insurance, it is constantly attributed to the original peril as the direct and proximate cause, and the underwriters are held responsible therefor, although salvage is not specifically, and in terms, insured against.

These are by no means the only illustrations of the danger of introducing such an application of the maxim into the law of insurance, as is now contended for. Suppose a perishable cargo is greatly damaged by the perils of the sea, and it should, in consequence thereof, long afterwards, and before arrival at the port of destination, become gradually so putrescent as to be required to be thrown overboard for the safety of the crew, the immediate cause of the loss would be the act of the master and crew; but there is no doubt that the underwriters would be liable for a total loss, upon the ground that the operative cause was the perils of the sea. Suppose a vessel which is insured against fire only is struck by lightning and takes fire, and in order to save her from utter destruction she is scuttled and sunk in shoal water, and she cannot afterwards be raised; it might be said that the immediate cause of the loss was the scuttling, but in a juridical sense it would be attributed to the fire, and the underwriters would be held liable therefor. Suppose another case, that of a vessel insured against all perils but fire; and she is shipwrecked by a storm on a barbarous coast, and is there burnt by the natives; it might be said that the proximate cause of the loss was the fire, and yet there is no doubt that the underwriters would be held liable on the policy upon the ground that the vessel had never been delivered from the original peril of shipwreck.

Illustrations of this sort might be pursued much further, but it seems unnecessary. Those which have been already suggested sufficiently establish that the maxim, *causa proxima non remota spectatur*, is not without limitations, and has never been applied in matters of insurance to the extent contended for, but that it has been constantly qualified, and constantly applied only in a modified practical sense, to the perils insured against. In truth, in the present case, the loss occasioned by the contribution is (as has been already suggested) properly a consequence of the collision, and in no just sense a substantive independent loss.

§ 526. *Authorities reviewed.*

In the next place, how stand the authorities on this subject? The only authority which has been cited by the counsel for the defendants, to sustain their argument, is the case of *De Vaux v. Salvador*, 4 Ad. & Ell., 420. That case is certainly direct to the very point now in judgment. It was a case of collision, where the assured had been compelled to pay for an injury done to another vessel by the mutual fault of both vessels, according to the rule of the English court of admiralty, which, in a case of mutual fault, apportions the loss between them. Lord Denman, in delivering the opinion of the court, admitted that the point was entirely new; and, after referring to the above maxim, said: "It turns out that the ship (insured) has done more damage than she has received, and is obliged to pay the owners of the other ship to some amount, under the rule of the court of admiralty. But this is neither a necessary nor a proximate effect of the perils of the sea. It grows out of an arbitrary provision in the law of nations; from views of general expediency, not as dictated by natural justice, nor (possibly) quite consistent with it; and can no more be charged on the underwriters than a penalty incurred by contravention of the revenue laws of any particular state, which was rendered inevitable by perils insured against." This is the whole reasoning of the learned judge upon this point; and with great respect, if the views already suggested are well founded, it is not supported by the analogies of the law, or by the principles generally applied to policies of insurance. The case of a penalty, put by the learned judge, does not strike us with the same force as it does his lordship. If any nation should be so regardless of the principles of natural justice as to declare that a vessel driven on shore by a storm should be forfeited because its revenue laws were thereby violated, it would then deserve consideration whether the underwriters would not be liable for the loss, as an inevitable incident to the shipwreck. At all events, the point is too doubtful in itself to justify us in adopting it as the basis of any reasoning in the present case.

The case before the king's bench was confessedly new, and does not appear upon this point to have been much argued at the bar. It seems to have been decided, principally, upon the ground of the absence of any authority in favor of the assured; and as it appears to us, in opposition to the analogies furnished by other acknowledged doctrines in the law of insurance.

The same question, however, has undergone the deliberate consideration of some of the greatest maritime jurists of continental Europe, and the result at which they have arrived is directly opposite to that of the king's bench. Pothier lays it down as, in his opinion, the clear result of the contract of insurance, that the underwriters are bound to pay not only the direct loss occasioned by any peril insured against, but all the expenses which follow as a consequence therefrom. Pothier, *Traité d' Assurance*, n. 49. Estrangin, a very excellent modern commentator upon Pothier (Estrangin's note), asserts that there is not the slightest doubt on the subject. Emerigon, whose reputation as a writer on the law of insurance is second to no one, unequivocally adopts the same opinion. Emerig. *Assur.*; ch. 12, § 14, pp. 414-417. In short, all those learned foreigners hold the doctrine that whenever the thing insured becomes by law directly chargeable with any expense, contribution or loss, in consequence of a particular peril, the law treats that peril, for all practical purposes, as the proximate cause of such expense, contribution or loss. And this they hold, not upon any peculiar provisions of the French ordinance, but

upon the general principles of law applicable to the contract of insurance. In our opinion this is the just sense and true interpretation of the contract.

It has been suggested that there is a difference between our policies and the French policies; the latter containing an express enumeration of fortuitous collision, or running foul (*abordage fortuit*), as a peril insured against, while in our policies it falls only under the more general head of "perils of the sea." But this furnishes no just ground for any distinction in principle. The reasoning, if any, to be derived from this circumstance, would seem rather to apply with more force in favor of the plaintiff, since even, when the risk of collision is specifically enumerated, the expenses and contribution attendant upon it are treated as inseparable from the direct damage to the vessel itself, as a part of the loss. In short, whether a particular risk is specified in terms, or is comprehended in the general words of the policy, the same result must arise, namely, that the underwriters are to bear all losses properly attributable to that peril, and no other losses.

It may be proper to remark that the rule which we here adopt is just as likely, in actual practice, to operate favorably as unfavorably to the underwriters. If by the collision the *Paragon* had been sunk, and the galliot saved, the underwriters would have had the entire benefit of the reciprocity of the rule. It would sound odd that in such a case the underwriters should be entitled to receive the full benefit of the Hamburg law for their own indemnity, and yet, in the opposite case, that they should escape from the burden imposed by that law.

In all foreign voyages, the underwriters necessarily have it in contemplation that the vessel insured must, or at least may, be subjected to the operation of the laws of the foreign ports which are visited. Those very laws may in some cases impose burdens, and in some cases give benefits, different from our laws; and yet there are cases under policies of insurance, where it is admitted that the foreign law will govern the rights of the parties, and not the domestic law. Such is the known case of a general average, settled in a foreign port according to the local law, although it may differ from our own. *Simonds v. White*, 2 Barn. & Cresw., 805. In the present case, the policy was on time, and the vessel had, as it were, a roving commission to visit any foreign port, and of course might well be presumed at different periods to come under the dominion of various codes of laws, which might subject her to various expenditures and burdens. The underwriters have no right to complain, that, when those expenditures and burdens arise from a peril insured against, they are compelled to pay them, for they were bound to have foreseen the ordinary incidents of the voyage. Suppose a vessel injured by the perils of the sea puts into a foreign port to repair, and the license to repair, or the repairs themselves, are burdened with a heavy revenue duty; no one will doubt that the charge must be borne by the underwriters, as an expense incident to the repair; and yet it might truly be said not to be the natural result of the peril, but only a charge imposed by law, consequent thereon.

Upon the whole, we are of opinion that it be certified to the circuit court that in this case the contributory amount paid by the *Paragon*, on account of the collision, was a direct, positive and proximate effect from the accident, in such sense as to render the defendants liable therefor upon this policy.

HAZARD v. NEW ENGLAND MARINE INSURANCE COMPANY.

(8 Peters, 557-587. 1834.)

ERROR to U. S. Circuit Court, District of Massachusetts.

Opinion by MR. JUSTICE MCLEAN.

STATEMENT OF FACTS.—The plaintiffs brought an action of *assumpsit* in the circuit court for the district of Massachusetts on a policy of insurance, dated the 29th of December, 1827, whereby the defendants caused to be assured Josiah Bradlee & Co., for Thomas Hazard, Jr., of New York, \$15,000 on the ship Dawn and outfits, at and from New York to the Pacific ocean and elsewhere, on a whaling voyage, during her stay and fishing and until her return to New York or port of discharge in the United States. The declaration contained various counts stating a total loss of the vessel and a partial loss of the cargo, and also a partial damage to the vessel by perils of the seas.

It appeared in evidence that the vessel sailed on the 29th of December, 1827, and on her outward passage struck upon a rock at the Cape de Verd islands and knocked off a part of her false keel, but proceeded on her voyage and continued cruising, and encountered some heavy weather, until she was finally compelled to return to the Sandwich Islands, where she arrived in December, 1829, in a leaky condition, and upon an examination by competent surveyors, she was found to be so entirely perforated by worms in her keel, stem and stern post, and some of her planks, as to be wholly innavigable, and being incapable of repair at that place, she was condemned and sold. The vessel had sustained an injury at the Cape de Verds, and she put into the port of St. Salvador, at both of which places the bottom of the ship was examined by swimmers.

On the trial a bill of exceptions was taken by the plaintiff's counsel to certain instructions of the court to the jury, and the case is brought before this court by a writ of error.

The first instruction excepted to is as follows: "The court further charged, that in ascertaining what is to be understood as a coppered ship, in applications for insurance on a voyage of this nature, the terms of the application are to be understood according to the ordinary sense and usage of those terms in the place where insurance is asked for and made, unless the underwriter knows that a different sense and usage prevail in the place in which the ship is then lying, and in which the owner resides, and from which he writes asking for the insurance; or unless the underwriter has some other knowledge that the owner uses the words in a different sense and usage from those which prevail in the place where the insurance is asked for and made."

This instruction refers to the letter written by the plaintiff at New York on the 22d of September, 1827, to his agent in Boston requesting him to have the ship Dawn insured, and in which letter he made the following statement respecting the ship: "This is the same ship that you had insured for me in Boston some years since. I will only observe that I believe her to be one of the strongest and best ships in the whale fishery; she has been newly coppered to light-water mark, above which she is sheathed with leather to the wales," etc.

§ 527. *Representations are collateral to policy.*

A representation to obtain an insurance, whether it be made in writing or by parol, is collateral to the policy, and as it must always influence the judgment of the underwriters in regard to the risk, it must be substantially correct.

It differs from an express warranty, as that always makes a part of the policy, and must be strictly and literally performed.

§ 528. "*Coppered ship*;" *meaning by usage.*

The rule prescribed by the circuit court to govern the jury in giving a construction to the representation in this case was founded upon the fact, supposed, admitted or proved, that what "is to be understood as a coppered ship at New York would not be so considered at Boston." And this presents the point for consideration, whether the plaintiff, in making the representation, was bound by the usage of Boston or of New York, where his letter was written and his ship was moored.

§ 529. *Letter written in New York by party residing there, and containing representations, to be interpreted as it would there be understood.*

It is insisted that Boston is the place where the contract was made, and where effect was given to the representation; and that, consequently, not only the contract, but the inducements which led to it, must be controlled by the usages of Boston.

This is an important question in the law of insurance, and it seems not to have been settled by any adjudication in this country, and none has been cited from England. The plaintiff's counsel contends that it is substantially a question of seaworthiness, and should be governed by the same rule; and he refers to a decision in 4 Mason, 439, as decisive of the point. In that case an insurance was made in Boston, upon a British vessel belonging to the port of Halifax, in Nova Scotia, and the court says: "If the Boston standard of seaworthiness should essentially differ from that in Halifax, in respect to equipments for a South American voyage of this sort, it would be pressing the argument very far to assert that the vessel must rise to the Boston standard before the policy could attach. Where a policy is underwritten upon a foreign vessel, belonging to a foreign country, the underwriter must be taken to have knowledge of the common usages of trade in such country, as to the equipments of vessels of that class for the voyage on which she is destined. He must be presumed to underwrite upon the ground that the vessel will be seaworthy in her equipments, according to the general custom of the port, or at least of the country to which she belongs."

In every policy there is an implied warranty of seaworthiness, and this is a condition precedent on the part of the insured. The policy does not attach unless the vessel be "properly manned and provided with all necessary stores, and in all respects fit for the intended voyage." The equipment of the vessel must depend upon the nature of the voyage; as a ship might be seaworthy for a voyage across the Atlantic, and not for a whaling voyage in the Pacific.

A representation might embrace all the facts of an implied warranty of seaworthiness; but this is wholly unnecessary, and is seldom if ever done. The representation is designed to state the quality and condition of the ship, if that be the object of insurance, so as to induce the underwriters to insure on reasonable terms; and it is not limited to the facts necessary to constitute seaworthiness.

A question of seaworthiness is determined by the usages of the port where the vessel is fitted out in reference to the destined voyage. But the facts stated in a representation may go beyond those usages, and the insured is bound to the extent of his communication, whether verbal or written. In the one case, the law implies a definite and fixed responsibility; in the other, the liability depends upon the express declarations of the insured.

If the representation in this case fall below the implied warranty of seaworthiness, it does not in any degree affect such warranty; it cannot, therefore, be considered as a substitute for the implied seaworthiness of the ship, but as a representation which entered into the consideration of the underwriters when they fixed the premium of insurance. The question then recurs, was the plaintiff bound, in describing the ship, to use the appropriate terms according to the usage in Boston or in New York? It is said the terms used were calculated to mislead the underwriters, as they resided at Boston; and in insuring a "coppered ship," would of course refer to a vessel which could be so appropriately called at Boston.

The writer of the letter is a resident of the city of New York; his letter was written at that place; and he described his vessel then in the harbor of that city. What terms would he be supposed to use in giving this description, those which are peculiar to New York or those which are peculiar to Boston? Can he be presumed to know the usages of Boston in this respect, and must he not be presumed to know those of New York? In making a representation respecting his vessel, his mind would not be directed to Boston, but to his ship then in the harbor of New York; and in describing her as a "coppered ship," he would refer to the appropriate designation at New York. And would not the minds of the underwriters at Boston, seeing that the letter was written at New York, and represented a vessel in the harbor of that city, be very naturally directed to the sense in which the terms used were viewed in that place? Would they not inquire whether the words "coppered ship" mean the same thing at New York as at Boston?

In a case of seaworthiness, such is admitted to be the rule; and if the representation be not a warranty of seaworthiness, still, does not the reason of the rule apply in the one case as forcibly as in the other? The underwriters are presumed to know what constitutes seaworthiness in a foreign port, and to act under this knowledge; and why may they not, with equal propriety, be presumed to know, on a representation, the usage at the place where the vessel lies, and where she is described? It is but a presumed knowledge of usage in both cases, and which in both cases must have the same effect on the rights of the parties. If, therefore, the rule be applicable to a case of seaworthiness, it must be equally so to a case of representation.

The underwriters are presumed to know the usages of foreign ports to which insured vessels are destined; also the usages of trade and the political condition of foreign nations. Men who engage in this business are seldom ignorant of the risks they incur, and it is their interest to make themselves acquainted with the usages of the different ports of their own country and also those of foreign countries. This knowledge is essentially connected with their ordinary business, and by acting on the presumption that they possess it, no violence or injustice is done to their interests.

It would, therefore, seem to be reasonable to conclude that the defendants, when they made the insurance, were not misled by the representations of the plaintiff. That they must have considered the ship to be described according to the New York usage; such, at least, is the presumption which arises from the facts, and in strict analogy to other cases. The circuit court, therefore, erred in their instruction to the jury, that the representation was to be construed by the usage in Boston.

§ 530. *Statement as to coppering must be substantially true.*

The second instruction of the court to which exception was taken is, "that

although the terms of the letter applying for insurance were not to be considered a technical warranty, yet, if the coppering of the ship, as stated in the letter on which the insurance was made, was substantially untrue and incorrect in a point material to the risk, such a misrepresentation would discharge the underwriters, although the ship was partially coppered, and although the loss did not arise from any deficiency in the coppering." Taking this instruction as disconnected with the first one, the principle asserted is undoubtedly correct. It is upon the representation that the underwriters are enabled to calculate the risk and fix the amount of the premium; and if any fact material to the risk be misrepresented, either through fraud, mistake or negligence, the policy is avoided. It is, therefore, immaterial in what way the loss may arise where there has been such a misrepresentation as to make void the policy.

§ 531. *Ordinary perils; worms in the Pacific ocean.*

The fourth instruction excepted to will be next considered, as it embraces the principle asserted in the third. The judge charged "that if the jury should find that in the Pacific ocean worms ordinarily assail and enter the bottoms of vessels, then the loss of a vessel destroyed by worms would not be a loss within the policy." This is an important question, and it seems now for the first time to be brought before this court.

In 1796 the case of *Rhol v. Parr* was tried, which involved this question, before Lord Kenyon and a special jury, at *nisi prius*, reported in 1 Espinasse, 445. His lordship said that "it appeared to him a question of fact rather than of law, such as the jury were competent to decide on, from the opinion on the subject adopted by the underwriters and merchants." And "the jury found that it was not a loss within the term of 'perils of the sea' in policies of insurance, and of course that the plaintiff could not recover for a total loss." There seems to have been a general acquiescence in this decision in England, as it has never been overruled.

In the case of *Martin v. Salem Marine Ins. Co.*, 2 Mass., 420, the court expressly recognized the doctrine laid down in the case of *Rhol v. Parr*. But this doctrine is controverted in the case of *Garrigues v. Cox*, 1 Binn., 596; and in *Depeyster v. Commercial Ins. Co.*, 2 Caines, 90, Mr. Justice Livingston said that he did not "mean to be understood as subscribing to the *nisi prius* opinion of Lord Kenyon in the case of *Rhol v. Parr*, that it was not necessary to decide in the case whether the loss by worms was within the policy."

It was well remarked by Lord Kenyon, that whether a destruction by worms be within the policy was a question of fact rather than of law, and could be best ascertained by a jury from the opinion of underwriters and merchants. This was a *nisi prius* decision; but it gave such general satisfaction to both merchants and underwriters, and all others concerned, as never to have been questioned in England. It was the establishment of a usage by the opinions of those most competent to judge of its reasonableness and propriety; and the approbation which has since been given to it in England by acquiescence may well constitute it a rule in that country by which contracts of insurance are governed. And independent of the fact of its having been adopted by the supreme court of Massachusetts, is not the decision entitled to great consideration in this country? It comes from the same source from which the principles of our commercial law are derived, and, to some extent, the forms of our commercial contracts. Would it not be reasonable to suppose that these contracts are entered into with a knowledge of the rule by

which they are construed in the most commercial country, if our own courts had adopted no rule on the subject? But in the present case, the opinion of Lord Kenyon having been adopted in Massachusetts, the rule must certainly apply to all contracts made and to be executed in that state.

The court in their instruction did not lay down the rule broadly that a destruction by worms was not within the policy; but the jury were told that if, "in the Pacific ocean, worms ordinarily assail and enter the bottoms of vessels, then the loss of a vessel destroyed by worms would not be a loss within the policy." In other words, if the vessel was lost by an ordinary occurrence in the Pacific ocean, it was a loss against which the underwriters did not insure. In an enlarged sense, all losses which occur from maritime adventures may be said to arise from the perils of the sea, but the underwriters are not bound to this extent. They insure against losses from extraordinary occurrences only; such as stress of weather, winds and waves, lightning, tempests, rocks, etc. These are understood to be the "perils of the sea" referred to in the policy, and not those ordinary perils which every vessel must encounter.

If worms ordinarily perforate every vessel which sails in a certain sea, is not a risk of injury from them as common to every vessel which sails on that sea as the ordinary wear and decay of a vessel on other seas? The progress of the injury may be far more rapid in the one case than in the other; but do they not both arise from causes peculiar to the different seas, and which affect, in the same way, all vessels that enter into them? In one sea the aggregation of marine substances which attach to the bottom of the vessel may possibly produce a loss; in another a loss may be more likely to occur through the agency of worms. Can either of these losses be said to have been produced by extraordinary occurrences? Does not the cause of the injury exist in each sea, though in different degrees; and against which it is as necessary to guard as to prevent the submersion of a ship by having its seams well closed?

In the form in which the instruction under consideration was given this court think there is no error. If it be desirable to be insured against this active agent which infests southern seas, it may be specially named in the policy.

The third instruction objected to is: "That if there was no misrepresentation in regard to the ship, and she substantially corresponded with the representation, still, if the injury which occurred at the Cape de Verdes were reparable, and could have been repaired there or at St. Salvador, or at any other port at which the vessel stopped in the course of the voyage, the master was bound to have caused such repairs to be made if they were material to prevent any loss. And if he omitted to make such repairs because he did not deem them necessary, and if, by such neglect alone, the subsequent loss of the ship by worms was occasioned, the underwriters are not liable for any such loss so occasioned."

If the loss by worms is not within the policy, as has already been considered under the fourth instruction, it must at once be seen that the court did not err in giving this instruction. The negligence or vigilance of the master could be of no importance, under the circumstances, in regard to the liability of the underwriters.

The other instructions in the case relate to the loss of the vessel by worms and the representation made by the plaintiff; and as they do not raise any

distinct point which has not already been substantially considered, it is unnecessary to enter into a special examination of them.

The judgment of the circuit court must be reversed and the cause remanded for further proceedings.

2. *Perils of Lake and River.*

SUMMARY—*Perils of the lakes*, § 532.—*Perils of the Mississippi*, § 533.

§ 532. A policy insured cattle shipped upon a vessel plying between ports on Lake Superior against "perils of the lakes" and "other perils and misfortunes," and "the usual risk of lighterage." The cattle were put upon a lighter for landing, and guarded and protected in the usual manner of lighterage at the place, but, by an accident that could not have been guarded against by ordinary exertion and prudence, broke through their fastenings and were drowned. *Held*, that the underwriter was liable. *Anthony v. Aetna Ins. Co.*, §§ 534-36.

§ 533. An accidental fire is not a peril of the Mississippi, and evidence of an expert is inadmissible, that perils of that river are "sinking, by coming in collision with rocks, snags, or other boats or vessels, and fire, and that the most common form of bills of lading contains the exception, perils of the river and fire, but that in many instances the word fire is omitted, and that he had not known an instance where want of that word had created a difficulty in adjusting a loss, or was considered to give a claim against a boat on account of a loss by fire." *Garrison v. Memphis Ins. Co.*, §§ 537-39.

[NOTES.—See §§ 611-647.]

ANTHONY *v.* AETNA INSURANCE COMPANY.

(Circuit Court for Michigan: 1 Abbott, 343-351. 1869.)

Opinion by WITHEY, J.

STATEMENT OF FACTS.—On May 1, 1865, an open, season policy was issued by defendants to plaintiff, insuring the plaintiff's property from ports and places to ports and places, including the voyage in which was this risk. The adventure was to begin from the loading, and continue until the property should "arrive and be safely landed at the port of destination." The risks covered by the policy are, "perils of the lakes, seas, rivers, canals, railroads, fires, jettisons, and all other perils and misfortunes that have or shall come to the hurt, detriment or damage of the said property, or any part thereof;" also, "the usual risk of lighterage at Ontonagon."

Under this insurance the plaintiff shipped on board the propeller *Pewabic*, from Bayfield to Ontonagon, on Lake Superior, forty or more beef cattle. The vessel arrived off the latter port in July, 1865, but was prevented by a bar in the harbor from landing. The animals were taken from the propeller on to a lighter to be landed, and were fastened upon the lighter in this way: A chain of five-eighths inch iron—called an anchor chain—ran fore and aft through the middle of the lighter, fastened at the ends to timber heads eight or ten feet from each end of the lighter. To this chain the cattle were tied by ropes, heads in, on opposite sides of the chain. When the lighter had proceeded from a quarter to a third of the distance in, the cattle, from some cause not explained, became frightened, breaking the chain into three pieces, and twenty-seven of the cattle, tied to one of these pieces, went over into the lake and were drowned by the weight of the chain carrying their heads under water. The lighter was tugged in and out, and was in good condition. The cattle were fastened on the lighter in the customary way of lightering at that place.

Such was the case made by the plaintiff at the trial, and the question presented, which we are called upon to decide, is whether the loss was occasioned

by a "peril of the lakes," or "other peril and misfortune," within the meaning and intent of the policy.

§ 534. *Underwriter indemnifies only against extraordinary perils.*

The general doctrine is, that the insurer undertakes, in a marine risk, only to indemnify against extraordinary perils of the sea, and not against those ordinary ones to which every ship must inevitably be exposed. Every loss which arises from tempests, or by rocks, winds or waves, *strictly and naturally* comes under the idea of a loss occasioned by perils of the sea. But if this be the extent of the phrase, "perils of the sea," we should be obliged to conclude that it covered only accidents of an extraordinary nature, and produced only by *natural* causes peculiar to that element. Such, however, is clearly not the rule for construing the phrase, "perils of the sea," in reference to marine insurance.

Mr. Parsons, in his work on Marine Insurance, vol. 1, page 544, says: "The phrase 'perils of the seas' covers all losses or damage which arise from the extraordinary action of the wind and sea, and from inevitable accidents directly connected with navigation, excepting those provided for in other parts of the policy, as captures and the like."

Mr. Justice Story, in the case of *The Reeside*, 2 Sumn., 567, 571, remarks that "the phrase 'danger of the seas,' whether understood in its most limited sense, as importing only a loss by the natural accidents peculiar to that element; or whether understood in its more extended sense, as including inevitable accidents upon that element, must still, in either case, be clearly understood to include only such losses as are of an extraordinary nature, or arise from some irresistible force, or some overwhelming power, which cannot be guarded against by the extraordinary exertions of human skill and prudence."

The supreme court of the United States, in *Garrison v. Memphis Ins. Co.*, 19 How., 312, 314 (§§ 537-39, *infra*), seems to give the more extended sense to the term "perils of the sea," as suggested by Judge Story. That court says these words "have been extended to comprehend losses arising from some irresistible force or overwhelming power, which no ordinary skill could anticipate or evade."

It has often been said, and correctly, that what are ordinary and what are extraordinary perils is a question of much difficulty. The difficulty has been illustrated by many cases: Thus, in *Magnus v. Buttemer*, 9 Eng. L. & Eq., 461, a vessel moored in a tide harbor, and took ground when the tide fell. In consequence of this she was hogged and strained all over. It was held the underwriters were not liable. In *Potter v. Suffolk Ins. Co.*, 2 Sumn., 197 (§§ 520-21, *supra*), the circumstances were very similar to the last case, and Mr. Justice Story held "that, unless there was inherent weakness in the vessel, such damage could only be occasioned by an unusual and extraordinary accident in grounding, upon the ebbing of the tide, which would be a peril of the sea."

In *Hunter v. Potts*, 4 Campb., 203, Lord Ellenborough held that a leak occasioned by rats was not a peril of the sea, not being a loss of an extraordinary nature. But in *Garrigues v. Cox*, 1 Binn., 592, a leak occasioned by rats was held to be a peril within the policy. And Mr. Parsons, in his *Marine Insurance*, volume 1, page 546, note, after citing a number of cases, concludes his review by saying: "On the authority of the recent cases in this country, we should consider the insurers liable in such a case, even if the rats remained on board through the negligence of the master, on the ground that the damage

by water was the proximate cause of the loss." We might refer to many other cases on the subject, but we think they will not tend very much to elucidate the question involved in the case at bar, inasmuch as every case depends so much on its own particular facts and circumstances.

§ 535. *The drowning of the cattle a loss by peril of the sea.*

My own views are strongly in the direction of holding this case to be a loss within the term "perils of the sea," in accordance with the more comprehensive sense of those words and their more reasonable signification—in brief, because the cattle were drowned, which is peculiar to the element on which they were being transported; because they were drowned by an accident that could not have been guarded against by ordinary exertions or prudence, considering the fact that it was the usual mode of lightering at that place, which fact must be presumed to have been known to the insurer; because, too, it could not reasonably have been foreseen that there was inherent weakness in the chain; and because, in the absence of explanation by the insurer, it is to be presumed the fright of the animals was caused by something connected with navigation, whether from the exhaust of steam, the working of machinery of the tug, the ringing of a bell, or otherwise. It was a peril of navigation, which could not well have been foreseen or guarded against by the carrier.

But we are not compelled to rest our decision on the ground strictly of a loss by a "peril of the sea," and the court does not wish to be understood as so deciding. I have simply indicated the tendency of my own mind after an examination of the question, because that particular point was much dwelt upon by the arguments of the learned counsel.

§ 536. *A loss within "other perils and misfortunes" and "usual risk of ligh-
terage."*

We are entirely clear, after a careful examination of the authorities, that the loss was a risk within the general terms of the policy, "all other perils and misfortunes," and the specific provision, "the usual risk of ligh-
terage at Ontonagon."

While it is laid down by the authorities that these general words, "all other perils," cover only perils of the *like kind* to those specifically enumerated, we think they are material and operative words, and are not in the policy to have no effect assigned to them in its construction. Hildyard on Marine Insurance, page 348, says these words have "the effect of providing for any doubts which might arise as to cases which come nearly, but not precisely, under the specific causes of loss. In *Cullen v. Butler*, 5 Maule & Sel., 465, Lord Ellenborough says: 'They are entitled to be considered as material and operative words, and to have due effect assigned to them in the construction of this instrument, and which will be done by allowing them to comprehend and cover other cases of marine damage of the like kind with those which are specially enumerated and occasioned by similar causes.'"

The animals did not die from disease or any inherent defect in them, but from an accident on water in course of the voyage, and was something peculiar to that element. Had the accident of breaking the fastening occurred in a land transportation, no such result could have taken place. The cattle were drowned by their heads being drawn under water by the weight of the piece of chain to which they were tied. It was five-eighths inch iron, and had the chain been perfect would undoubtedly have resisted any strain the whole number of the animals on board could have produced, and yet the accident was fortuitous.

It was the custom to use this chain for fastening cattle lightered from vessels; it was believed to be sufficiently strong, and, as we have already remarked, it could not have been foreseen, in all reasonable probability, that there was inherent weakness in this anchor chain. The insurer must be presumed to have known the usual mode and appliances of lighterage at the place, and to have had it in contemplation when taking the risk.

If, now, we regard it doubtful whether the loss was strictly within the indemnity against "perils of the sea," still we think it should be regarded as caused by perils of *like kind*, and therefore covered by the general words of the policy. No case has been found where the facts were like those in the one at bar; but on principle, *Devaux v. l'Anson*,⁷ Scott, 507, is regarded as sustaining the conclusions to which we have arrived. In that case the effect of the general words of the policy, "all other perils and misfortunes," were very fully considered, and the cases which had been decided referred to. The declaration averred that the "ship was broken, damaged and destroyed, and rendered wholly incapable of pursuing the said voyage, by certain perils which the said assurers as aforesaid by the said policy did take upon themselves, to wit, by the accidental breaking and giving way of the tackle and supports whereby the said ship was supported in being moved from a certain dock, in consequence of which breaking and giving way the said ship struck violently against the sand and was bilged, broken, destroyed, damaged, and rendered incapable of pursuing the said voyage as aforesaid." The defendants traversed the allegation that the ship was "broken, damaged and destroyed, and rendered incapable of pursuing the said voyage by *any perils which the said assurers, by said policy, did take upon themselves*." Lord Chief Justice Tindal said, "the point remaining to be considered is whether the loss was occasioned by any of the perils insured against by the policy. It is to be observed that the words in the policy are very large; the policy not only enumerates 'perils of the sea,' but 'all other perils, losses and misfortunes that had or should come to the hurt, detriment or damage' of the subject-matter of the insurance." After referring to several cases, the learned judge says, "the loss occasioned by the endeavor to get the vessel afloat from the dock in which she had just been repaired was a loss within the policy." Here the supports broke and caused the damage, like the case at bar.

Again, the other clause in the contract, "the usual risk of lighterage at Ontonagon," was clearly not necessary to indemnify the assured against "perils of the sea," nor perils of the like kind, for the risk begins with loading the freight and continues *until safely landed*. Assuming, then, what is claimed by defendants, the accident which happened not to be a loss by "perils by the sea," nor "other perils and misfortunes," we should, in order to give due effect to the clause, "usual risk of lighterage," in view of the other stipulations of the policy being held not to cover the loss, say that it is covered by the risk of lighterage. In the view we have taken of "all other perils and misfortunes," there is no occasion to inquire into the effect of the lighterage clause; but if we were to hold differently in reference to the other specific and general clauses of the policy, it would be difficult to see how the lighterage clause could be regarded as operative words in the contract, unless held to cover their loss.

For the reasons given, the motion must prevail, and a new trial be awarded.

GARRISON v. MEMPHIS INSURANCE COMPANY.

(19 Howard, 812-818. 1856.)

APPEAL from U. S. Circuit Court, District of Missouri.

Opinion by MR. JUSTICE CAMPBELL.

STATEMENT OF FACTS.—The appellee filed a bill in the circuit court against the appellants, the owners of the steamboat Convoy, a vessel formerly employed in the navigation of the Mississippi river, and which in 1849 was consumed by fire, with a cargo of cotton.

The appellee is an insurance corporation of Memphis, Tennessee, and insured one thousand one hundred and fifty-two bales of the cotton belonging to this cargo from loss by fire; this insurance was effected upon fifteen distinct parcels, and shipped mostly from Tennessee to a number of consignees in New Orleans. The company adjusted the losses with the assured on their policies, and bring this suit for reimbursement, by enforcing the claims of the shippers against the owners. These answer the bill by a denial of their legal responsibility for the loss. They maintain that fire is one of the perils of the river Mississippi; that all the bills of lading that exempt the carrier from a loss by perils of the river imply fire as one of those perils; that the variations in the bills of lading, some including "fire," and "unavoidable accidents" as well as fire, are referable to the fact that they are preferred by different shippers, who have different forms for expressing the same legal consequence. That they all understand that a carrier is exempt from a liability for fire on a bill of lading exonerating him from the risks of the river.

It was admitted on the hearing that the boat was consumed without any negligence or fault of the owners, their agents or servants. The circuit court excused the owners from losses, where the bills of lading contained an exception of fire or unavoidable accidents, but condemned them on the others to satisfy the demand of the company.

§ 537. *Accidental fire not a peril of the river.*

It cannot be denied that the appellants are responsible, according to the strictness of the common law rule determining the carrier's liability, unless an accidental fire is one of the exceptions included in the term "perils of the river." These words include risks arising from natural accidents peculiar to the river, which do not happen by the intervention of man, nor are to be prevented by human prudence; and have been extended to comprehend losses arising from some irresistible force or overwhelming power which no ordinary skill could anticipate or evade. *Jones v. Pitcher*, 3 S. & P., 136; 4 Yerg., 48; 5 Yerg., 82; *Schooner Reeside*, 2 Sum., 568.

They exonerate a carrier from a liability for a loss arising from an attack of pirates, or from a collision of ships, when there is no negligence or fault on the part of the master and crew. Latterly the courts have shown an indisposition to extend the comprehension of these words. The destruction of a vessel by worms at sea is not accounted a loss by the perils of the sea; nor was a damage from bilging, arising in consequence of the insufficiency of tackle for getting her from the dock; nor was damage occasioned to a vessel by her props being carried away by the tide while she was undergoing repairs on the beach, excused as falling within that exception. In *Laveroni v. Drury*, 8 Ex. R., 166, a question arose whether a damage to a cargo of cheese, occasioned by rats, was within the exception of the dangers or accidents of the sea and navigation; and the continental and American authorities were cited

to the barons of the exchequer to show that it was, and that the carrier was excused, he having taken the usual and proper precautions against them.

That court decided otherwise, and say "the exception includes only a danger or accident of the sea or navigation, properly so called (*viz.*, one caused by the violence of the winds and waves, *a vis major*, acting upon a seaworthy and substantial ship), and does not cover damage by rats, which is a kind of destruction not peculiar to the sea or navigation, or arising directly from it, but one to which such a commodity as cheese is equally liable in a warehouse on land as in a ship at sea." And the court conclude, "that the liability of the master and owner of a general ship is *prima facie* that of a common carrier, but that his responsibility may be either enlarged or qualified by the terms of the bill of lading, if there be one, and that the question whether the defendant is liable or not is to be ascertained by this document when it exists." The principle of these cases establishes a liability against a carrier for a loss by fire arising from other than a natural cause, whether occurring on a steamboat accidentally, or communicated from another vessel or from the shore, and the fact that fire produces the motive power of the boat does not affect the case. *New J. S. N. Co. v. Merchants' Bank*, 6 How., 344, 381; *Hale v. N. J. S. N. Co.*, 15 Conn., 539; *Singleton v. Hilliard*, 1 Strab., 203; *Gilmore v. Carman*, 1 S. & N., 279.

§ 538. *Evidence not admissible to show that "fire" was by force of usage understood as a peril of the river.*

In this suit a witness was introduced who claims to have been long familiar with the usages of the navigation and the river insurance risks of the Mississippi, and competent to testify in reference to the perils of that river. He says, "those are, sinking, by coming in collision with rocks, snags, or other boats or vessels, and fire; that the most common form of bills of lading contains the exceptions, perils of the river and fire; but that in many instances the word fire is omitted, and he has not known an instance where the want of that word has created a difficulty in adjusting a loss, or was considered to give a claim against a boat on account of a loss by fire." The first inquiry is whether this evidence is admissible. In mercantile contracts evidence is admissible to prove that the words in which the particular contract is expressed, in the particular trade to which the contract refers, are used in a peculiar sense, and different from that which they ordinarily import, and to annex incidents to written contracts in respect to which they are silent, but which both parties probably contemplated, because usual in such contracts.

But although it is competent to explain what is ambiguous, and to introduce what is omitted, because sanctioned by usage, it is not competent to vary or contradict the terms of the contract. The exceptions in the bills of lading under consideration have been in use in policies of insurance and contracts of affreightment for a long period, and have acquired a distinct signification in the customs of merchants, and the opinions of professional men and courts. It would be surprising if any particular or artificial meaning was attached to them in the customs of the Mississippi river, contrary to, or distinguishable from, that which existed elsewhere in the community of shippers and merchants. In this case the evidence fails to establish any peculiar sense of these words, as appropriate to the locality where the parties to this contract reside and made their contract. The evidence rather serves to show that the witness did not recognize the liability of a carrier as it exists in the common law, and was ready to acquit him of responsibility for losses to which he did not con-

tribute, by the negligence or fault either of himself or his agents. In *Turney v. Wilson*, 7 Yerg., 340—a case decided in the state from which the shipments described in the bill were chiefly made—evidence was offered to show there was an implied contract recognized in the usages of shippers and merchants, which had prevailed from the first settlement of the country, to exempt the carrier from losses, except those proceeding from negligence or dishonesty, to explain or construe a bill of lading of the common form. The court decided that the dangers of the river were such as could not have been prevented by human skill and foresight, and were incident to river navigation. That all evidence was irrelevant that did not show that the loss was occasioned by the act of God, the enemies of the country, or dangers of the river; that the custom could not affect or in anywise alter the written contract of the parties, as contained in the bill of lading, as the language had a definite legal meaning which this custom could not change. A similar question arose in the case of the Schooner *Reeside*, 2 Sum., 568, where Justice Story condemns, in pointed language, the habit of admitting loose and inconclusive usages and customs “to outweigh the well-known and well-settled principles of law.” And in *Rogers v. Mechanics’ Ins. Co.*, 1 Story, 603 (§§ 490–92, *supra*), he denies the authority of a usage of a particular port, in a particular trade, to limit or control or qualify the language of mercantile contracts, such as a policy of insurance. A usage, such as is pleaded in this suit, if existing, must be notorious and certain, and have been uniform in its application and long established in practice. It must have been exhibited in the transactions of the individuals and corporations concerned, in conducting the business of shipments, transportation and insurance through the Mississippi valley.

If the evidence had established that policies of insurance there did not designate fire among the risks assumed; that the words “perils of the river” were used to include that risk, and losses by fire had been uniformly settled under that clause in the policy; that contracts of affreightment had been made and losses adjusted on the same conditions; that these usages had received the sanction of professional and judicial opinion in the states bordering that river,—the cause of the appellants would have presented different considerations. The record contains nothing to exempt them from the legal rule of liability, as established by the common law. Seven of the bills of lading produced contain the exception, “perils of the river and fire;” three others add to the perils of the river, “unavoidable accidents;” and in these cases the circuit court exonerated the appellants from responsibility.

§ 539. *Insurance company subrogated to rights of shipper under bill of lading and may maintain suit in equity against owner of vessel.*

The appellants further contend that the insurance company is not subrogated to the claims of the shippers of the cotton, whose losses have been adjusted on their policies of insurance; or, if this is so, still their suit should have been at law, in the name of the assured—the remedy being adequate and complete. In *Randall v. Cochran*, 1 Vesey, Sen., 98, the chancellor replied to a similar objection, “that the plaintiff had the plainest equity that could be.” The person originally sustaining the loss was the owner; but, after satisfaction made to him, the insurer. And in *White v. Dabinson*, 14 Sim., 273, an insurer enforced a lien on a judgment recovered by the assured for a loss, where the loss had been partially settled by him, on the policy. *Monticello v. Morrison*, 17 How., 152. These cases also show that an insurer may apply to equity

whenever an impediment exists to the exercise of his legal remedy in the name of the assured.

The bill discloses fifteen different contracts of affreightment, of a similar character, which have been adjusted by the appellees, and which form the subject of this suit. They have been joined in the same bill, and much inconvenience and vexation have been prevented. Without further inquiry, we think a sufficient ground for a resort to equity is disclosed. Decree affirmed.

3. Acts of Parties Concerned.

SUMMARY — Negligence and barratry, §§ 540-546. — Illicit trade, §§ 547-557.

§ 540. An underwriter is not liable for a loss due to negligence as the proximate cause thereof; hence, where an insured vessel, by the negligence of its officers, collides with and injures another vessel not at fault, the underwriter of the negligent vessel is not liable for the loss that falls upon that vessel in the payment of the damages of the collision, though the policy insured against barratry. (a) General Interest Ins. Co. v. Sherwood, §§ 558-62.

§ 541. It is no defense to an action upon a marine policy covering fire and barratry, that a loss by fire was caused by negligence on the part of the master. Patapasco Ins. Co. v. Coulter, §§ 563-65.

§ 542. In the case of a marine policy insuring against fire, a loss by fire, where the fire was directly and immediately caused by barratry not insured against, is not within the insurance. Waters v. Merchants' Ins. Co., §§ 566-69.

§ 543. In the case of an explosion caused by fire, fire is the proximate cause of the loss. *Ibid.*

§ 544. A policy of marine insurance covers mere negligence, but not misconduct. Levi v. Insurance Assoc., §§ 570-75.

§ 545. Failure of a pilot to follow a custom of the Mississippi river, well known and established, but not known and prescribed by positive law, is negligence, not misconduct. *Ibid.*

§ 546. A warranty against loss or injury by negligence, if broken, relieves the underwriter. *Ibid.*

§ 547. A seizure or detention for illicit trade must be based upon reasonable grounds, within an exemption of an underwriter from "any charge, damage or loss which may arise in consequence of seizure for or on account of illicit trade." But such seizure need not be followed by judgment of condemnation or acquittal to exempt the underwriter. Carrington v. Merchants' Ins. Co., §§ 575-78.

§ 548. A ship insured was seized by a non-commissioned cruiser for his government while her outward cargo was not yet all unloaded, and while she was in the course of her voyage. She had sailed with contraband goods, belonging to the owners of the ship, with a false destination and false papers, which still accompanied the vessel. The contraband articles had been landed before the policy, which was on time, designating no particular voyage, had attached. The underwriter knew the nature and objects of the voyage, and excepted the same from the risk. The alleged cause of the seizure was the trade in contraband goods. *Held*, that there was reasonable ground for the seizure, and that a non-commissioned cruiser might seize. *Ibid.*

§ 549. A policy is not divisible, so as to be good in part and bad in part. If at its inception it is founded on any illegality, in which any of the owners participated, it is void as to all. Clark v. Protection Ins. Co., §§ 579-88.

§ 550. Where a ship was insured on a voyage to Liverpool, and took on board in New Orleans a chain cable, smuggled by another vessel, and was lost on the voyage to Liverpool by a peril of the seas, *held*, that she was not subject to forfeiture, but that the master was personally liable to the penalties prescribed by law, and that the underwriters were liable for a total loss. *Held*, also, that the insurance on the cable was good, the title being in the owner of the vessel, and the illegality not attaching to the voyage on which it was used. *Ibid.*

§ 551. A policy was underwritten "\$1,000 on brig Union and \$4,000 on effects on board said brig from Salem to port or ports in the West Indies, one or more times, for the purpose of selling her outward and procuring a return cargo, and at and from thence to her port of discharge in the United States." The memorandum for insurance contained this clause, omitted from the policy: "The Union is bound to Kingston, Jamaica; if not allowed to sell there, will pro-

(a) Reversing S. C., 1 Blatch., 251, where it had been held that the underwriters were liable for the damage done by the collision, and for the costs and expenses, including counsel fees, incurred in defense of the vessel insured, in the collision suit.

ceed to Cuba." At the time of the insurance both parties supposed the port of Kingston open to American vessels, and neither contemplated any illicit trade. The Union went to Kingston supposing the port open, and was seized and condemned for illicit trade. *Held*, that the underwriters were not liable for the loss,—that the omitted clause, if inserted in the policy, would not have changed the nature of the insurance. *Held*, also, that the omitted clause was not part of the contract to be inserted in the policy, but a representation of fact. *Andrews v. Essex Ins. Co.*, §§ 589-98.

§ 552. Where a seizure is made within the territory of a foreign government, for illicit trade, the warranty against such trade may be broken though the seizure was made before the vessel arrived at her port of destination, or before she had an opportunity to do some act amounting to actual trading. *Smith v. Delaware Ins. Co.*, §§ 599, 600.

§ 553. The warranty against illicit trade amounts to a stipulation that the trade in which the assured shall engage shall be lawful, to the end of protecting the property insured, and that it shall not become unlawful by the misconduct or neglect of the assured, as to provide necessary documents required to legitimate it. *Ibid*.

§ 554. A clause in a policy providing that "the insurers are not liable for seizure by the Portuguese for illicit trade," covers an attempt to trade illicitly among the Portuguese. *Church v. Hubbard*, §§ 601-605.

§ 555. The right of a nation to seize vessels attempting illicit trade is not confined to its harbors or to the range of its batteries. *Ibid*.

§ 556. A policy of marine insurance upon a traffic which the laws of the country of the underwriter may thereafter forbid, and whether forbidden or not, is invalid in case the traffic should be forbidden before loss. *Gray v. Sims*, §§ 606-608.

§ 557. A vessel within a port blockaded after the beginning of her voyage, and prevented from proceeding upon it, sustains a loss within a clause against "arrests, restraints and detentions of kings," etc. And if the vessel so restrained be a neutral, having on board a neutral cargo, laden before the blockade, the restraint is unlawful. *Olivera v. Union Ins. Co.*, §§ 609, 610.

[NOTES.—See §§ 611-647.]

GENERAL MUTUAL INSURANCE COMPANY v. SHERWOOD.

(14 Howard, 351-368. 1852.)

Opinion by MR. JUSTICE CURTIS.

STATEMENT OF FACTS.—This is a writ of error to the circuit court of the United States for the southern district of New York.

The action was *assumpsit* on a time policy of insurance, subscribed by the plaintiffs in error, upon the brig Emily, during one year from the 17th day of October, 1843, for the sum of \$8,000, the vessel being valued at the sum of \$16,000. The policy, described in the declaration, assumed to insure against the usual sea perils, among which is barratry of the master and mariners. The declaration avers that during the prosecution of a voyage, within the policy, while on the high seas, and near the entrance of the harbor of the city of New York, by and through the want of a proper look-out, by the mate of the said brig, and by and through the erroneous order of the chief mate, who was stationed on the top-gallant fore-castle of the said brig, who saw the schooner, hereinafter named, and cried out to the man at the wheel, "Helm hard down—luff,"—whereas he ought not to have given the said order; and by and through the negligence and fault of the said brig Emily, the said brig ran into a schooner called the Virginian, and so injured her that she sank, whereby the said brig Emily became liable to the owners of the said schooner and her cargo to make good their damages; which liability was a charge and incumbrance on the said brig. The declaration then proceeds to aver that the brig was libeled, by the owners of the schooner and her cargo, in the district court of the United States; that a decree was there made, whereby it was adjudged: "That the collision in the pleadings mentioned, and the damages and loss incurred by the libelants in consequence

thereof, occurred by the negligence or fault of the said brig, and that the libelants were entitled to recover their damages by them sustained thereby;" that the same having been assessed, a decree therefor was made by the district court, which, on appeal, was affirmed by the circuit court, which found "that the hands on board the Emily failed to keep a proper look-out, and that the said brig might have avoided the collision by the use of proper caution, skill and vigilance." The declaration further avers that the plaintiff has paid divers sums of money to satisfy this decree and the expenses of making the defense, amounting to the sum of \$8,000.

This statement of the substance of the declaration presents the question which has been here argued, and sufficiently shows how it arose; for although there was a demurrer to the first two counts in the declaration, and a trial upon the general issue pleaded to the other counts, and a bill of exceptions taken to the ruling at the trial, yet the same question is presented by each mode of trial, and that question is whether, under a policy insuring against the usual perils, including barratry, the underwriters are liable to repay to the insured, damages paid by him to the owners of another vessel and cargo, suffered in a collision occasioned by the negligence of the master or mariners of the vessel insured.

The great and increasing internal navigation of the United States, carried on over long distances, through the channels of rivers and other comparatively narrow waters, where the danger of collisions, and the frequency of their occurrence, are much greater than on maritime voyages, renders the respective rights of underwriters and insured, growing out of such occurrences, of more moment in this than any other civilized country; and the court has considered the inquiry presented by this case with the care which its difficulty and its importance demand.

§ 558. *Contract of insurance not a clear and formal contract; hence greatly subject to interpretation through usage.*

In examining, for the first time, any question under a policy of insurance, it is necessary to ascertain whether the contract has received a practical construction by merchants and underwriters; not through any partial or local usages, but by the general consent of the mercantile world. Such a practical construction, when clearly apparent, is of great weight, not only because the parties to the policy may be presumed to have contracted in reference to it, but because such a practice is very high evidence of the general convenience and substantial equity of it as a rule. This is true of most commercial contracts; but it is especially true of a policy of insurance, which has been often declared to be an "obscure, incoherent, and very strange instrument," and, "generally, more informal than any other brought into a court of justice" (Per Buller, J., 4 T. R., 210; Mansfield, C. J., 4 Taunt., 380; Marshall, C. J., 6 Cranch, 45; Lord Mansfield, 1 Burr., 347); but which, notwithstanding the number and variety of the interests which it embraces, and of the events by which it is affected, has been reduced to much certainty by the long practice of acute and well-informed men in commercial countries, by the decisions of courts in America and in England, and by able writers on the subject in this and other countries.

And it should not be forgotten that not only in the introduction of this branch of law into England by Lord Mansfield, but in its progress since, both there and here, a constant reference has been had to the usage of merchants, and the science of insurance law has been made and kept a practical and con-

venient system by avoiding subtle and refined reasoning, however logical it may seem to be, and looking for safe practical rules.

§ 559. *Insurers of one vessel not liable for damage to another, not insured, by collision the fault of vessel insured.*

Now, although cases like the present must have very frequently occurred, we are not aware of any evidence that underwriters have paid such claims, or that, down to the time when one somewhat resembling it was rejected by the court of king's bench, in *De Vaux v. Salvador*, 4 Ad. & Ell., 420, decided in 1836, such a claim was ever made. And we believe that if skilful merchants or underwriters, or lawyers, accustomed to the practice of the commercial law, had been asked whether the insurers on one vessel were liable for damage done to another vessel not insured by the policy, by a collision occasioned by the negligence of those on board the vessel insured, they would, down to a very recent period, have answered unhesitatingly in the negative.

As we shall presently show, such, for a long time, was the opinion of the writers on insurance on the continent of Europe, and in England and America. And this alone would be strong proof of the general understanding and practice of those connected with this subject. But although this practical interpretation of the contract is entitled to much weight we do not consider it perfectly decisive. It may be that by applying to the case the settled principles of the law of insurance, the loss is within the policy; and that it has not heretofore been found to be so, because an exact attention has not been given to the precise question. Or it may be that the weight of recent authority, and the propriety of rendering the commercial law as uniform as its necessities, should constrain us to adopt the rule contended for by the defendant in error. And, therefore, we proceed to examine the principles and authorities bearing on this question.

§ 560. *The loss and its cause.*

Upon principle the true inquiries are, What was the loss, and what was its cause? The loss was the existence of a lien on the vessel insured, securing a valid claim for damages, and the consequent diminution of the value of that vessel. In other words, by operation of law, the owners of the *Virginian* obtained a lien on the vessel insured, as security for the payment of damages due to them for a marine tort, whereby their property was injured.

What was the cause of this loss? We think it is correctly stated by this court in the case of the *Paragon* (*Peters v. Warren Ins. Co.*, 14 Pet., 109; §§ 522-26, *supra*). In that case it was said: "In the common case of an action for damages for a tort done by the defendant, no one is accustomed to call the verdict of the jury, and the judgment of the court thereon, the cause of the loss to the defendant. It is properly attributable to the original tort, which gave the right to damages consequent thereon." The cases there spoken of were claims *in personam*. But the language was used to illustrate the inquiry, what should be deemed the cause of a loss by a claim *in rem*, and is strictly applicable to such a claim. Whether the owners of the *Virginian* would proceed *in rem* or *in personam* was at their election. It affected only their remedy. Their right, and the grounds on which it rested, and the extent of the defendant's liability, and its causes, were the same in both modes of proceeding. And in both, the cause of the loss of the defendant would be the negligence of his servants, amounting to a tort. The loss consisting in a valid claim on the vessel insured, we must look for the cause of the loss in the cause of the claim, and this is expressly averred by the declaration to

have been the negligence of the servants of the assured. From the nature of the case it was absolutely necessary to make such an averment. If the declaration had stated simply a collision, and that the plaintiff had paid the damages suffered by the Virginian and her cargo, it would clearly have been bad on demurrer; because, although it would show a loss, it would state no cause of that loss. It is only by adding the fact that the damage done to the Virginian was caused by negligence, that is, by stating the cause of damage, that the cause of payment appears, and when it appears, it is seen to be the negligence of the servants of the assured.

§ 561. *Causa proxima; negligence.*

We know of no principle of insurance law which prevents us from looking for this sole operative cause, or requires us to stop short of it in applying the maxim *causa proxima non remota spectatur*. The argument is, that collision, being a peril of the sea, the negligence which caused that peril to occur is not to be inquired into; it lies behind the peril and is too remote. This is true when the loss was inflicted by collision, or was by law a necessary consequence of it. The underwriter cannot set up the negligence of the servants of the assured as a defense. But in this case he does not seek to go behind the cause of loss, and defend himself by showing this cause was produced by negligence. The insured himself goes behind the collision, and shows, as the sole reason why he has paid the money, that the negligence of his servants compelled him to pay it. It is true that an expense, attached by the law maritime to the subject insured, solely as a consequence of a peril, may be considered as proximately caused by that peril. But where the expense is attached to the vessel insured, not solely in consequence of a peril, but in consequence of the misconduct of the servants of the assured, the peril *per se* is not the efficient cause of the loss, and cannot, in any just sense, be considered its proximate cause. In such a case the real cause is the negligence, and unless the policy can be so interpreted as to insure against all losses directly referable to the negligence of the master and mariners, such a loss is not covered by the policy. We are of opinion the policy cannot be so construed. When a peril of the sea is the proximate cause of a loss, the negligence which caused that peril is not inquired into; not because the underwriter has taken upon himself all risks arising from negligence, but because he has assumed to indemnify the insured against losses from particular perils, and the assured has not warranted that his servants will use due care to avoid them.

These views are sustained by many authorities. Mr. Arnould, in his valuable Treatise on Insurance, vol. 2, 775, lays down the correct rule: "Where the loss is not proximately caused by the perils of the sea, but is directly referable to the negligence or misconduct of the master or other agents of the assured, not amounting to barratry, there seems little doubt that the underwriters would be thereby discharged." To this rule must be referred that class of cases in which the misconduct of the master or mariners has either aggravated the consequences of a peril insured against, or been of itself the efficient cause of the whole loss. Thus, if damage be done by a peril insured against, and the master neglects to repair that damage, and in consequence of the want of such repairs the vessel is lost, the neglect to make repairs, and not the sea damage, has been treated as the proximate cause of the loss. In the case of *Copeland v. The N. E. Marine Ins. Co.*, 2 Met., 432, Shaw, C. J., reviews many of the cases, and states that "the actual cause of the loss is the want of repair, for which the assured are responsible, and not the sea damage

which caused the want of repair, for which it is admitted the underwriters are responsible." And the same principles were applied by Story, J., in the case of *Hazard v. N. E. Marine Ins. Co.*, 1 Sumn., 218, where the loss was by worms, which got access to the vessel in consequence of her bottom being injured by stranding, which injury the master neglected to repair. So where a vessel has been lost or disabled, and the cargo saved, a loss caused by the neglect of the master to tranship or repair his vessel and carry the cargo cannot be recovered. *Schieffelin v. N. Y. Ins. Co.*, 9 Johns., 21; *Bradhurst v. Col. Ins. Co.*, 9 Johns., 17; *Am. Ins. Co. v. Centre*, 4 Wend., 45; *S. C.*, 7 Cow., 564; *McGaw v. Ocean Ins. Co.*, 23 Pick., 405. So where condemnation of a neutral vessel was caused by resistance of search (*Robinson v. Jones*, 8 Mass., 536), or a loss arose from the master's negligently leaving the ship's register on shore. *Cleveland v. Union Ins. Co.*, 8 Mass., 308. So where a vessel was burnt by the public authorities of a place into which the master sailed with a false bill of health, having the plague on board (*Emerigon*, by Meredith, 348); in these and many other similar cases, the courts having found the efficient cause of the loss to be some neglect of duty by the master, have held the underwriter discharged. Yet it is obvious that in all such cases, one of the perils insured against fell on the vessel. And they are to be reconciled with the other rule, that a loss caused by a peril of the sea is to be borne by the underwriter, though the master did not use due care to avoid the peril, by bearing in mind that in these cases it is negligence, and not simply a peril of the sea, which is the operative cause of the loss. It may sometimes be difficult to trace this distinction, and mistakes have doubtless been made in applying it, but it is one of no small importance in the law of insurance, and cannot be disregarded without producing confusion. The two rules are in themselves consistent. Indeed, they are both but applications to different cases of the maxim *causa proxima non remota spectatur*. In applying this maxim, in looking for the proximate cause of the loss, if it is found to be a peril of the sea, we inquire no further; we do not look for the cause of that peril. But if the peril of the sea which operated in a given case was not of itself sufficient to occasion, and did not in and by itself occasion, the loss claimed, if it depended upon the cause of that peril whether the loss claimed would follow it, and therefore a particular cause of the peril is essential to be shown by the assured, then we must look beyond the peril to its cause to ascertain the efficient cause of the loss.

The case at bar presents an illustration of both rules. So far as the brig *Emily* was herself injured by the collision, the cause of the loss was the collision, which was a peril insured against, and the assured, showing that his vessel suffered damage from that cause, makes a case and is entitled to recover. But he claims to recover not only for the damages done to his vessel which was insured, but for damages done to the other vessel not insured. To entitle himself to recover these, he must show not only that they were suffered by a peril of the sea, but that the underwriter is responsible for the consequences of that peril falling on a vessel not insured. It is this responsibility which is the sole basis of his claim, and to make out this responsibility he does not and cannot rest upon the occurrence of a collision; this affords no ground for this claim; he must show a particular cause for that collision, and aver that by reason of the existence of that cause, the loss was suffered by him, and so the underwriter became responsible for it.

§ 562. *Where negligence the proximate cause the underwriter not liable.*

This negligence is therefore the fact without which the loss would not have been suffered by the plaintiff, and by its operation the loss is suffered by him. In the strictest sense, it causes the loss to the plaintiff. The loss of the owners of the *Virginian* was occasioned by a peril of the sea, by which their vessel was injured. But nothing connects the plaintiff with that loss, or makes it his, except the negligence of his servants. Of his loss this negligence is the only efficient cause, and in the sense of the law it is the proximate cause.

The ablest writers of the continent of Europe, on the subject of insurance law, have distinctly declared that, in case of damage to another vessel solely through the fault of the master or mariners of the assured vessel, the damage must be repaired by him who occasioned it, and the insurer is not liable for it. Pothier, *Traité d'Assurance*, No. 49, 50; Boucher, 1500, 1501, 1502; 4 Boulay Paty, *Droit Maritime*, ed. of 1823, 14, 16; Santayra's *Com.*, 7, 223; Emerigon, by Meredith, 337. If the law of England is to be considered settled by the case of *De Vaux v. Salvador*, 4 Ad. & El., 420, it is clear such a loss could not be recovered there. Mr. Marshall is evidently of opinion that unless the misconduct of the master and crew amounted to barratry, the loss could not be recovered. Marsh. on Ins., 495. And Mr. Phillips so states in terms. 1 Phil. on Ins., 636.

It has been urged that, in the case of the *Paragon* (*Peters v. Warren Ins. Co.*, 14 Pet., 99; §§ 522-26, *supra*), this court adopted a rule which, if applied to the case at bar, would entitle the insured to recover. But we do not so consider it. It was there determined that a collision without fault was the proximate cause of that loss. Indeed, unless the operation of law, which fixed the lien, could be regarded as the cause of that loss, there was no cause but the collision, and that was a peril insured against.

We are aware that in the case of *Hale v. Washington Ins. Co.*, 2 Story, 176, Story, J., took a different view of this question; and we are informed that the supreme court of Massachusetts has recently decided a case in conformity with his opinion, which is not yet in print, and which we have not been able to see. But with great respect for that very eminent judge, and for that learned and able court, we think the rule we adopt is more in conformity with sound principle, as well as with the practical interpretation of the contract by underwriters and merchants; and that it is the safer and more expedient rule. We cannot doubt that the knowledge by owners, masters, and seamen, that underwriters were responsible for all the damage done by collision with other vessels through their negligence, would tend to relax their vigilance and materially enhance the perils, both to life and property, arising from this cause.

The judgment of the circuit court must be reversed, and the cause remanded, with directions to render a judgment for the defendants on the demurrer to the first two counts, and award a *venire de novo* to try the general issue pleaded to the other counts.

PATAPSCO INSURANCE COMPANY *v.* COULTER.

(3 Peters, 222-241. 1830.)

ERROR to U. S. Circuit Court, District of Maryland.

Opinion by MR. JUSTICE JOHNSON.

STATEMENT OF FACTS.—This was a case of insurance on profits on a voyage from Philadelphia to Gibraltar, and a port in the Mediterranean not higher

up than Marseilles, and at and from thence to Sonsonate, in the province of Guatemala, Pacific ocean, with the liberty of Guayaquil. The risks are those usually inserted in policies, including fire and barratry. The loss alleged is from fire alone.

The vessel reached Gibraltar in safety, and while lying there took fire, and was entirely consumed, together with her cargo. The evidence on the part of defendants below went, first, to charge the master with having caused the fire by his own carelessness; secondly, with having desisted, and restrained the crew and others from efforts which might have extinguished the fire, under apprehensions not very well founded, that it would communicate with powder, laden near to where the fire originated. It was also objected to the plaintiff's right of recovery, that he had given no kind of evidence of profits, or probable profits, from a sale at Gibraltar.

This defense furnishes the subject of three bills of exception. The first of which went to the refusal of the court to instruct the jury, that if they believed the fire proceeded from the negligence or carelessness of the captain, the plaintiff below was not entitled to recover. The second, that if they believed the fire originated in accident, without any want of due care and attention in the captain and crew, yet if, after it had commenced, the captain and crew might, with ordinary care and exertion, have extinguished it, the plaintiff below was not entitled to recover.

The first of these instructions was refused expressly. The second was refused as prayed; and in its stead the court instructed the jury that the plaintiff was entitled to recover, unless they should be of opinion, from the evidence, that after the vessel was discovered to be on fire, the master and crew might have extinguished it, and preserved the vessel and cargo. That the master was bound to extinguish the fire, if practicable; and if he stood aloof, without making any exertion to extinguish it, and suffered the vessel to be destroyed, it would have afforded evidence of such gross negligence as would amount to barratry.

As the plaintiff below is in possession of the verdict, it is immaterial to him if this charge was more favorable to his adversary than the law admits. We have only to do with so much of the case presented by these bills of exception as makes against the interest of the insurers. And as to the refusal to instruct the jury that "their verdict must be for the insurers, if they believe the loss to have proceeded from the carelessness or negligence of the captain," it is obvious, since barratry is insured against, that the court must not be held to have affirmed that fire proceeding from negligence was a loss within the policy, independently of the risk of barratry, but that negligence was no defense where barratry was insured against.

§ 563. *What is barratry.*

It cannot be denied, that what with adjudged cases and elementary opinions, this doctrine has got into a great deal of confusion. Many attempts have been made to define the term barratry, in its marine sense; but when compared with the ideas attached to the word, as derived from the most respectable sources, such definitions will too generally be found deficient in precision or comprehensiveness; they need commentaries to apply or explain them. And it is remarkable that the point in which all the definitions in the English or American authorities agree, to wit, that fraud must be a constituent of the act of barratry, is that in which practically all the difficul-

ties arise. The question seems to be between *dolus* and *culpa*, which of those two words best conveys the sense of the law.

It cannot be denied that the etymology of the word favors the adoption of the former. The term barratry is known to the common law; and Cowel's Interpreter refers its origin to a Latin word, which would attach to it the idea of meanness, selfishness and knavery. Some of our English books, following a French writer (Pasquier sur Emerigon), derive it from *barat*, an old French or Italian word, which they explain by *tromperie*, *fourbe*, *mensonge*.

I should myself derive the word from the Spanish *barateria*, *baratero*, which are rendered *fraus* and *fraudulentus*. But it is worthy of particular notice, that writers on maritime law of the first respectability (I think Emerigon gives six in number), in explaining the marine sense of the word barratry, use the French word *prevariquez*, which can only be translated into "acting without due fidelity to their owners." The best French dictionary we have renders it by *agir contre les devoirs de son charge*, acting contrary to the duties of his undertaking; and *trahir la cause ou l'interet des personnes qu'on est obligé de defendre*, to betray the cause or interest of those whom we are bound to protect.

Nor will it be found that the idea of the British courts of the meaning of fraud as applied to barratry varies perceptibly from this exposition. In the case of *Moss v. Byrom*, 6 T. R., 379, we find the very words adopted by one of the judges; "if the captain acted contrary to his duty to his owners" it was barratry; and "if he did any act to increase the risk" it was barratry. And in the case of *Busk v. Royal Exchange Ins. Co.*, 2 Barn. & Ald., 73, the court lay it down as the law, that the term barratry is used in the policies as applicable to the "wilful misconduct" of the master and mariners. And even in the case of *Phyn v. Royal Ins. Co.*, 7 T. R., 505, in which Lawrence, J., wishes to resume or explain his definition in *Moss v. Byrom*, he concludes with adopting the definition of Lee, C. J., in *Stamma v. Brown*, 7 T. R., 508, in which he says "barratry must be some breach of trust in the master *ex maleficio*," in which, I presume, *maleficio* must mean some wilful and injurious act. And as this case is given by the latest English compiler (11 Petersdorf, 269, case 6) as the authority for the unqualified doctrine "that there must be fraud to constitute barratry, and the definition of Lee, C. J., just quoted, is given in his margin as comprising the substance of this case, we are furnished with an apt opportunity of ascertaining the idea attached in Great Britain to both the terms "fraud" and *maleficio*, by referring to the case itself.

The defense of the underwriters there turned upon a deviation, and the question was whether it was a fraudulent deviation. If a general deviation, the underwriters were discharged; but if a fraudulent deviation, then it was barratry and a risk in the policy. The whole evidence in the cause in which the question of fraud was raised was this: The vessel was bound from London to Jamaica, but was driven by currents out of her course. Upon recovering her reckoning she was found to be between the Grand Canaries and the Island of Teneriffe. In this situation it was admitted that her course was southwest, instead of which the captain bore up for the island of Santa Cruz, which lay northwest, and in sight about thirty miles off, and came to anchor for the purpose, as is supposed in the argument, to get refreshments, or in some way for his own accommodation. The jury found it to be a simple deviation

without fraud, and the court only decide that they cannot adjudge it a fraudulent deviation in opposition to the finding of the jury. But it is nowhere hinted that the jury might not have found it otherwise, and their verdict have been sustained upon the evidence in that cause.

On the contrary, so far as fraud or *maleficium* may be supposed to imply a dishonest or injurious intention towards the owner, the idea is negated by a variety of cases. In that of *Earle v. Rowcroft*, 8 East, 126, it was admitted that the captain unaffectedly acted with a view to promote the owners' interest, and would materially have promoted their interest had he escaped detection. But he had deviated from his instructions and increased the risk by trading with an enemy, and it was held to be barratry. The court there say, it has been asked how is this act of the captain in going into d'Elmina, in order to purchase the cargo for his owners more cheaply and expeditiously, a breach of trust as between him and them? Now, I conceive that the trust reposed in a captain of a vessel obliges him to obey the written instructions of his owners, where they give any; and where the instructions are silent, he is at all events to do nothing but what is consonant to the laws of the land, whether with or without a view to their advantage.

Here we see that an act "inconsistent with written instructions," and an act "not consonant to the laws of the land," are brought within the description of fraud upon the owners, as applied to the definition of barratry. From which it would seem to result that it is not confined to moral fraud; or that the term is not well chosen; or that practically, in its application to this subject, *culpa* would better express the idea than *dolus*.

The commercial regulations of maritime nations, both of ancient and modern times, are very various on the subject of the liability of assurers for the acts of the master; and it is not without much appearance of reason that Emerigon observes that the French ordinance has put it upon the just medium. The regulations on this subject are contained in the twenty-sixth, twenty-seventh and twenty-eighth articles of the fifth title.

By the twenty-sixth article, "all losses and damages happening at sea, by tempest, shipwreck, running aground or aboard of other ships, changing the course of the voyage or of the ship, ejection, fire, taking, rifling, detention by princes, declaration of war, reprisals, and generally by all maritime accidents, shall be at the risk of the insurers. By the twenty-seventh, however, if the changing of the course, voyage or ship happens by the order of the insured, without the consent of the insurers, they shall be discharged from the risk; which shall likewise take place in all other losses and damages happening by the fault of the insured; nor shall the insurers be obliged to restore the premium, if the time of their bearing the risk be begun. Nor shall the insurers be obliged to bear the losses and damages happening to ships and goods by the fault of the master and mariners, except that by the policy they be engaged for the barratry of the master.

It is this last rule to which the observation of Emerigon is particularly directed; and although the British decisions do not adopt the negative language of the regulation without limitation, they certainly come up to the positive rule which it implies, whenever the case of the master is considered a fault with reference to his duty to his owner. It has been remarked by a British court (*Busk v. Royal Ex. Ass. Company*, 2 Barn. & Ald., 82), that in France negligence, as well as wilful misconduct, is considered barratry; and they give the authority of the commentator on the ordinance of Louis the Fourteenth,

Valin, for the assertion. But as the author is commenting upon the twenty-eighth article, I am inclined to consider the passage as only intimating that negligence is a fault within the words of the ordinance.

And the same court, in the same cause, have certainly affirmed the same principle, in its positive sense; that is, that where an insurance is against barratry, a loss arising from fire originating in negligence shall be borne by the underwriters. It would be a great relief to this court if there existed such an uniformity in the decisions upon this subject as to place our decision upon adjudged cases. But it is not to be questioned that the English and American decisions are in direct hostility with each other as to a loss by fire arising from negligence, where there is an insurance against barratry.

§ 564. *Gross negligence evidence of barratry.*

It must be repeated that the general question, where there is no insurance against barratry, need not here be considered. The judge was not bound to give an instruction abstracted from the case. And the question whether, where the breach laid was loss by fire only, the plaintiff could maintain his action by giving in evidence a barratrous burning, did not properly occur. The point, when properly stated, stands thus: the plaintiff lays the breach by fire, and the defendant, to repel his liability, insists that the fire was produced by negligence of the master; the plaintiff replies that negligence is no defense where the barratry is insured against; the court maintains the doctrine of the plaintiff, and adds that negligence itself, when gross, is evidence of barratry. And certainly a master of a vessel who sees another engaged in the act of scuttling or firing his ship, and will not rise from his berth to prevent it, is *prima facie* chargeable with barratry. Although a mere misfeasance, it is a breach of trust, a fault, an act of infidelity to his owners. So if, in the height of a storm, the captain and crew turn in without resorting to the nautical precautions of laying the vessel to, and otherwise preparing her to overcome the peril, it may well be left to a jury to determine if such conduct be not barratrous.

The truth is, that in the incidents of this kind of contract, misfeasance and nonfeasance often approach so near to each other in character and consequences that it is not surprising if courts of justice should incline to the adoption of rules which would relieve them from the difficulty of discriminating, or the inconsistencies that might result from their efforts to discriminate.

The case of *Grim v. Phoenix Ins. Co.*, decided in New York (13 Johns., 451), was certainly a very strong case to establish the doctrine that a loss by fire, proceeding from negligence of the master and mariners, was not a loss within the policy, although barratry be one of the risks. It will, however, be found by looking into the reasons which governed the court in that case, that its conclusions were drawn partly from the too general expressions of an elementary writer, and partly from analogy with other decisions in which the expressions of the court, unless restricted to the cases before them, were justly deemed authority for the decision there rendered. The question was one of the first impression, and one on which the best constituted minds may well have been led to contrary conclusions. It was however, no unreasonable claim upon the profession made by Lawrence, J., in the case of *Phyn v. Royal Ex. Association Co.*, with regard to his own doctrines in *Moss v. Byrom*, "that what fell from him there must be taken in reference to the case then in judgment before the court." Thus restricted, doctrines will often be found correct, which in a more general sense might well be questioned. And in the case of *Voss v. United*

Ins. Co., 2 Johns., 180, and also in that of *Cleveland v. Union Ins. Co.*, 8 Mass., 308, relied upon in the New York decision, the act of the master, for which the underwriters were held to be discharged, was in the first instance sailing towards a blockaded port with intent to violate the blockade, and in the second, leaving his register behind him. The first of these cases did not call for the opinion of Kent, Justice, on the subject of negligence; the second is exactly one of those cases in which a nonfeasance becomes a misfeasance, and both relate to the discharge of a duty unquestionably belonging to the insured, and the master as his agent. Attempting a breach of blockade was an unwarrantable increase of risk, which might or might not be barratrous according to circumstances. And for a vessel to leave her register behind in time of war, affected her seaworthiness as much as leaving her compass or quadrant or anchors at home at any time. So neglecting to take a pilot, neglecting to pay port duties, neglecting to obtain a clearance, neglecting to comply with the laws of any port which the vessel has leave to enter,—all these, although nonfeasances, involve misfeasances, which discharge the underwriters, because they violate implied duties incident to navigating the vessel, and produce a positive and definite increase of risk.

It was not until the year 1818, that the question was settled in the British courts on the liability of the underwriters for a loss like the present. In the case of *Busk v. Royal Exch. Assurance Co.*, 2 Barn. & Ald., 73, the question is finally and fully decided there, in direct hostility with the decision in New York, and this court is now for the first time called upon to establish a rule for its own government in similar cases.

Losses by fire must happen either from the act of God, from design, or from accident. If from design, and by the captain and crew, it is barratry; if by any other person, or by pure accident, it is clearly a risk by fire, but from the peculiar character of this risk, it is no easy matter to point out an accident that may not be resolved into negligence. If by the falling of a candle, it may have been because due care was not bestowed upon securing it, and if from a spark from the caboose, it may have been from neglect in not closing or constructing it, and if from a flue or a stove, the same reason may be assigned. It has already been shown that gross negligence may be evidence of barratry, and when it is considered how difficult it is to decide where gross negligence ends, and ordinary negligence begins, and to distinguish between pure accident and accident from negligence, we cannot but think that the British courts have adopted the safe and legal rule in deciding that where the policy covers the risk of barratry, and fire be the proximate cause, they will not sustain the defense that negligence was the remote cause.

We think this rule also the most consistent with analogy and mercantile understanding. It is very justly observed in the case of *Busk v. Royal Exch. Assurance Co.*, that it is a strong argument against the objection there raised for the first time, that in the great variety of cases that have occurred upon marine policies, no such point had ever been made. And I will add, it is not improbable from comparison of dates that the defense maintained in the New York decision suggested that made in the British courts.

The long acquiescence may have had its origin in a general mercantile understanding, or perhaps in the doctrine of Malynes, whose book unites the recommendations of antiquity, good sense, and practical knowledge. The passage has been misquoted as to its place; it is found in page 155, in these words: "Barratrie of the master and mariners can hardly be avoided, but by

a provident care to know them, or at least the master of the ship upon which the assurance is made. And if he be a careful man, the danger of fire above mentioned will be the less for the ship; boys must be looked unto every night and day. And in this case let us also consider the assurers; for it has oftentimes happened, that by a candle unadvisedly used by the boys, or otherwise, before the ships were unladen, they have been set on fire and burned to the very keel, with all the goods in them, and the assurers have paid the sums of money by them assured. Nevertheless, herein the assurers might have been wronged, although they bear the adventure until the goods be landed; for it cometh to pass sometimes, that whole ships' loadings are sold on shipboard, and never discharged," etc. In the residue of this passage, the author certainly intimates that the wrong done to the assurers is in being made to pay after the transfer of the interest to a third person, and the initiation of a new voyage. And the general doctrines involved in this case are certainly sustained by analogy to other cases. It seems generally conceded, that in the case of insurance against fire on land, negligence of servants or of the tenant is no defense, nor of the proprietor, unless of such a character as to sustain the imputation of fraud or design. And the rule that a loss, the proximate cause of which is a peril insured against, is a loss within the policy, although the remote cause may be negligence of the master or mariners, has been affirmed in several successive cases in the English courts. The case of *Walker v. Maitland*, 5 Barn. & Ald., 171, cited in argument, is a very strong case of this description. And both in that and the case of *Bishop v. Pentland*, 7 Barn. & Cress., 219, decided as late as 1827, the decision in *Busk v. The Royal Exchange Assurance Company* is expressly quoted by the court, and affirmed as law. So that the doubt expressed by Mr. Phillips upon the authority of that case does not seem well founded. Phillips on Insurance, 249.

It is true that in the application of the principles to particular cases, courts of justice will sometimes find themselves embarrassed in discriminating between that *crassa negligentia* which will discharge the underwriters by varying or increasing the risk, and that upon which they may be made liable on the ground of barratry; but the difficulty is only one which those engaged in the administration of justice have often to feel and lament, to wit, the difficulty of fathoming men's motives; and in this the court can only rely on the judgment and experience of juries. While the captain is not regardless of his duty to his owner, his actions cannot be barratrous; but if no act of infidelity to the owner be imputable to him from the evidence, then it is affirmed in various cases that a material increase of the risk from gross negligence may discharge the underwriters. Such was admitted to be the law in *Toulmin v. Anderson*, 1 Taunt., 227, and *Toulmin v. Inglis*, 1 Camp., 421. The case of *Pipon v. Cope*, 1 Camp., 434, was decided on this distinction, and the defense set up in *Heyman v. Parish*, 2 Camp., 149, went upon the same ground. It is true these are *nisi prius* cases, but they serve to illustrate the doctrine and course of decision.

In the case of *Arcangelo v. Thompson*, 2 Camp., 620, it was ruled that, where the loss was laid by capture, it was no defense for the underwriters to prove that the capture was barratrous; and it would indeed be singular, if where one breach is laid and proved, the party defendant could avail himself of another breach for which he was equally liable on the same contract.

§ 565. *Destruction of cargo a loss of profits insured.*

The third prayer for instruction is in these words: "that the plaintiffs had

offered no evidence that the sales of the flour at Gibraltar would have yielded the plaintiffs a profit, and therefore they were not entitled to recover." This was refused, and the question is, whether the defendants were entitled to it, as prayed. This instruction presents two propositions: 1. That it was necessary to prove loss of profits, otherwise than by the loss of the cargo. 2. That the plaintiff was limited to proof of profits on a sale at Gibraltar. With regard to the second it is clear that the instruction was properly refused, for there was nothing in the policy to prevent the assured from proceeding with the original cargo to the Pacific, although the course of trade would have sanctioned him in selling and replacing it. But the first proposition is one of more difficulty.

Courts of justice have got over their difficulties on the question whether profits are an insurable interest, but how and where that interest must be established by proof, in case of loss, is not well settled. Here again there appears to be a conflict between the British and American decisions. The earliest of the British decisions, that of *Barclay v. Cousins*, 2 East, 544, certainly supports the doctrine that the profits sink with the cargo, or at least that the loss of one is *prima facie* evidence of the loss of the other, and throws the *onus probandi* upon the defendant. Such is the intimation of the court, p. 551, and the recovery was had in that case without proof that profit would have been made had the cargo arrived at the destined port. In the case of *Henrickson v. Margetson*, 2 East, 549, of which a note is given in that case, the recovery was also had without proof that the profits would have been made, or any other proof than an interest in and loss of the cargo; and Lord Mansfield seems to have suggested the true ground for dispensing with such proof, to wit, the utter impracticability of making it, without the spirit of prophecy to determine the precise time when the vessel would arrive at her destined port.

The two subsequent cases which are cited in the elementary books to sustain the contrary doctrine are not full to the point. In that of *Hodgson v. Glover*, 6 East, 316, there was another question of as great difficulty, to wit, whether in a clear case of average loss, the plaintiff could recover as for a total loss, or recover anything without evidence to determine the average. Of the four judges who sat, two decided against the plaintiff upon the one ground, and two upon the other.

In the second case, that of *Eyre v. Glover*, 16 East, 218, although the point was touched upon in argument, yet the court neither expressly affirm nor deny it; it was not the leading question in the cause, and at last judgment is rendered for plaintiff without requiring such proof. But the case of *Mumford v. Hallet*, 1 Johns., 439, goes further. It was a case of insurance on profits, in which there was no evidence given that profits would have been made upon an arrival, nor was any other loss proved than an incident to the loss of the goods. On that state of facts, Livingston, J., who delivers the opinion of the court, remarks, "it does not follow that a profit will be made if the cargo arrived, yet its loss would give a right to recover on such a policy." There are other questions in the case; but, after all were settled, this principle was essential to the plaintiff's right to recover.

In the case of *Fosdick v. Norwich Ins. Co.*, 3 Day, 108, decided in the supreme court of errors of Connecticut, the question was moved in argument, that to justify a recovery the plaintiff must show that profits would have accrued upon safe arrival of the goods; but the language of the court, in

expressing their decision, is not so explicit as to enable us to determine whether it was intended to apply as well to the proof of loss as to the insurable interest. Yet the right of the plaintiff to recover being affirmed in that case without other proof than the loss of the goods, it would seem to be an authority for the doctrine that no other was necessary.

The report furnishes no other proof of loss of profits than what was implied in the loss of the cargo in which the insured had an interest. And on the question of insurable interest, which was the main question in the cause, the chief justice asks: "If profits are anything more than an excrescence upon the value of goods beyond the prime cost?"

As to the American cases, Mr. Phillips quotes that of *Loomis v. Shaw* (if I understand his language as he meant to use it) as going further than the case warrants. 2 Johns., 36. The court waives the question now under consideration, by suggesting that the defendant had waived it by an act of his own.

In the case of *Abbot v. Sebor*, 3 Johns., 39, which was a motion for a new trial, the decision turned chiefly on the question whether the court had misdirected the jury in instructing them that the plaintiff must recover the whole sum insured on profits, or nothing. That is, that he could not recover for an average loss. The question, if proof that profits would have been made had the vessel arrived in safety was necessary to his recovering, was not touched. Yet the right to recover is affirmed in that case, and it does not appear that any proof to that effect had been offered or required, beyond the loss of the goods on which the profit was expected. But the authority amounts to no more than an implication.

We must now dispose of the question upon reason and principle; and here it seems difficult to perceive why, if profit be a mere excrescence of the principal, as some judges have said; or an incident to or identified with it, as others have said, why the loss of the cargo should not carry with it the loss of the profits. This rule has convenience and certainty to recommend it; of which this case presents a striking illustration. Here was a voyage of many thousand miles to be performed, the final profits of which must have been determined by a statement of accounts passing through several changes, some of which might have resulted in loss, some in gain; and in each case the good or ill fortune of the adventure turning on the gain or loss of a day in the voyage. What human calculation or human imagination could have furnished testimony on a fact so speculative and fortuitous? To have required testimony to it, would have been subjecting the rights of the plaintiff to mere mockery. On this point we must support the American decisions.

JUSTICES THOMPSON and BALDWIN dissenting.

WATERS v. MERCHANTS' LOUISVILLE INSURANCE COMPANY.

(11 Peters, 218-225. 1837.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This is a case certified to us from the circuit court for the district of Kentucky, upon certain questions upon which the judges of that court were opposed in opinion.

The action was brought by Waters, the plaintiff, on a policy of insurance underwritten by the Merchants' Louisville Insurance Company, whereby they insured and caused to be insured the plaintiff, "lost or not lost, in the sum of

\$6,000 on the steamboat *Lioness*, engine, tackle, and furniture, to navigate the western waters usually navigated by steamboats, particularly from New Orleans to Natchitoches, on Red river, or elsewhere, the Missouri and Upper Mississippi excepted (Captain Waters having the privilege of placing competent masters in command at any time, \$6,000 being insured at New Albany, Indiana); whereof William Waters is at present master; beginning the adventure upon the said steamboat from the 12th of September, 1832, at 12 o'clock, meridian, and to continue and endure until the 12th of September, 1833, at 12 o'clock, meridian (twelve months)." The policy further provided that "It shall be lawful for the said steamboat, during said time, to proceed to, touch and stay at, any point or points, place or places, if thereunto obliged by stress of weather or other unavoidable accidents, also at the usual landings for wood and refreshments, and for discharging freight and passengers, without prejudice to this insurance. Touching the adventures and perils, which the aforesaid insurance company is contented to bear, they are of the rivers, fire, enemies, pirates, assailing thieves, and all other losses and misfortunes which shall come to the hurt, detriment or damage of the said steamboat, engine, tackle and furniture, according to the true intent and meaning of this policy." The premium was nine per cent. The declaration avers a total loss; and that the said steamboat and appurtenances insured "were, by the adventures and perils of fire and the river, exploded, sunk to the bottom of Red river aforesaid, and utterly destroyed."

The defendants pleaded six several pleas, to which a demurrer was put in by the plaintiff; and in the consideration of the demurrer, the following questions and points occurred: 1. Does the policy cover a loss of the boat by a fire caused by the barratry of the master and crew? 2. Does the policy cover a loss of the boat by fire, caused by the negligence, carelessness or unskilfulness of the master and crew of the boat, or any of them? 3. Is the allegation of the defendants in their pleas, or either of them, to the effect that the fire, by which the boat was lost, was caused by the carelessness, or the neglect, or unskilful conduct of the master and crew, a defense to this action? 4. Are the said pleas, or either of them, sufficient?

These questions constituted the points on which the division of the judges took place in the court below; and they are those upon which we are now called to deliver our opinion upon the argument had at the bar.

§ 566. *Loss by fire insured against, caused by barratry not insured against, creates no liability upon the underwriter.*

As we understand the first question, it assumes that the fire was directly and immediately caused by the barratry of the master and crew, as the efficient agents; or, in other words, that the fire was communicated and occasioned by the direct act and agency of the master and crew, intentionally done from a barratrous purpose. In this view of it, we have no hesitation to say that a loss by fire caused by the barratry of the master or crew is not a loss within the policy. Such a loss is properly a loss attributable to the barratry, as its proximate cause, as it concurs as the efficient agent, with the element, *eo instanti*, when the injury is produced. If the master or crew should barratrously bore holes in the bottom of the vessel, and the latter should thereby be filled with water and sink, the loss would properly be deemed a loss by barratry, and not by a peril of the seas or of rivers, though the flow of the water should co-operate in producing the sinking.

§ 567. *Loss by fire insured against, caused by mere negligence or unskilfulness, renders underwriters liable.*

The second question raises a different point, whether a loss by fire, remotely caused by the negligence, carelessness or unskilfulness of the master and crew of the vessel, is a loss within the true intent and meaning of the policy. By unskilfulness, as here stated, we do not understand, in this instance, a general unskilfulness, such as would be a breach of the implied warranty of competent skill to navigate and conduct the vessel; but only unskilfulness in the particular circumstances remotely connected with the loss. In this sense it is equivalent to negligence or carelessness in the execution of duty, and not to incapacity.

This question has undergone many discussions in the courts of England and America, and has given rise to opposing judgments in the two countries. As applied to policies against fire on land, the doctrine has for a great length of time prevailed, that losses occasioned by the mere fault or negligence of the assured or his servants, unaffected by fraud or design, are within the protection of the policies, and as such recoverable from the underwriters. It is not certain upon what precise grounds this doctrine was originally settled. It may have been from the rules of interpretation applied to such policies containing special exceptions, and not excepting this; or it may have been, and more probably was, founded upon a more general ground, that as the terms of the policy covered risks by fire generally, no exception ought to be introduced by construction, except that of fraud of the assured, which, upon the principles of public policy and morals, was always to be implied. It is probable, too, that the consideration had great weight, that otherwise such policies would practically be of little importance, since, comparatively speaking, few losses of this sort would occur which could not be traced back to some carelessness, neglect or inattention of the members of the family.

Be the origin of it, however, what it may, the doctrine is now firmly established both in England and America. We had occasion to consider and decide the point at the last term, in the case of *Columbia Ins. Co. of Alexandria v. Lawrence*, 10 Pet., 517, 518, which was a policy against the risk of fire on land. The argument addressed to us on that occasion endeavored to establish the proposition that there was no real distinction between policies against fire on land and at sea; and that in each case the same risks were included, and that as the risk of loss by fire occasioned by negligence was not included in a marine policy, unless that of barratry was also contained in the same policy, it followed, that as the latter risk was not taken on a land policy, no recovery could be had. In reply to that argument, the court made the comments which have been alluded to at the bar, and the correctness of which it becomes now necessary to decide.

It is certainly somewhat remarkable that the question now before us should never have been directly presented in the American or English courts, viz.: whether, in a marine policy (as this may well enough be called), where the risk of fire is taken, and the risk of barratry is not (as is the predicament of the present case), a loss by fire, remotely caused by negligence, is a loss within the policy. But it is scarcely a matter of less surprise, considering the great length of time during which policies against both risks have been in constant use among merchants, that the question of a loss by negligence in a policy against both risks should not have arisen in either country until a comparatively recent period.

If we look to the question upon mere principle, without reference to authority, it is difficult to escape from the conclusion that a loss by a peril insured against and occasioned by negligence is a loss within a marine policy, unless there be some other language in it which repels that conclusion. Such a loss is within the words, and it is incumbent upon those who seek to make any exception from the words, to show that it is not within the intent of the policy. There is nothing unreasonable, unjust, or inconsistent with public policy, in allowing the insured to insure himself against all losses from any perils not occasioned by his own personal fraud. It was well observed by Mr. Justice Bayley, in delivering the opinion of the court in *Busk v. Royal Exch. Assurance Co.*, 2 Barn. & Ald., 79, after referring to the general risks in the policy, that "the object of the assured certainly was to protect himself against all the risks incident to a marine adventure. The underwriter being therefore liable, *prima facie*, by the express terms of the policy, it lies upon him to discharge himself. Does he do so by showing that the fire arose from the negligence of the master and mariners?" "If, indeed, the negligence of the master would exonerate the underwriter from responsibility, in case of a loss by fire, it would also in cases of a loss by capture, or perils of the sea. And it would, therefore, constitute a good defense in an action upon a policy, to show that the captain had misconducted himself in the navigation of the ship, or that he had not resisted an enemy to the utmost of his power." There is great force in this reasoning, and the practical inconvenience of carving out such an implied exception from the general peril in the policy furnishes a strong ground against it; and it is to be remembered that the exception is to be created by construction of the court, and is not found in the terms of the policy. The reasons of public policy, and the presumption of intention in the parties to make such an exception, ought to be very clear and unequivocal, to justify the court in such a course. So far from any such policy or presumption being clear and unequivocal, it may be affirmed that they lean the other way. The practical inconvenience of creating such an exception would be very great. Lord Tenterden alluded to it in *Walter v. Maitland*, 5 Barn. & Ald., 174. "No decision (said he) can be cited, where in such a case (the loss by a peril of the sea) the underwriters have been held to be excused in consequence of the loss having been remotely occasioned by the negligence of the crew. I am afraid of laying down any such rule. It will introduce an infinite number of questions, as to the *quantum* of care, which, if used, might have prevented the loss. Suppose, for instance, the master were to send a man to the masthead to look out, and he falls asleep, in consequence of which the vessel runs upon a rock, or is taken by the enemy; in that case it might be argued, as here, that the loss was imputable to the negligence of one of the crew, and that the underwriters are not liable. These, and a variety of other such questions, would be introduced, in case our opinion were in favor of the underwriters." His lordship might have stated the argument from inconvenience, even in a more general form. If negligence of the master or crew were under such circumstances a good defense, it would be perfectly competent and proper to examine on the trial any single transaction of the whole voyage, and every incident of the navigation of the whole voyage, whether there was due diligence in all respects, in hoisting or taking in sail, in steering the course, in trimming the ship, in selecting the route, in stopping in port, in hastening or retarding the operations of the voyage, for all these might be remotely connected with the loss. If there had been more diligence, or less

negligence, the peril might have been avoided or escaped, or never encountered at all. Under such circumstances, the chance of a recovery upon a policy for any loss, from any peril insured against, would of itself be a risk of no inconsiderable hazard.

§ 568. *Causa proxima.*

This is not all; we must interpret this instrument according to the known principles of the common law. It is a well established principle of that law, that in all cases of loss we are to attribute it to the proximate cause, and not to any remote cause,—*causa proxima non remota spectatur*; and this has become a maxim not only to govern other cases, but (as will be presently shown) to govern cases arising under policies of insurance. If this maxim is to be applied, it disposes of the whole argument in the present case, and why it should not be so applied we are unable to see any reason.

Let us now look to the authorities upon the point. In *Busk v. The Royal Exchange Assurance Company*, 2 Barn. & Ald., 73, the very point came before the court. The policy covered the risk by fire, and the question made was, whether the fact that the loss of the ship by fire, occasioned by the negligence of the crew, was a good defense. The court held that it was not. In that case the policy also included the risk of barratry; and it is now said that the decision of the court turned wholly upon that consideration, the court being of opinion that in a policy where the underwriter takes the superior risk of barratry, there is no ground to infer that he does not mean to take the inferior risk of negligence; it is certainly true that the court do rely in their judgment upon this circumstance, and it certainly does fortify it. But there is no reason to say that the court wholly relied upon it and that it constituted the exclusive ground of the judgment; on the contrary, Mr. Justice Bayley, in delivering the opinion, takes pains in the earlier part of that opinion to state and to rely upon the maxim already stated. He said, "in our law, at least, there is no authority which says that the underwriters are not liable for a loss, the proximate cause of which is one of the enumerated risks, but the remote cause of which may be traced to the misconduct of the master and mariners." "It is certainly a strong argument against the objection now raised for the first time, that in the great variety of cases upon marine policies, which have been the subjects of litigation in courts of justice (the facts of many of which must have presented a ground for such a defense), no such point has ever been made." In *Walker v. Maitland*, 5 Barn. & Ald., 173, a similar question was presented where the maxim was still more strongly indicated as the general, though not as the exclusive, ground of the judgment. The case of *Bishop v. Pentland*, 7 Barn. & Cres., 219, turned exclusively upon the very ground of the maxim, and not a single judge relied upon the policy as containing the risk of barratry. Indeed, it does not appear that the risk of barratry was, in that case, in the policy. Mr. Justice Bayley, on that occasion, put the former cases as having been expressly decided upon this maxim. His language was, "the cases of *Busk v. Royal Exch. Assurance Co.*, and *Walker v. Maitland*, establish as a principle that the underwriters are liable for a loss, the proximate cause of which is one of the enumerated risks, though the remote cause may be traced to the negligence of the master and mariners."

Then came the case of *The Patapsco Ins. Co. v. Coulter*, 3 Pet., 222 (§§ 563-65, *supra*), where the loss was by fire, and barratry also was insured against. The court on that occasion held that in such a policy, a loss which was remotely caused by the master or the crew was a risk taken in the policy, and

the doctrine in the English cases already cited was approved. It is true that the court lay great stress on the fact that barratry was insured against; but it may also be stated that this ground was not exclusively relied on, for the court expressly refer to and adopt the doctrine of the English cases, that the proximate and not the remote cause of a loss is to be looked to. It is known to those of us who constituted a part of the court at that time that a majority of the judges were then of opinion for the plaintiff upon this last general ground, independently of the other.

It was under these circumstances that the case of *The Columbia Insurance Company of Alexandria v. Lawrence*, 10 Pet., 507, came on for argument; and the court then thought, that in marine policies, whether containing the risk of barratry or not, a loss whose proximate cause was a peril insured against is within the protection of the policy, notwithstanding it might have been occasioned remotely by the negligence of the master and mariners. We see no reason to change that opinion, and on the contrary, upon the present argument, we are confirmed in it.

The third and fourth questions are completely answered by the reasoning already stated. Those pleas contain no legal defense to the action in the form and manner in which they are pleaded, and are not sufficient to bar a recovery by the plaintiff.

§ 569. *Explosion caused by fire, covered by policy insuring against loss by fire.*

Some suggestion was made at the bar whether the explosion, as stated in the pleas, was a loss by fire or by explosion merely. We are of opinion that, as the explosion was caused by fire, the latter was the proximate cause of the loss. The fifth plea turns upon a different ground. It is that the taking of gunpowder on board was an increase of the risk. If the taking of the gunpowder on board was not justified by the usage of the trade, and therefore was not contemplated as a risk by the policy, there might be great reason to contend that if it increased the risk the loss was not covered by the policy. But in our opinion the facts are too defectively stated in the fifth plea to raise the question.

Our opinion will be certified to the circuit court accordingly. On the first question, in the negative; on the second question, in the affirmative; and on the third and fourth questions, in the negative.

LEVI v. NEW ORLEANS INSURANCE ASSOCIATION.

(Circuit Court for Louisiana: 2 Woods, 68-71. 1874.)

Opinion by Woods, J.

STATEMENT OF FACTS.—The execution of the policies and the fact of the loss are admitted by defendants.

They defend against a recovery on several grounds:

1. Because the collision and consequent loss were caused by the carelessness, negligence and improper conduct of the master of the *Sabine*, and of his mariner and servants, and by their gross fault and violation of law and the rules of navigation.

In the case of *Shirley v. The Richmond*, just decided [2 Woods, p. 58], I have found that the loss of the *Sabine* was the result of a collision with the *Richmond*, and that the collision was occasioned by the fault of the *Sabine* in not keeping the middle or thread of the river, but running close to the left bank

under Twelve Mile Point, where she encountered the Richmond, who was in her proper place.

It is claimed that this fact should defeat a recovery in this case on the grounds: (a) That by the general law of insurance, the fact that the loss occurred through the fault of the officers of the boat bars a recovery upon the policy of insurance. (b) That the code of Louisiana bars a recovery under the like circumstances; and (c) That specially the Union Mutual Insurance Company is discharged from liability on its policy by reason of the following warranty in the policy: "Warranted free from any loss or damage occasioned by barratry, or by the negligence or misconduct of those in charge of the steamboat at or before the time of any accident or disaster." I shall notice these grounds in their order.

§ 570. *Negligence is insured against, misconduct is not.*

"It is the settled rule that negligence and carelessness are insured against, while misconduct, which is a violation of definite law, a forbidden act, is never insured against." Flanders on Fire Insurance, 2d ed., 553; Citizens' Ins. Co. v. Marsh, 5 Wr., 386; Johnson v. Berkshire Ins. Co., 4 Allen, 388; Phoenix Ins. Co. v. Cochran, 51 Penn. St., 148; Chandler v. Worcester Fire Ins. Co., 3 Cush., 328; Goodman v. Harvey, 4 Ad. & Ell., 870.

In The Columbian Ins. Co. v. Lawrence, 10 Pet., 507, Judge Story says: "The next question is whether a loss by fire occasioned by the fault and negligence of the assured, their servants and agents, but without fraud or design on their part, is a loss for which the underwriter is liable. In regard to marine insurance cases, this was a question much vexed in the English and American courts. But in England the point was completely settled in Busk v. Royal Exch. Ins. Co., 2 Barn. & Ald., 82, upon the general ground that *causa proxima, et non remota spectatur*; and, therefore, that a loss whose proximate cause is one of the enumerated risks in the policy is chargeable to the underwriters, although the remote cause may be traced to the negligence of the master and mariners. The same doctrine was afterwards affirmed in Walker v. Maitland, 5 B. & Ald., 171, and Bishop v. Pentland, 7 Barn. & Cres., 219, and is now deemed incontrovertibly established. The same doctrine was fully discussed and adopted by this court in the case of The Patapsco Ins. Co. v. Coulter, 3 Pet., 222" (§§ 563-65, *supra*). See, also, St. Johns v. Ins. Co., 1 Duer, 371; Hynds v. Schenectady Ins. Co., 16 Barb., 119; Gates v. Madison Ins. Co., 1 Seld., 469; Catlin v. Ins. Co., 1 Sumn., 434 (§§ 1435-42, *infra*); Mathews v. Howard Ins. Co., 13 Barb., 234. These authorities establish conclusively the doctrine that mere carelessness and negligence of the master and officers of a boat do not relieve the insurance companies from liability for loss occasioned thereby.

§ 571. *Distinction between negligence and misconduct.*

The question remains, were the officers of the Sabine guilty of misconduct, or of carelessness and negligence only? Misconduct is defined to be a transgression of some established and definite rule of action, where no discretion is left except what necessity may demand, as contradistinguished from negligence, carelessness and unskilfulness, which are transgressions of some established but indefinite rule of action, where some discretion is necessarily left to the actor. Citizens' Ins. Co. v. Marsh, 41 Penn. St., 386.

I think no better illustration could be given of what constitutes carelessness, negligence and unskilfulness, as distinguished from misconduct, than the conduct of the pilot of the Sabine, which caused the collision by which she

was lost. He failed and neglected to follow a custom of the river, well known and established, but not prescribed by any positive law. That custom was that ascending boats should run under the points near the shore so as to avoid the current, while descending boats followed the main channel or thread of the river, so as to take advantage of the current. The neglect by the pilot of the Sabine to observe this rule resulted in the collision. But this was no misconduct; there was no wilful violation of positive law. If the pilot could see along the bank of the river for a long distance, and there was no boat coming in an opposite direction, there was no positive law of the river to forbid a descending boat from running near the shore. But the fault was that he ran near shore at night, and when rounding a point where, if he happened to meet an ascending boat, there was danger of collision. This was negligence, carelessness and unskilfulness, but it was not wilful misconduct.

I cite two instances of misconduct taken from reported cases, which will show how far the conduct of the pilot of the Sabine falls short of misconduct. The captain of a steamer, while racing, for the purpose of making more steam, brought from the hold of the vessel a barrel of turpentine, knocked out the head and placed it so near the furnace that the fire was communicated to the wood upon which the turpentine was thrown and then to the barrel; such manner of use of turpentine being in contravention of an act of congress. This, as matter of law, was held to be misconduct, and to avoid the policy.

In *Chandler v. Worcester Insurance Company*, Shaw, chief justice, puts the case of a party insured, standing by the fire, which was yet so trifling that by throwing on a cup of water which was at hand, the fire might be extinguished, and yet neglecting to do so, as a case of misconduct, which would avoid a policy. 3 Cush., 328. The case of the Sabine is not like either of the cases just mentioned. There was no wilful violation of a positive law, nor was there such gross negligence as to amount to misconduct. I am of opinion, therefore, that the first ground of objection to a recovery is not well taken.

§ 572. *Section 3651, Revised Statutes of Louisiana, applies only to cases of misconduct.*

2. It is claimed that the code of Louisiana bars a recovery against the insurance companies under the circumstances of this case. The law relied on is section 3651 of the Revised Statutes of 1870, p. 709, which declares: "Any accident except such as is impossible to be foreseen or avoided, that may happen to any steamboat from racing, carrying higher steam than may be allowed by law, running into or afoul of another boat, or that may occur whilst the captain, pilot or engineer is engaged in gambling or attending any game of chance, or hazard, or whenever an accident happens from the boat being overloaded, the owner of the boat shall be responsible for all loss or damage, and shall be barred from the recovery of freight or insurance, and the officer violating the provisions of this section shall be subject to a fine of not less than \$500 nor more than \$2,000, and imprisonment for not less than three months nor more than three years; and in the event of loss of life being the result of such accident, then said officers shall be adjudged guilty of manslaughter."

This act was passed in 1834. Whether it is still in force has been a question raised but not decided by the supreme court of Louisiana. *Caldwell v. The Insurance Company*, 1 La. An., 85.

But considering it to be still the law, it clearly appears that it was intended only to operate in cases where the carelessness of the officers of the boat was

so gross as to justify a criminal prosecution, and, in cases where loss of life occurred, a prosecution for manslaughter. In other words, there must have been misconduct on the part of the officers of the boat. The whole tone and spirit of the section seems to indicate this. I have already expressed the opinion that there was no misconduct of the officers of the Sabine which resulted in the collision. I am of opinion, therefore, that this section of the Revised Statutes does not bar a recovery in these cases.

§ 573. *Warranty against loss or injury by barratry or negligence.*

3. In the policy of the Union Mutual Insurance Company, but in neither of the others, is this stipulation: "It is also warranted and agreed by the assured, that the steamer shall be navigated in strict compliance with the provisions of any and all acts of congress regulating or pertaining to the management of vessels propelled in whole or in part by steam, and with the rules adopted by competent authority under any such act or acts and free from any loss or damage by barratry, or by the negligence of those in charge of the steamboat at or before the time of any accident or disaster."

It is claimed for the Union Mutual Insurance Company that this warranty must have been strictly complied with or there can be no recovery against it. It is not shown by the record that the Sabine was not navigated in strict compliance with the acts of congress or with the rules adopted under such act. The fault committed by the Sabine was in the non-observance of a rule or custom of the river. It is not shown or claimed that the loss was occasioned by barratry, and we have found that there was no wilful misconduct, but only negligence in the management of the boat. But the negligence of those in charge of the boat, at or before the time of any accident or disaster, which occasions the loss, is expressly warranted against in this policy, and if that warranty is binding upon the assured, it will be a bar to a recovery.

The clause in this policy, upon which the Union Mutual Insurance Company relies, is an unusual one, as counsel for the company have taken pains to show. But it is printed like all other parts of the policy in large leaded type, and it is made a distinct paragraph, and the words, "it is also agreed and warranted by the assured," with which the paragraph commences, are printed in type much larger than the body of the paragraph. The remark of the supreme court of the United States in *Insurance Co. v. Slaughter*, 12 Wall., 409, that "in order to avoid just cause of complaint it would be better for insurance companies to employ type large enough to arrest the attention of an interested party," can have no application to this case. We find this warranty in this policy conspicuously printed, and we cannot presume that it was inserted without the knowledge of the assured. We cannot make contracts for parties or act as their guardians to supply the want of care and vigilance in the conduct of their business. If the assured did not know that such a warranty was to be found in the policy, it was because he did not take the trouble to read it. We find it in the policy and it is as much a part of the contract as any other, and is as binding on the parties as any other.

Having found that the loss to the Sabine was occasioned by the negligence, carelessness and unskilfulness of her pilot, the case of the Union Mutual Insurance Company is fully within the express warranty, and there can be no recovery against that company. *De Hahn v. Hartley*, 1 Term, 343; 1 Arnould on Insurance, 584. As to the other companies, the defenses which they have set up have been found to be untenable.

§ 574. *Measure of damages; construction of policy.*

The question remains, therefore, What ought to be the amount of the recovery against the New Orleans Mutual Insurance Association and against the Home Mutual Insurance Company?

In the policies executed by the companies, the Sabine was valued at \$27,000, and each policy was for the sum of \$4,500. If the Sabine were a total loss, or if she were abandoned to the insurance companies, they must pay the full sum insured. But the Sabine was not a total loss, for she was raised and repaired. Was she abandoned? The policies of both the New Orleans Mutual Insurance Association and of the Home Mutual Insurance Company contain these clauses:

“And it is agreed that in case of any loss or misfortune aforesaid, it shall be the duty of the assured to use every reasonable effort for the safeguard and recovery of the said steamboat and every part thereof, and if recovered to cause the same to be forthwith repaired, if practicable; to the charges whereof the said insurance company will contribute in proportion as the sum herein insured bears to the agreed value herein, and in case of the neglect or refusal of the assured, or their agents or assigns, to adopt prompt and efficient measures for the safeguard and recovery thereof, then the said company shall have the election to interpose and recover said steamboat or any part thereof, and cause the same to be repaired for the account of the assured; to the charges of which the said insurance company will contribute in proportion as the sum herein insured bears to the agreed value in this policy.

“And in no case whatever shall the assured have the right to abandon until it is ascertained that the recovery and repairs of the said steamboat are impracticable, nor shall the assured have the right to sell the wreck or any part thereof without the written consent of said company.”

The Sabine was raised by a wrecking company, and after being so raised she was libeled for salvage and sold, and her purchaser had her repaired at an expense of \$3,100. These facts being established, it is clear that the insured had no right to abandon under the terms of these policies, for they had no right to abandon until it was ascertained that the recovery and repairs of the steamboat were impracticable. This was never ascertained, for it was not true, and the right to abandon did not exist.

I have examined the evidence to see whether there was in fact an abandonment and an acceptance of the abandonment by the insurance companies. The evidence fails to satisfy me that there was a purpose to abandon, or that the insurance companies intended to waive their right under their policies, and accept the abandonment. There can, therefore, only be a recovery against the New Orleans Mutual Insurance Association and the Home Mutual Insurance Association, as in case of no abandonment. The case will be referred to a master to ascertain and report from the evidence now on file the amount to be paid by each company under the terms of the policy.

CARRINGTON v. MERCHANTS' INSURANCE COMPANY.

(8 Peters, 495-525. 1834.)

CERTIFICATE OF DIVISION from U. S. Circuit Court, District of Massachusetts.
Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—On the 1st of October, 1824, the defendants, the Merchants' Insurance Company, underwrote a policy of insurance for the plaintiffs, Carrington and others, for \$10,000, on property on board the ship General Carrington, at and from the port of Coquimbo, in Chili, to any port or ports, place or places, one or more times, for and during the term of twelve calendar months, commencing on the 5th day of June, 1824, at noon, and ending on the 5th day of June, 1825, at noon. The policy is against the usual perils, and contains the following clause: "It is also agreed that the assurers shall not be answerable for any charge, damage, or loss which may arise in consequence of seizure or detention, for or on account of illicit or prohibited trade, or trade in articles contraband of war. But the judgment of a foreign consular or colonial court shall not be conclusive upon the parties as to the fact of there having been articles contraband of war on board, or as to the fact of an attempt to trade in violation of the law of nations."

The ship sailed from Providence, Rhode Island, on the 21st of December, 1823, cleared for the Sandwich Islands and Canton, but was immediately bound to Valparaiso, in Chili, with such ulterior destination as was stated in her orders; the clearance being a usual and customary mode of clearance at that time for vessels bound to Chili and Peru. A part of the cargo consisted of eighteen cases of muskets and bayonets, each case containing twenty; and three hundred kegs or quarter kegs of cannon-powder, containing about twenty-five pounds each; and these, together with the residue of the cargo, belonged to the owners of the ship. At the commencement of the voyage, and until the final loss of the ship, open hostilities existed between Spain and the new governments or states of Chili and Peru. From the orders it was apparent that the object of the voyage was to sell the cargo in Chili and Peru. The ship was to proceed direct for Valparaiso, and was to enter that port under the plea of a want of water. Some part of the cargo was expected to be sold at that port; and thence the ship was to proceed along the coast of Chili and Peru for the purposes of trade. There is no allegation that the underwriters were not well acquainted with the nature and objects of the voyage.

The ship arrived at Valparaiso on the 17th of April, 1824. At the time of her arrival, and until the loss, as hereinafter stated, the Spanish royal authorities were in possession of a portion of upper Peru, including Quilca and Moliendo, and of the port of Callao, in lower Peru. The rest of Peru, and the whole of Chili, were in possession of the Peruvian and Chilian new governments. In the harbor of Valparaiso, sixteen casks of the powder were, with the knowledge of the government, sent on board of an English brig, then in the harbor; and, as the plaintiffs allege, sold to the master of the brig; and all the muskets, except ten, alleged to be kept for the ship's use, were landed in Valparaiso, with the knowledge of the government.

The ship, with the remainder of her cargo on board, sailed from Valparaiso, early in May following; arrived at Coquimbo, in Chili, on the 13th day of the same month. There, the remainder of the powder, except nine casks, more or

less damaged, alleged to be retained for the ship's use, was landed in the course of the same month, with the knowledge of the government. The ship sailed from Coquimbo for Huasco, in Chili, on or about the 5th day of June following, and arrived at Huasco in the same month; having sold, at the previous port, a part of her outward cargo, by permission of the government, as the plaintiffs allege, and taken in merchandise belonging to the plaintiffs, and other citizens of the United States, to be delivered at some ports on the coast. The ship arrived at Quilca, with the greater part of her outward cargo still on board, on the 20th of June, and there sold, with the knowledge of the government, as the plaintiffs allege, a considerable portion of her outward cargo, and delivered some of the articles taken in at the previous ports. While lying at anchor in the roadstead of Quilca, and before she had completed the discharge of her outward cargo, she was seized by an armed vessel, called the *Constante*, commanded by one Jose Martinez, sailing under the royal flag, and acting, as the defendants allege, by the royal authority of Spain; but alleged by the plaintiffs to be fitted out and commissioned at Callao, by Jose Ramon Rodil, the highest military commander of the castle of Callao, holding his commission subordinate to La Serna, the viceroy of Peru, under the king of Spain; there being, as the defendants allege, no regular civil government in the place; the castle of Callao being then, and until the final loss of the ship, besieged by sea and land. The ship was carried from Quilca to Callao, where certain proceedings were had against her and her cargo on board, by the orders of General Rodil; and they were never restored, but were totally lost to the plaintiffs. The alleged cause of the seizure and detention was the trade in articles contraband of war, by the landing of the powder and muskets in Chili, as aforesaid.

This cause comes before the court upon a certificate of a division of opinion of the judges of the circuit court for the district of Massachusetts. Upon the trial of the cause upon the evidence, the parties propounded certain questions, upon which the circuit court (with the assent of the parties) certified a division of opinion for the purpose of obtaining the final decision of this court in regard to them.

§ 575. *There must be reasonable ground for seizure.*

The first is, whether a seizure and detention, to come within the exception of the policy relating to contraband and illicit trade, must be for a legal and justifiable cause. The question here propounded is not whether there must be a legal or justifiable cause for condemnation, but simply, whether there must not be such cause for the seizure and detention. And we are of opinion that the question ought to be answered in the affirmative. The language of the exception, when properly construed, leads to this conclusion; and it is confirmed by authorities standing upon analogous clauses. The language is: "The assurers shall not be liable for any charge, damage or loss which may arise in consequence of seizure or detention for or on account of illicit trade, or trade in articles contraband of war." It is not, then, every seizure or detention which is excepted; but such only as is made for and on account of a particular trade. A seizure or detention which is a mere act of lawless violence, wholly unconnected with any supposed illicit or contraband trade, is not within the terms or spirit of the exception. And as a little is a seizure or detention not *bona fide* made upon a just suspicion of illicit or contraband trade, but the latter used as a mere pretext or color for an act of lawless violence; for, under such circumstances, it can in no just sense be said to be made for

or on account of such trade. It is a mere fraud to cover a wanton trespass; a pretense, and not a cause for the tort. To bring a case, then, within the exception, the seizure or detention must be *bona fide* and upon a reasonable ground. If there has not been an actual illicit or contraband trade, there must at least be a well-founded suspicion of it, a probable cause to impute guilt, and justify further proceedings and inquiries; and this is what the law deems a legal and justifiable cause for the seizure or detention. The general words of the policy cover the risks of restraints and detainments of all kings, princes and people. The exception draws from it such as are *bona fide* made for and on account of illicit or contraband trade. So that, upon the mere terms of the exception, there would not seem any real ground for doubt. But if there were, the next succeeding clause associated with it demonstrates that such must have been the understanding of the parties. It is there said that the judgment of a foreign consular or colonial court shall not be conclusive upon the parties as to the fact of there having been articles contraband of war on board, or as to the fact of an attempt to trade in violation of the laws of nations. Now if a mere lawless seizure or detention, under the pretext of illicit and contraband trade, were within the exception, the inquiry whether there had been contraband articles on board, or an attempt of illicit trade, would be in most if not in all cases wholly unimportant and nugatory to the assured, for whose benefit the clause is introduced; since the sentence would always establish a pretense for the seizure and detention, although not a justifiable cause for it. The reasonable interpretation of the clause must be, that it was introduced to enable the assured to disprove the existence of justifiable cause for the seizure or detention, by showing that the facts did not warrant it.

We think that the authorities cited at the bar lead to the same conclusion. In *Church v. Hubbard*, 2 Cranch, 187, 2 Cond. Rep., 385 (§§ 601-5, *infra*), where the exception was "that the insurers do not take the risk of illicit trade with the Portuguese, and the insurers are not liable for seizure by the Portuguese for illicit trade," the main question was, whether an attempt to trade, not consummated by actual trading, was within the exception. The court held that it was. On that occasion the chief justice said: "No seizure, not justifiable under the laws and regulations established by the crown of Portugal for the restriction of foreign commerce with its dependencies, can come within this part of the contract; and every seizure which is justifiable by those laws and regulations must be deemed within it." And, applying this language to the circumstances of the present case, we may add, that no seizure or detention not justifiable by the law of nations can come within the present exception, and every seizure which is justifiable by the law of nations must be deemed within it. The case of *Smith v. Delaware Ins. Co.*, 3 Serg. & R., 74; and *Faudel v. Phoenix Ins. Co.*, 4 Serg. & R., 29; *Johnston v. Ludlow*, 1 Caines' Cas. in Error, 29; S. C., 2 Johns. Cas., 481 (see, also, *Laing v. United Ins. Co.*, 2 Johns. Cas., 174; S. C., 2 Johns. Cas., 487; *Tucker v. Juhel*, 1 Johns., 20), adopt a similar doctrine, if they do not proceed beyond it. The case of *Higginson v. Pomroy*, 11 Mass., 104, contained an exception of "illicit trade with the Spaniards;" and the court held that the exception extended to every seizure and detention suggested by the prohibitions of trade and intercourse, as the means of enforcing them, and whether of prevention or of punishment for infraction; and that, therefore, it extended to cases where the charge of illicit trade with the Spaniards might be ultimately repelled, and where the property seized might be in consequence acquitted under the circumstances of

the particular case. But this supposes that there was probable or justifiable cause for the seizure, *bona fide* existing; and the court explicitly assented to the general doctrine in *Church v. Hubbard*, 2 Cranch, 187. It is true that the learned chief justice, in delivering the opinion of the court, added that "perhaps (we may add), although not necessary to the present decision, even arbitrary acts of the Spanish colonial governments, if assumed to be justified on their parts by the prohibitions of trade and intercourse, are, we think, within the exception of seizure for illicit trade." This is professedly a mere *dictum* of the court; and, giving it every reasonable force as authority, it proceeds on the supposition that such arbitrary acts are *bona fide* done, and are not mere pretexts to cover an illegal seizure.

The second question is, whether, assuming the other facts to be as stated and alleged above, and taking the authority of the seizing vessel to be such as the plaintiffs allege (that is to say, of an armed vessel fitted out and commissioned at Callao, by Rodil), there was a legal and justifiable cause for the seizure of the *General Carrington* and her cargo. The third is precisely the same in terms, except taking the authority of the armed vessel to be such as the defendants allege (that is to say, to be an armed vessel sailing under the royal Spanish flag and acting by the royal authority of Spain).

Both these questions present the same general point, whether there was, under the circumstances of the case, a legal and justifiable cause for the seizure and detention of the ship and her cargo. The facts material to be taken into consideration in ascertaining this point are, that the ship, when seized, had not landed all her outward cargo, but was still in the progress of the outward voyage originally designated by the owners; that she sailed on that voyage from Providence with contraband articles on board, belonging, with the other parts of the cargo, to the owners of the ship, with a false destination and false papers, which yet accompanied the vessel; that the contraband articles had been landed before the policy, which is a policy on time, designating no particular voyage, had attached; that the underwriters, though taking no risks within the exception, were not ignorant of the nature and objects of the voyage; and that the alleged cause of the seizure and detention was the trade in articles contraband of war by the landing of the powder and muskets already mentioned.

If by the principles of the law of nations there existed under these circumstances a right to seize and detain the ship and her remaining cargo, and to subject them to adjudication for a supposed forfeiture, notwithstanding the prior deposit of the contraband goods, then the questions must be answered in the affirmative, that there was a legal and justifiable cause.

According to the modern law of nations, for there has been some relaxation in practice from the strictness of the ancient rules, the carriage of contraband goods to the enemy subjects them, if captured, *in delicto*, to the penalty of confiscation; but the vessel and the remaining cargo, if they do not belong to the owner of the contraband goods, are not subject to the same penalty. The penalty is applied to the latter only when there has been some actual co-operation on their part in a meditated fraud upon the belligerents, by covering up the voyage under false papers and with a false destination. This is the general doctrine when the capture is made *in transitu*, while the contraband goods are yet on board. But when the contraband goods have been deposited at the port of destination and the subsequent voyage has thus been disconnected with the noxious articles, it has not been usual to apply the

penalty to the ship or cargo upon the return voyage, although the latter may be the proceeds of the contraband. And the same rule would seem by analogy to apply to cases where the contraband articles have been deposited at an intermediate port on the outward voyage, and before it had terminated, although there is not any authority directly in point. But in the highest prize courts of England, while the distinction between the outward and homeward voyage is admitted to govern, yet it is established that it exists only in favor of neutrals who conduct themselves with fairness and good faith in the arrangements of the voyage. If, with a view to practice a fraud upon the belligerent and to escape from his acknowledged right of capture and detention, the voyage is disguised and the vessel sails under false papers and with a false destination, the mere deposit of the contraband in the course of the voyage is not allowed to purge away the guilt of the fraudulent conduct of the neutral. In the case of *The Franklin*, in 1801 (3 Rob., 217), Lord Stowell said: "I have deliberated upon this case and desire it to be considered as the settled rule of law received by this court, that the carriage of contraband with a false destination will make a condemnation of the ship as well as the cargo." Shortly afterwards, in the case of *The Neutralitet*, 1801 (3 Rob., 295), he added: "The modern rule of the law of nations is, certainly, that the ship shall not be subject to condemnation for carrying contraband goods. The ancient practice was otherwise, and it cannot be denied that it was perfectly justifiable in principle. If to supply the enemy with such articles is a noxious act with respect to the owner of the cargo, the vehicle which is instrumental in effecting that illegal purpose cannot be innocent. The policy of modern times has, however, introduced a relaxation on this point, and the general rule now is that the vessel does not become confiscated for that act. But this rule is liable to exceptions. Where a ship belongs to the owner of the cargo, or where the ship is going on such service under a false destination or false papers, these circumstances of aggravation have been held to constitute excepted cases out of the modern rule and to continue them under the ancient rule." The cases in which this language was used were cases of capture upon the outward voyage. See, also, *The Edward*, 4 Rob., 68. The same doctrine was afterwards held by the same learned judge to apply to cases where the vessel had sailed with false papers and a false destination upon the outward voyage and was captured on the return voyage. See *The Nancy*, 3 Rob., 122; *The Christianberg*, 6 Rob., 376. And, finally, in the cases of *The Rosalia* and *The Elizabeth*, in 1802 (4 Rob.), note to table of cases, the lords of appeal in prize cases held that the carriage of contraband outward with false papers will affect the return cargo with condemnation. These cases are not reported at large. But in the case of *The Baltic*, 1 Acton, 25, and that of *The Margaret*, 1 Acton, 333, the lords of appeal deliberately reaffirmed the same doctrine. In the latter case, Sir William Grant, in pronouncing the judgment of the court, said: "The principle upon which this and other prize courts have generally proceeded to adjudication in cases of this nature (that is, where there are false papers) appears simply to be this: that if a vessel carried contraband on the outward voyage she is liable to condemnation on the homeward voyage. It is by no means necessary that the cargo should have been purchased by the proceeds of this contraband. Hence we must pronounce against this appeal, the sentence (of condemnation) of the court below being perfectly valid and consistent with the acknowledged principles of general law."

We cannot but consider these decisions as very high evidence of the law of

nations, as actually administered; and in their actual application to the circumstances of the present case, they are not, in our judgment, controlled by any opposing authority. Upon principle, too, we trust, that there is great soundness in the doctrine as a reasonable interpretation of the law of nations. The belligerent has a right to require a frank and *bona fide* conduct on the part of neutrals in the course of their commerce in times of war, and if the latter will make use of fraud and false papers to elude the just rights of the belligerents and to cloak their own illegal purposes, there is no injustice in applying to them the penalty of confiscation. The taint of the fraud travels with the party and his offending instrument during the whole course of the voyage, and until the enterprise has, in the understanding of the party himself, completely terminated. There are many analogous cases in the prize law, where fraud is followed by similar penalties. Thus, if a neutral will cover up enemy's property under false papers, which also cover his own property, prize courts will not disentangle the one from the other, but condemn the whole as good prize. That doctrine was solemnly affirmed in this court, in the case of *The St. Nicholas*, 1 Wheat., 417; 3 Cond. Rep., 614.

§ 576. *A non-commissioned cruiser may seize.*

Upon the whole, our opinion is, that the general question involved in the second and third questions, whether there was a legal and justifiable cause of capture under the circumstances of the present case, ought to be answered in the affirmative. The question as to the authority of the cruiser to seize, so far as it depends upon her commission, can only be answered in a general way. If she had a commission under the royal authority of Spain, she was beyond question entitled to make the seizure. If Rodil had due authority to grant the commission, the same result would arise. If he had no such authority, then she must be treated as a non-commissioned cruiser, entitled to seize for the benefit of the crown; whose acts, if adopted and acknowledged by the crown or its competent authorities, become equally binding. Nothing is better settled, both in England and America, than the doctrine that a non-commissioned cruiser may seize for the benefit of the government; and if his acts are adopted by the government, the property, when condemned, becomes a *droit* of the government. *The Amiable Isabella*, 6 Wheat., 1; 5 Cond. Rep., 1; *The Dos Hermanos*, 10 Wheat., 306; 6 Cond. Rep., 109; *The Melomane*, 5 Rob., 41; *The Elsebe*, 5 Rob., 174; *The Maria Françoise*, 6 Rob., 282.

§ 577. *Question imperfectly stated.*

The fourth and fifth questions involve the point as to the authority of Rodil. The fourth is in the following terms: Whether a general in the military service of Spain, subordinate to La Serna, viceroy of Peru, under the king of Spain, but having the actual and exclusive command at Callao, and no civil authority existing therein, and cut off by the forces of the enemy by sea or land from all communication with any superior civil or military officer, could lawfully seize and detain neutral property for contraband trade, if just cause existed for a condemnation thereof. The fifth question is whether such officer so situated has a right to appoint and constitute a court, of which he himself is one, for the trial and condemnation of such property. These questions are both understood to refer to the supposed authority of Rodil as an officer of the government to make the seizure in his official capacity. We are of opinion that no sufficient facts are stated to enable this court to give any opinion as to the nature or extent of the authority of such an officer under the laws of Spain, or his commission from and under the Spanish government.

We shall, therefore, return an answer to them declaring that they are too imperfectly stated to admit of any opinion to be given by this court.

§ 578. *Sentence of condemnation or acquittal not necessary to exempt underwriter.*

The sixth and last question is whether, supposing the ship to have traded in articles contraband of war in the ports of Chili, and to have been seized afterwards in a port of Peru, then under the royal authority, before she had discharged her outward cargo, for and on account of such contraband trade, the underwriters be not discharged, whether the subsequent proceedings for her adjudication were regular or irregular. This question is understood to raise the point whether, if the seizure and detention be *bona fide* for and on account of illicit or contraband trade, a sentence of condemnation or acquittal, or other regular proceedings to adjudication, are necessary to discharge the underwriters. We are of opinion that they are not. If the seizure or detention be lawfully made for or on account of illicit or contraband trade, all charges, damages and losses consequent thereon are within the scope of the exception. They are properly attributable to such seizure and detention as the primary cause, and relate back thereto. If the underwriters be discharged from the primary hostile act, they are discharged from the consequences of it. The whole reasoning in *Church v. Hubbard*, 2 Cranch, 187 (§§ 601-5, *infra*), presupposes that, if the underwriters be exempted from the risk of a justifiable seizure for illicit trade, they are not accountable for losses consequent thereon, whether arising from a sentence of condemnation or otherwise.

CLARK v. PROTECTION INSURANCE COMPANY.

(Circuit Court for Massachusetts: 1 Story, 109-135. 1840.)

STATEMENT OF FACTS.—*Assumpsit* on a policy of insurance underwritten by the Protection Insurance Company, on the 10th of November, 1837, whereby they insured the plaintiffs, "Means & Clark, for whom it concerns, payment to them to be insured, lost or not lost, \$20,000 on the ship Avon, at sea and in port, for and during the term of one year from the 12th day of November, 1837, at noon; and if at sea at the expiration of said term, the risk to continue until her arrival at the port of destination, at a *pro rata premium*." The parties agreed upon the following statement of facts:

The defendants, on the 10th of November, 1837, made a policy of insurance whereby they insured Means & Clark, for whom it might concern, in the sum of \$20,000 on the ship Avon, valued at \$28,000, for one year. The vessel was owned by Joseph Clark, James R. Groton, George Sproul, Arthur Child, who was master, and Thomas Johnson, all of Waldoborough, in the state of Maine, and the plaintiffs, and the policy was made for them and by their orders.

She sailed from Waldoborough, Maine, on her first voyage, in November, 1837, for New Orleans, arrived there in December, thence went to Natchez, and sailed thence for Liverpool about February 1, 1838, and was totally lost by the perils of the seas on her passage. When she sailed from Waldoborough she had on board, besides her steam cable, one hempen and one iron cable. The master was employed for the owners to obtain the rigging and part of the equipments of the ship, and it was his intention to change the hempen cable for the iron one hereinafter mentioned.

At New Orleans the hempen cable was taken out and an iron one substi-

tuted, of the value of more than \$400, which was purchased and put on board in the following manner: In September, 1837, the said Arthur Child requested his brother, Samuel, then about to sail for Pictou, in the Province of Nova Scotia, to purchase an iron cable there for said vessel. The cable was bought there, shipped on board of a vessel belonging to citizens of the United States, concealed under a cargo of coal, thence carried to the port of New York, not entered or landed there with the rest of the cargo, but concealed on board, and thence carried in the same vessel to New Orleans, and there secretly taken out, without any license or authority of any officer of the customs, and put aboard the Avon at night, long after sunset, and kept there concealed while the Avon remained in the United States, the object being to evade the payment of the duties to which such cable was liable on importation into the United States. There is no evidence that any of the plaintiffs, except the said Arthur Child, were privy to or had any knowledge of these doings or of his intentions. The Avon, without the hempen cable or the iron cable substituted for it, was unseaworthy. The insurance company, in ignorance of these facts, on June 25, 1838, paid Means & Clark, on account of said loss, the sum of ———; but, on coming to a knowledge of these circumstances, conceive themselves not to be liable at all and claim to recover back the amount paid.

§ 579. *Policy void in part, void entirely.*

Opinion by STORY, J.

The present policy was underwritten for all the owners upon their joint account, and under such circumstances I agree that if the policy at its inception was founded in any illegality, in which one only of the owners (the master), who is said to be the owner of one-eighth, participated, it is utterly void as to all, for the policy is not divisible so as to be good in part and bad in part. It must then stand *in toto*, or not at all. The case of *Parkin v. Dick*, 2 Camp., 221, is not exactly like the present, but it may serve to illustrate the principle. The policy here is a joint contract for all the owners, and no recovery can be had unless it is legal as to all of them, for whatever is recovered must go for the joint account. If all the plaintiffs had sued on the policy in their own names, we should see at once that the objection would be fatal. It can make no difference that the suit is brought in the name of their agents; for if the principals could not recover, by reason of any illegality, their agents cannot. In *Parkin v. Dick*, 2 Camp., 221, the policy was on different articles, each package of which was to pay the same average, as if it were separately insured; and some of the articles specified on the back of the policy were naval stores, the exportation of which was prohibited without a license from the crown. No such leave was obtained for the voyage; and Lord Ellenborough first, and afterwards the court of king's bench, held the policy utterly void, as to all the other articles insured, as well as the naval stores. Lord Ellenborough, in delivering the judgment in the court of king's bench (11 East, 502, 503), said: "The policy is one entire contract on goods to be thereafter specified, to which the underwriters subscribed; and the subsequent specification, by the assured, cannot alter the nature of the contract with respect to the underwriters, so as to sever that which was originally one entire contract. It has been decided a hundred times, that if a party insure goods altogether in one policy, and some of them are of a nature to make the voyage illegal, the whole contract is illegal and void." Now, this language applies, *a fortiori*, to a joint

contract, where one party, by reason of his own illegality, is incapable of recovering. See, also, *De Begnis v. Armistead*, 10 Bingh., 107, 110, 111.

§ 580. *Taking cable smuggled by another vessel, no forfeiture of ship.*

But the main questions in the present case are, first, whether there is any illegality in the transactions which affected or could affect the owners personally, or could justify proceedings *in rem* against the vessel insured; and, secondly, if there was, whether that illegality was of a nature which affected or could affect the present policy, or the voyages thereby insured.

In respect to the first question, the material facts are, that before the ship sailed from Waldoborough, the master, being, as before stated, a part owner, was employed by the other owners to procure the rigging and a part of the equipments of the ship. The master employed his brother, who was about to sail for Pictou in Nova Scotia, to procure there a chain cable for the ship, which was afterwards intended to be brought into the United States, and placed on board of the ship (as I think the subsequent circumstances show), without the payment of duties upon the importation thereof. The chain cable was accordingly bought and shipped on board of an American vessel, concealed under her cargo. The vessel afterwards arrived at New York without the cable's being entered or landed there; and the cable was thence carried in the same vessel to New Orleans, where it was secretly and without any license, and without the payment of any duties, put on board of the *Avon*, then lying in that port, and kept concealed on board until her departure from the port, on the voyage for Liverpool, during which she was lost. The statement of facts further admits that there is no evidence that any of the owners, except the master, were privy to, or had any knowledge of, these doings, or of the master's intention.

The question, then, is whether the taking on board of this chain cable, at New Orleans, under the above circumstances, was an illegal act, for which the owners were immediately liable by a suit *in personam*, or the vessel herself was subject to forfeiture. The argument for the insurance company is, that the transaction was within the provisions of the twenty-seventh and twenty-eighth sections of the duty collection act of 1799, chapter 128, and also against the provisions of the fiftieth and sixty-ninth sections of the same act.

It seems to me that the twenty-seventh and twenty-eighth sections of the act may at once be laid out of the case. The former applies only to vessels which unlade a part of their cargo within the limits of some district of the United States, or within four leagues of the coast thereof, and before such ship or vessel shall have come to the proper place for the discharge thereof. The twenty-eighth section applies only to the vessel which shall have received the same goods so unladen. So that it is apparent that the forfeitures and penalties do not cover a case like the present, where the cable was unladen after the arrival of the vessel at her proper port of discharge, and there taken on board of the *Avon*. This construction has nothing new in it. It was many years ago adopted by this court in the case of *The Schooner Industry*, 1 Gall., 114.

The fiftieth section of the act is, however, directly in point. It prohibits the unloading of any goods brought in any vessel from a foreign place, without a special license or permit of the collector, or other proper officer of the customs; and if they are unladen without such a license or permit, and are of the value of \$400, the vessel from which they are unladen is forfeited. But this

forfeiture attaches only to the unlading vessel, and not to the receiving vessel. The Industry, 1 Gall., 114. So that under this section of the act the Avon was not subject to any forfeiture. But there is a clause in the same section, which imposes a pecuniary penalty of \$400 upon the master, and any other persons who shall knowingly be concerned or aiding in such unlading, or in removing, storing or otherwise securing the goods. The master of the Avon was clearly within the reach of this prohibition and penalty; for he was knowingly concerned in the unlawful unlading of the iron cable.

The sixty-ninth section of the same act, also, seems to me clearly to cover the present case, and to inflict a pecuniary penalty on the master of the Avon. It provides that if any person shall conceal or buy any goods, knowing them to be liable to seizure under the act, he shall forfeit and pay a sum double the amount in value of the goods so concealed or purchased. The state of facts shows a most studied concealment of the iron cable by the master of the Avon, and therefore brings him clearly within the reach of the penalty. But then there is no forfeiture inflicted upon the vessel or other vehicle, or the store in which the concealment takes place.

The result, therefore, is, that in the present case the Avon was not subjected to any forfeiture whatsoever *in rem*; but the act of smuggling and concealing the iron cable was illegal, and the master of the Avon was concerned in such smuggling and concealment, and personally liable to the pecuniary penalties prescribed therefor. I adopt the doctrine of Lord Holt, in *Bartlett v. Vinor*, Carlton, 252, and of Lord Chief Justice Tindal in *De Begnis v. Armistead*, 10 Bingh., 107-110, that every contract made for or about a matter or thing which is prohibited and made unlawful by statute is a void contract, although the statute does not mention that it shall be so, but only inflicts a penalty on the offender; because a penalty implies a prohibition, although there are no prohibitory words in the statute. In other words, every statute imposing a penalty imports a prohibition, and makes the prohibited act illegal.

§ 581. — *the fact that the chain had been smuggled would not avoid policy on ship.*

So that in this view we are driven to the consideration of the other question in the case; and that is, whether this illegality was of a nature which affected or could affect the present policy, or the voyage or voyages thereby insured. Now it is material to state that the question is not whether, if a seizure of the ship had taken place on account of this illegal conduct of the master, the underwriters would have been liable for any loss or injury consequent thereon, or whether, if the iron cable had been seized and confiscated by a regular sentence of condemnation for the illegal unlading thereof, the underwriters would have been liable for such a loss as an appurtenance of the ship. There is no doubt whatsoever, that in neither case would the underwriters have been liable on the policy; for the proximate cause of the loss would have been the illegal or fraudulent act of the master, from which, under our policies, the underwriters are ordinarily exempted. The present loss was by the peril of the sea — a peril clearly insured against; and if we are to regard the maxim, *Causa proxima, non remota spectatur*, the plaintiffs are entitled to recover for that loss, unless the policy itself, or the voyage, was illegal.

§ 582. *Policy not affected by a contemplated illegal act in a lawful voyage.*

I confess myself wholly unable to perceive upon what ground the policy itself is void, or the voyage, during which this transaction took place, is ille-

gal. The policy was on time, for the term of one year; and, of course, covered all legal voyages which might be undertaken during that period. At the time when it was underwritten there is no pretense to say that it was in the contemplation of the insured to engage in any illegal voyages whatsoever. The voyage from Waldoborough to New Orleans, and from thence to Liverpool, was in all its objects and ends perfectly legal. The only possible suggestion which, upon the state of the facts, can be made, is, that the master about that period contemplated the procurement of a chain cable for the ship from the British Provinces, which might at a subsequent period be illegally taken on board at another port, and which was in fact taken on board, long after the policy was underwritten and had attached upon a voyage then in progress. Now, I am unable to see how the validity of a policy can be affected by a mere contingent, future, contemplated illegal act in the progress of a voyage, the voyage itself being otherwise, in its origin, concoction, and accomplishment, perfectly legal. Suppose, in the present case, the chain cable never had been carried to New Orleans, or taken on board the Avon, it would certainly be difficult for a moment to maintain the doctrine that the policy was utterly void. A mere intention to do an illegal act, or other act which would avoid a policy, if done, but which has never been consummated by any act, has never, as far as I know, been deemed *per se* to vitiate the policy. There is in all cases of this sort a *locus pœnitentiæ*; there must be the act and the intent coupled together. If, when a policy on a ship is underwritten, the owner has in contemplation a deviation from the voyage insured, but, from a change of purpose or otherwise, no deviation in fact takes place, we all know that the policy is good, and covers all losses insured against. Put the case much stronger, and indeed one which reaches in its scope the present; suppose, at the time when a policy on the ship is underwritten on a voyage perfectly lawful, out and home, the owner has it in contemplation to smuggle a part, or even the whole, of the cargo on the return voyage, but it is a mere contingent intention, and not absolute; and, in point of fact, he afterwards in the course of the voyage changes his intention, or, without changing his intention, no smuggling ever takes place; would the policy be utterly void in its concoction, so as not to cover any losses occurring in the course of the voyage by the perils of the sea? I know no case that goes to such an extent. In order to produce such an effect as to make the policy utterly void in its origin, it is necessary that the plan of the voyage itself and the main purposes of the enterprise should be absolutely illegal. The voyage should be originally and absolutely, in whole or in part, illegal, as to trade and objects; such as a voyage to and from an enemy's port, or a voyage for the purpose of smuggling goods out and home; or a voyage in the violation of some other public law, such as the breach of an embargo or non-intercourse edict (see 1 Phillips on Insurance, pp. 85, 91, 92, 2d edit., 1840), and not merely a contingent intention to do some collateral act in the course of a legal voyage or trade, which might itself, if done, be illegal. The illegality should not only be contingently contemplated, but there should be some overt act put in progress, as by sailing in furtherance and accomplishment of the illegal voyage.

The case of *Parkin v. Dick*, 2 Camp., 22; S. C., 11 East, 502, 503, was a case where the insurance was on goods, a part of which were by law prohibited from exportation; it was held that the voyage, as to such goods, was illegal in its origin, and that therefore the whole policy was void. The question in *Marryatt v. Wilson*, 8 Term R., 31; S. C., 1 Bos. & Pull., 430, was

whether a policy on a circuitous voyage from America to the East Indies was prohibited by the British laws. It was held that such a circuitous voyage was not so prohibited, and consequently the policy was valid; but otherwise it would have been void. In *Bird v. Pigou*, Lord Kenyon held that if any part of an integral voyage be illegal, a policy upon the integral voyage is void. See 2 Selw. N. P., 991, London edit., 1831; Id., Wheaton's edit., vol. ii, p. 191, n.; S. C., 1 Phillips on Insurance, p. 91, 2d edit., 1840. I see no reason to doubt the correctness of this decision. It seems founded in a plain principle of law, that a contract is an entirety, and cannot be good in part and bad in part. It is true that Lord Kenyon is reported in *Wilson v. Marryatt*, 8 Term R., 31, 47, 48, to have gone further, and to have said that if there were any infirmity or illegality in any part of the integral voyage, it would have made the whole voyage illegal, so that the assured could not recover on a policy on any part of it, even a policy on that part alone which was legal. This was a mere *obiter dictum*, not called for by the case; and it is certainly somewhat shaken, although not overturned, by the decision in *Bird v. Appleton*, 8 T. Rep., 562. On that occasion Mr. Justice Lawrence said: "In order to render the insurance illegal, the illegality should exist during the course of the voyage insured." It will be found exceedingly difficult, in point of principle, to distinguish between an illegality in a former voyage, and that in a prior part of a sound voyage, where the policy covers only the part of the voyage which is legal.

§ 583. *Liability to forfeiture will not avoid a policy in case of loss not touching the cause of forfeiture where the policy is good at inception.*

There are, moreover, other cases (on which I shall presently have occasion to comment) in which a doctrine has been asserted which is perhaps not easily reconcilable with that in *Parkin v. Dick*, unless upon the ground that the policy in that case was made upon the illegal goods as a part of the specification on the policy. But, certainly, these cases go far to invalidate the broadness of the argument which has been addressed to the court upon the present occasion. That argument goes to this extent: that if the policy covered any property which was dealt with illegally during the voyage or time mentioned in the policy, it avoided the policy. It would hence follow, that if a ship was insured upon a lawful voyage, and afterwards, during the course of the voyage, she should be engaged in any transaction which was illegal, and *a fortiori* if she should be engaged in a transaction which would subject her to seizure, and she should afterwards be lost by a mere peril of the seas (no seizure having been made), no recovery could be had for the loss. Now, I am not ready to accede to that proposition. On the contrary, as I understand the law, although the underwriters would not be liable for a loss by such a seizure, yet a loss occasioned by any other peril would be recoverable; because the policy itself would originally be valid at its inception, and the voyage would be lawful when the risk attached. I agree that if there was an illegality attaching to a part of the voyage insured at the commencement of the risk under the policy, it would avoid the policy. So it was held, in regard to the insurance on the ship, in *Bird v. Appleton*, 8 Term R., 563, 566. But in that very case there was another policy on goods; and the objection taken was, that the insured could not recover on the policy on goods belonging to the owner of the ship, because the ship was liable to seizure on account of an illicit traffic in the anterior part of the voyage. Mr. Justice Lawrence, on that occasion, said that he did not think the objection well

founded. "Here (said he) the illegality commenced by the captain's taking on board a cargo at Bombay, in order to carry it to Canton for sale (the insurance being on a cargo at and from Canton). But the doctrine relied upon by the defendant is perfectly new, that the insured cannot recover on a policy against the underwriters, because the ship, on a prior voyage, had been guilty of some transgression, for which she was liable to seizure. That is not a risk within the policy. If the ship had been seized for this cause during the voyage, the underwriters would not have been liable. They are only liable for risks in the course of the voyage insured." The same doctrine was held by Mr. Justice Le Blanc, in the same case. So that we see that past illegality in the voyage will not affect a policy which is otherwise legal. Neither should a future contingent illegality. There must be a present, actual illegality attaching to the very policy, at the commencement of, and as a part of, the risk.

§ 584. *Policy being originally valid, intent to take smuggled cable, and consummation, no avoidance of it.*

But then it may be said that here the illegal intent was completely carried into effect at New Orleans, and therefore there is both act and intent; and then the policy is utterly void *ab initio*. But we must take the present case according to the truth of the whole circumstances. The first question is, whether the policy ever attached as a valid contract to the ship. If it did, then the question is shifted. It is no longer whether the policy had any original validity, but whether an intended subsequent illegal act, consummated long after it attached to the ship, in the progress of a lawful voyage, would avoid it *ab initio*, or only exempt the underwriters from any losses occasioned by that illegal act.

§ 585. *Authorities reviewed.*

Now, it is here that the cases to which I have already alluded may be deemed to apply. They in effect decide that if the voyage, as originally insured, was valid, any subsequent illegality in the course of the voyage will not affect the policy, so far as concerns losses on property, not tainted by such illegality, although connected with the *res gestæ*. In *Butler v. Allnutt*, 1 Starkie, 222, the policy was on a cargo, on a voyage from an enemy's port, with a clause for a return premium of four per cent. on the safe arrival of the vessel in London from Bordeaux, the enemy's port. The voyage was undertaken under a license from the crown, but it was for the importation of certain specific articles; and others were taken on board, not included in the license. The suit was brought for the return premium, the vessel having safely arrived; and one objection taken was, that the articles taken on board, and not included in the license, vitiated the whole license and policy. But Lord Ellenborough held that, under the license, the voyage was lawful, and although the ship took on board other articles, that only removed the protection *pro tanto*. The same point was held in *Keir v. Andrade*, 6 Taunt., 498, which was the case of a policy on goods at and from London to Madeira, valued at £1,000, to pay average on each package. The goods were three hundred barrels of gunpowder, of which the exportation of one hundred and fifty barrels only was authorized by a license from the crown; and the plaintiff claimed for a loss by capture. One objection taken was, that the exportation of the second one hundred and fifty barrels was prohibited, and by statute the same barrels, as well as the ship, were thereby forfeited; and that, therefore, the whole adventure was illegal, and the insurance also illegal for the whole. But the court held that the policy was valid, and covered the one hundred and

fifty barrels the exportation of which was lawful, but not the other one hundred and fifty barrels. Now, here we see that there was not only an original intention to make an illegal exportation of the second one hundred and fifty barrels, but that it was carried into effect by an actual exportation; so that there was intent and act. But the court thought that, as the voyage was under the license, in itself legal, the illegal exportation of a part of the property insured did not affect that which was within the license. See, also, *Camelo v. Britten*, 4 Barn. & Ald., 184.

This is certainly a very strong case, since it may well be presumed that the whole enterprise, in its origin and concoction, was for the whole three hundred barrels; and the policy was made to cover the whole; and the voyage was commenced and prosecuted with the same intent. The case of *Sewell v. Royal Exchange Ins. Co.*, 4 Taunt., 855, approaches very near to the present. In that case there were two policies of insurance, one on the ship, and another on the ship and freight; the first on a voyage at and from Ramsgate (England) to St. Michaels; the second on a voyage at and from St. Michaels to London. The ship was Norwegian built, and owned in Denmark, then hostile to England, and was purchased by the plaintiffs under a license from the king. The ship was chartered by the master, as agent for the plaintiffs, to the freighter of the cargo, for a voyage from London to St. Michaels, and there to take on board a full cargo of fruit, and bring the same to London. The vessel was seized at St. Michaels, and carried to Tercera, and there sequestered. The loss was averred to be by a public seizure and capture. At the trial, one objection taken was, that under the British navigation act an importation in the vessel of such a cargo was prohibited; and that, since the charter-party was for the entire voyage out and home, the illegality vitiated as well the policy on the outward voyage as that upon the homeward voyage. The jury found a verdict for the plaintiffs upon the policy on the outward voyage; and this verdict was afterwards confirmed by the court. On this occasion, Sir James Mansfield, in delivering the opinion of the court, stated the ground of the decision to be, that it did not necessarily follow that the master might not have obtained a license for the importation from the crown, which was authorized to grant one, before the actual importation; and therefore the homeward voyage was not necessarily illegal. But the court intimated very strongly that if the homeward voyage had been illegal, the outward voyage being legal, there was a *locus pœnitentiæ* for the party not to perform the latter, and therefore a recovery might be had on the policy on the outward voyage.

The language of Sir James Mansfield was: "Much of the argument was that this was an illegal voyage, not only in the contemplation of the master, but that he was bound by the charter-party which he had entered into, to pursue it at all events. It is not necessary now to decide what would be the consequence of a person entering into a charter-party for a voyage out and home, the voyage home being illegal, and of his separating it into two voyages, by insuring the outward voyage separately, and the homeward voyage separately. The court are not called upon to decide whether in that case the outward voyage is part of the homeward and illegal voyage. If there was a clear *locus pœnitentiæ*, it would be unnecessary to decide that the outward voyage was illegal; for if the captain, getting out thither, discovered that he was on an illegal charter-party, and that he could not enforce the payment of his freight, he might go off to any other part of the world." Now this language is applied to a case far more stringent than that now before this court. There,

the original voyage, out and home, was absolutely fixed and in progress under the charter-party. Here the whole voyage contemplated by the policy was legal; and there was only a contingent future act of illegality contemplated to be done by the master, and which might never be done. There was not only a *locus penitentiae*, but there was a contingency as to the future purchase and arrival of the chain cable.

The case of *The Ocean Insurance Company v. Polleys*, 13 Pet., 157, 163, 164, clearly shows that, although a vessel insured has been previously guilty of an illegality which subjects her to forfeiture, that circumstance will not affect any contracts touching her future employment in a legal trade or on a legal voyage, or a policy on her for such a voyage. Nay, it was said in *Bird v. Appleton*, 8 Term R., 562, 569, 570, the antecedent character of the property insured, or the title by which it has been obtained, whether illegal or not, makes no difference. It still may be insured on a legal voyage. Suppose goods, smuggled on a former voyage, were afterwards embarked on a new and lawful voyage, never having been seized, it seems clear that they would be insurable. The contract is one degree removed from the illegality. See *Armstrong v. Toler*, 11 Wheat., 258.

We have seen, according to the reasoning and authorities already stated, that, where the voyage is legal, a future contemplated illegality in the course of that voyage does not make it void *ab initio*. Then does it make any difference that the future illegal act is consummated, if the act does not contaminate the voyage itself? I think not. If the illegal act is followed by a forfeiture and seizure of the thing insured, I agree that the underwriters are not liable for the loss. But the mere fact of liability to forfeiture does not avoid the insurance, or prevent a recovery for a loss by any independent peril. The fact is that a ship or other property does not lose its insurable character by being liable to seizure and forfeiture for an antecedent act or for a subsequent act by which she is by law forfeitable. Until seized and forfeited, the owner retains his original ownership thereof. Here, as has been already suggested, the voyage from New Orleans to Liverpool was a legal voyage; the taking on board the chain cable there was a collateral act, illegal, indeed, but no more touching the legality of the voyage than if there had been taken on board some illegal ship-stores, or smuggled wines for the voyage. It would be an alarming doctrine, if once established, that any collateral act of illegality in the course of a voyage, not an original practical ingredient in the voyage itself, should avoid a policy *ab initio*. A single bale of goods smuggled by the master or owner of the cargo, in the course of his voyage, might, under such circumstances, defeat the whole insurance upon the ship and cargo, or both, although there was no illegality otherwise directly attaching to them. When the chain cable was taken on board at New Orleans the act of illegality was complete and ended. It had nothing to do with the further prosecution of the voyages of the ship for the remaining term of time covered by the policy. Suppose the chain cable had been smuggled on a former voyage by the owners, and put on board at Waldoborough or New Orleans, would that illegality have infected the subsequent voyage of the ship, while it remained on board? Suppose a ship's sails are made of smuggled canvas, illegally smuggled into the country, will that avoid an insurance on her on any subsequent voyages? Certainly, upon authority and principle, not.

§ 586. *Insurance on the cable good, smuggling having been previous to voyage.*

But then it is suggested that the insurance, as to the chain cable itself, is

void at all events. It seems to me not, upon the ground that the title was in the owner, and the illegality did not attach to the voyage on which it was used. It is like an insurance on goods already smuggled. The chain cable did not become an appurtenance of the ship until taken on board and concealed. The act of illegality was then, as has been already suggested, consummated before it attached to the ship as a part of her equipment. The time when the antecedent liability to forfeiture took place under such circumstances is of no consequence, whether it be a day or a year.

§ 587. *Concealment of intention to take smuggled chain no avoidance of policy.*

Again, it is suggested that here the policy is void *ab initio* by reason of the concealment from the underwriters of the original intention to smuggle this chain cable on board of the ship during the voyages and term of time insured. Reliance seems to be placed for this suggestion upon an *obiter dictum* of Mr. Justice Bayley, in *Parkin v. Dick*, 11 East, 504, where he said that the ship, being liable to seizure in consequence of having the naval stores on board, was thereby subjected to an extra risk, which ought, therefore, to have been communicated to the underwriters; and the omission of such communication would alone have avoided the policy. I meddle not with that proposition, with reference to circumstances like those in *Parkin v. Dick*, although it is open to much observation. It is sufficient to say that in that case the insurance was directly in part on property exported for an illegal voyage. Here there was in contemplation only a contingent future act of illegality. Has it ever been held that the non-disclosure of a contingent intention of future deviation, or even a present positive intention of future deviation from the voyage by the insured, was such a concealment as would avoid a policy? Certainly, such a doctrine could hardly be maintainable.

§ 588. *Forfeited property is not vested in the government the moment of forfeiture.*

Again, it is suggested that the ship and chain cable were both forfeited to the government, and vested *eo instanti* in the government by operation of law, as soon as it was taken on board; and consequently the owners had nothing to abandon to the underwriters; and, at all events, the chain cable was forfeited, so that it was no lawful appurtenance of the ship, and she was not seaworthy for the voyage. The argument, so far as concerns the ship, has been already answered by showing that she was not liable to forfeiture. But if the case were otherwise, the argument is founded on a fallacy. It is not correct to say that property forfeited is vested in the government at the very moment of forfeiture, and the title of the owner immediately divested. On the contrary, the established doctrine is that, notwithstanding the forfeiture, the property remains in the owner until it is actually seized by the government, and then by the seizure the title of the government relates back to the time of the forfeiture. In the case of *United States v. 1960 Bags of Coffee*, 8 Cranch, 404, and *Gelston v. Hoyt*, 3 Wheat., 247, 311, there had been a seizure and prosecution for the forfeiture by the government. The case of *The Mars*, in this court (1 Gall., 192, 198), as to this point, has never to my knowledge been doubted or denied. The case of *Lockyer v. Offley*, 1 Term R., 252, 260, manifestly proceeded upon the ground that, until seizure, the property of the owner was not divested. Mr. Justice Willes, in delivering the opinion of the court in that case, said: "But it has been said that under the statute 24 Geo. III., chapter 47, and the excise laws, the forfeiture attaches the moment the act is done; and that the barratry (smuggling) was committed during the voyage. It may

be so for some purposes, as to prevent intermediate alienations and incumbrances. But I think the actual property is not altered till after the seizure, though it may be before condemnation." The same doctrine was taken for granted by the supreme court in *The Ocean Insurance Co. v. Polleys*, 13 Pet., 157. I am aware of the bearing of the cases of *Fontaine v. Phoenix Ins. Co.* 11 Johns., 293, and also of the incidental confirmation of the doctrine thereof in *Amory v. McGregor*, 15 Johns., 24. But I am not prepared to accede to the doctrine there stated, opposed as it is to the other authorities and doctrines already stated. In short, I have been long accustomed to lay it up as an elementary axiom, that, in all cases of forfeiture of personal chattels, the property of the owner is not divested until there is an actual seizure thereof by or for the use of the government.

This view of the matter disposes of this part of the argument in both of its branches, viz., as to the abandonment and as to the seaworthiness of the ship. Upon the whole, my judgment is that the plaintiff is entitled to recover for a total loss on the policy.

ANDREWS v. ESSEX FIRE & MARINE INSURANCE COMPANY.

(Circuit Court for Massachusetts: 3 Mason, 6-27. 1822.)

STATEMENT OF FACTS.—Libel on a policy of insurance on the brig *Union* and cargo. The libel charges that a clause in the agreement on which the policy was underwritten was omitted by mistake, and declares on the policy as reformed. A total loss is alleged by capture and seizure under the authority of the king of Great Britain and Ireland.

Application was made for insurance by the following memorandum: "\$3,000 on brig *Union* and appurtenances, \$8,000 on effects on board said brig, *Allen Putnam* master, from Salem to port or ports in the West Indies, one or more times, for the purpose of selling outward and procuring a return cargo, and at and from thence to port of discharge in the United States; and what return if said vessel trades to but one port and arrives safe without loss? The *Union* is bound to Kingston, Jamaica; if not allowed to sell there, will proceed to Cuba." There were afterwards added the words, "two years old, sheathed last voyage, one hundred and twenty-nine tons." The memorandum was laid before the president and directors on the same evening, who agreed to underwrite a policy for *four per cent.* Before the proposition was accepted by the plaintiffs, Mr. Shepherd came to the office, and informed the secretary that he wished insurance only for \$1,000 on the vessel, and \$4,000 on the cargo, because he expected to get it for a less premium elsewhere; and the secretary then wrote upon the memorandum, "agreed for \$1,000 on vessel, and \$4,000 on effects as above," which Mr. Shepherd signed for himself and Mr. Andrews. The act of the secretary was confirmed by the president, and the policy was made out in the terms already stated, omitting the clause, "The *Union* is bound to Kingston, Jamaica; if not allowed to trade there, will proceed to Cuba." The policy as made out was received by the plaintiff without objection, and the usual premium note was given. By the public by-laws of the corporation "the president and directors consider themselves holden on a marine policy, from the time a verbal agreement is made between the president and the person applying for insurance. The president in all cases, where the person applying for insurance is unable to wait for the com-

pletion of his papers, will cause a memorandum of the agreement to be made and signed by the person applying for insurance."

The brig sailed on the voyage, and having spoken with a pilot near Morant point (Jamaica), who, upon inquiry, stated that the trade was open for Americans, the master concluded to go directly into the port of Kingston. Soon after his arrival in port a boat came alongside, from which he learned that the port was not open, and that it was necessary for him to represent that he came into port in distress. He accordingly did this; but the vessel and cargo were immediately afterwards seized, and the master still insisting, upon the trial in the vice-admiralty court, that the case was one of real distress, there was a decree of condemnation pronounced of both. From this decree there was an appeal to the high court of admiralty, which is still pending. It was agreed on both sides that there was no intention of illicit trade by the owners on this voyage, but that it was undertaken solely upon the expectation that the trade was, or would be on arrival at Jamaica, open and free. It was farther in evidence that the present respondents never underwrote any risks upon voyages in illicit trade, and that this was the general custom of incorporated insurance offices.

§ 589. *Equity may reform written contract on ground of mistake.*

Opinion by STORY, J.

There cannot at the present day be any serious doubt that a court of equity has authority to reform a contract, where there has been an omission of a material stipulation by mistake. And a policy of insurance is just as much within the reach of the principle as any other written contract. *Graves v. Boston Mar. Ins. Co.*, 2 Cranch, 418; *Henkle v. Royal Ex. Assur. Co.*, 1 Vern., 317; *Townshend v. Strangroom*, 6 Vern., 328, 333; *Matteux v. London Assur. Co.*, 1 Atk., 545; *Ramsbottom v. Gordon*, 1 Vern. & B., 165; *Watt v. Grove*, 2 Sch. & Lef., 492; *Gillespie v. Moon*, 2 Johns. Ch. Cas., 585; *Marshall, Insur.*, b. 1, ch. 8, § 4, and *id.*, notes; *Hogan v. Del. Insur. Co.* (Condy's edit., 345 (α), note); *Lyman v. United Ins. Co.*, 2 John. Ch. Cas., 630. But a court of equity ought to be extremely cautious in the exercise of such an authority, seeing that it trenches upon one of the most salutary rules of evidence, that parol evidence ought not to be admitted to vary a written instrument. It ought, therefore, in all cases to withhold its aid, where the mistake is not made out by the clearest evidence according to the understanding of both parties, and upon testimony entirely exact and satisfactory. There is less danger where the instrument is to be reformed by reference to a preliminary written contract, which it was designed to execute. But even here there is abundant room for caution, since the parties may have varied their intentions, or the clause may not have been originally understood by either party to go to the extent now required. And these considerations acquire additional force, where circumstances have occurred in the intermediate time which give an intense importance to the asserted mistake. Under these limitations the doctrine of courts of equity on this subject does not seem at variance with general convenience or justice.

In the present case the memorandum signed by the plaintiffs, after it was agreed to by the president of the company, constituted a good and valid agreement binding upon the parties. The by-laws of the company make it in such a case expressly obligatory upon them. And if there be an omission in the policy of any clause constituting a part of that agreement, it ought in equity and good conscience to be corrected. It is not sufficient for the underwriters

that they suppose the words do not cover a particular risk, for they may mistake the law, and their mistake shall not prejudice the other party. When once the contract is agreed to, whatever that contract, by a just and reasonable interpretation, includes, the underwriters are bound to insert in the policy, and if they omit to do it the assured has a right to insist upon a perfect conformity to the original proposition and agreement. The case under such circumstances is clearly distinguishable from the cases referred to at the bar, 2 Johns. Ch. Cas., 630; 2 Caines, 155, where the proposals for insurance never assumed any obligatory shape, and could therefore be considered in no other light than as proposals which were merged on the execution of the formal instrument. Here the proposal was agreed to and formed the basis for the execution of the policy, and there is no pretense to say that it was ever afterwards varied by the parties.

The true question then is, whether the omitted clause in the contemplation of both the parties was to be inserted in the policy. I say both the parties because it must be a joint intent and assent. It is not sufficient that one of the parties intended it, if it was not agreed to by the other. If the clause was to be inserted in the policy, then it is no answer on the part of the underwriters that they may possibly be liable for the risk of illicit trade against the known general usage and designs of the corporation. They must take the legal consequences of all that stands in the text of their contract. And the opinions of the very respectable gentlemen who have testified in this case demonstrate that the general understanding of merchants is in perfect conformity to the principles of law on this subject.

§ 590. *Policy need not contain everything mentioned in the memorandum for insurance.*

We must then resort in the first place to the memorandum itself to ascertain what was the contract to be executed. It is not pretended that everything contained in the memorandum was to be inserted in the policy. It is perfectly notorious that proposals of this nature often contain remarks, representations and queries for the information and guidance of the underwriters, which cannot by any reasonable construction be supposed proper for insertion in the policy. In many instances the insertion would be absurd, and in some might be repugnant to the obvious intent of the parties in their final act. This very memorandum illustrates the truth of these observations, for it contains particulars of inquiry and information which neither party now supposes to belong to the policy. It is not sufficient, therefore, to show that a clause is in the memorandum to justify its insertion in the policy, unless from its nature and object it clearly formed a part of the contract. A clause may in the event become material and decisive of a right if inserted, which may nevertheless, at the time of the proposal, not have been contemplated by either party as a part of the policy. It might make all the difference between a representation and a warranty, a difference in many cases of the most serious importance.

The memorandum in the present case contains a perfect description of the ship, the master, and the voyage intended to be insured, and the policy follows this description with the most minute care. It was drawn up according to the understanding of the insurance company as a full description of the risk, and it was received without objection by the plaintiffs. No application was made to alter it until after the loss occurred, and then the materiality of the clause now in question became apparent. It is argued that being material,

the plaintiffs are now entitled to have it inserted, because the parties must be presumed to have contemplated the insertion of everything material to the risk. That is true in a limited sense; but not universally. If the clause be material in the event, it must still be seen whether in fact it constituted, in the understanding of the parties, a part of the original contract. If there had been an omission of a descriptive part of the voyage, or of the name of one of the owners, it would have been perfectly clear that these must have constituted a necessary part of the policy upon the true import of the memorandum, and therefore the presumption of mistake would be irresistible. But if the clause be a mere statement of a fact, which in its place in the memorandum may be either construed a mere representation, or a modification of the terms of the contract, it stands equivocal, and the like presumption cannot prevail. The underwriters may, as in the present case, understand it in one sense and the insured in another; and it is the presumed assent of both which gives it the effect of a contract. The acts of the parties under such circumstances become very material; and their acquiescence in one mode of execution of the policy would go far to show that it was the true mode.

§ 591. *The memorandum in question not part of the contract.*

The clause in the memorandum is in these words: "The Union is bound to Kingston, Jamaica; if not allowed to sell there, will proceed to Cuba." It is certainly in terms a representation of a fact. Is it such a fact as belonged to the policy?

That the clause was not intended to abridge the general liberty given in the description of the voyage is conceded on all sides. The brig was still to be at liberty to go to any other port or ports in the West Indies, otherwise the general description would be useless. It would be absurd to ask or give general liberty to all West India ports, and in the same breath to tie up the adventure to Kingston and Cuba. Was it designed as a warranty that the brig should go to those ports? This can scarcely now be contended, for the underwriters did not claim its insertion in this view; and the owners by reserving the general liberty of the West Indies may fairly be presumed to have reserved the liberty of changing honestly the direct voyage. Can it then be considered in any other view than as a representation of the present intention of the owners, to guard against any objection for concealment or misrepresentation? The plaintiffs contend that its insertion was necessary and intended by them because it would cover the risk of the contingency of the voyage to Jamaica being lawful. The defendants deny that they ever contemplated such a risk under the contract. The burthen of proof then rests on the plaintiffs; and if the language of the memorandum be not unambiguous, if the construction be not necessary, but doubtful; if the acts of the parties have left the presumption against the plaintiffs, a court of equity ought to be very slow in undertaking to reform the policy upon conjecture.

It is material here to consider that the answer of the company explicitly denies any intention to insert the clause, or to become liable for the risk of illicit trade. The latter might be true, and yet if they had in fact bound themselves to such a risk, their mistake of the law would not help them. But the circumstance of the denial is not insignificant, as it stands confirmed by their acts. If their practice is not to insure illicit voyages, and the policy conforms to this practice, it would require strong evidence to force upon them such a risk by a construction of a memorandum clause, which justly might admit of various interpretations, and might fairly be understood in different

ways. The premium in a case of this nature is certainly not decisive either way; but if it be the usual premium for the common risks, it affords some presumption that the underwriters did not contemplate unusual risks; and in this view it may aid in the construction of doubtful words.

§ 592. *To justify correction, mistake must be made out clearly.*

The rule of courts of equity is not to reform a policy unless the mistake be made out by the clearest evidence. The cases of *Henkle v. Royal Exch. Assurance Co.*, 3 Vern., 317, before Lord Hardwicke; of *Lyman v. United Ins. Co.*, 2 Johns. Ch., 630, before Mr. Chancellor Kent; of *Hogan v. Delaware Ins. Co.*, Condry's *Marshall on Ins.*, 345 (a), note; *Wharton, Dig.*, 320, before Mr. Justice Washington, and of *Graves v. Boston Marine Ins. Co.*, 2 Cranch, 419, 442, before the supreme court of the United States, are conclusive upon this point. The asserted omission in the present case is indeed incontestable upon the evidence; but whether it was a part of the contract omitted by mistake is, to say the least of it, extremely questionable. I do not mean to say that the plaintiffs did not act with the most perfect fairness, or did not contemplate an indemnity against the very loss which has occurred. I believe they did; and that whatever security was to be obtained by a policy conforming to the substance of the memorandum they meant to provide for. The difficulty lies not in the honesty or reasonableness of their intentions, but in giving effect to those intentions, if they were not communicated in such a manner to the underwriters, in the memorandum, as to lead them to the conclusion that the omitted clause was a part of the proposed contract. Whatever might be my opinion as a private man upon the propriety of inserting the clause, as a judge sitting in equity I should have extreme difficulty in saying that the case afforded plenary evidence of any mistake which the court was called upon to rectify. The terms of the memorandum are not necessarily matters of contract, and if they are ambiguous in their import or object, the parties must be left to their rights upon the policy as executed.

§ 593. *Admiralty will not correct mistake in written contract of marine insurance.*

Perhaps it is the less necessary to dwell on this point, because I am of opinion that, if there be a mistake in the policy, this is not the tribunal to correct it. The authority over this subject is generally confided, and most conveniently, to courts of equity. The rules of evidence and the modes of relief in these courts are admirably adapted to cases of this nature; and it appears to me that the jurisdiction exclusively attaches there. To be sure, in a certain sense, and in the exercise of their general jurisdiction, courts of admiralty may be properly said to be courts of equity, that is, courts proceeding *æquo et bono*, and not confined to the narrow notions of the common law. But courts of admiralty have no general jurisdiction to administer relief as courts of equity. They cannot entertain an original bill or libel for specific performance, or to correct a mistake, or to grant relief against a fraud, though they may perhaps sometimes, like courts of law, perform what may be deemed analogous functions. They may give the same benefit, as if there were no fraud or mistake, or omission of performance; but this can be in a few cases only, which fall, in all their circumstances, completely within their general jurisdiction. Courts of admiralty, in my view, have jurisdiction over maritime contracts when executed, but not over contracts leading to the execution of maritime contracts. If there were a contract to build a ship, or to sign a shipping paper, or to execute a bottomry bond, and the party re-

fused to perform it, it has never been my impression that the enforcement of such a contract belonged to the admiralty. I know of no authority pointing to such a conclusion, and I must say I should be sorry to find one, for it would lead to the utter confusion of jurisdictions. But if the contract be an executed maritime contract, the jurisdiction attaches, and the admiralty may then administer relief upon that contract according to equity and good conscience. The law looks to the proximate and not to the remote cause as the source of jurisdiction; and deals with it only when it has assumed its final shape as a maritime contract. It has been said that the memorandum in the present case is an executed maritime contract, equivalent to a policy; but I understand it to be nothing more than an agreement for a policy; and if no policy had been executed, this court as a court of admiralty would not have had jurisdiction to enforce it. We are not at liberty in such cases to consider that done which ought to have been done.

If, therefore, anything, in point of law, material to the plaintiffs' case, depends upon this clause, and a mistake has occurred in omitting it, my judgment is that a court of admiralty is incapable of administering the proper relief. The remedy lies at common law, for damages for non-performance of the original agreement, or in equity, for a specific performance by reforming the policy. In the present suit I can only deal with the policy as it stands.

And this leads me to the other question made at the bar, which has always appeared to me to be the turning point of the cause, and to be in itself of very great difficulty and nicety. If, in the investigation of it, I could derive any consolation from full and learned arguments, I should be bound to make the acknowledgment that nothing has been omitted. Still, I cannot say that I have arrived at a conclusion without very considerable hesitation.

§ 594. *Knowledge of purpose of engaging in illicit trade necessary to make underwriters liable.*

It is perfectly settled that the underwriters, by the general terms of the policy, are not liable for any loss arising from foreign illicit trade, unless the policy be underwritten with the full knowledge on their part that such was the object of the voyage. This is the general doctrine of foreign maritime writers, and has been recognized in the fullest manner by the common law tribunals. 2 Valin, lib. 3, tit. 6, art. 49, pp. 127, 128, 130; Cleirac Le Guidon, ch. 2, arts. 2 and 5, pp. 233, 234; Santema, p. 4, n. 17, p. 5, n. 10; Straccha, Assecur, Gloss. 5, p. 23; Loccenius, lib. 2, ch. 5, n. 7, p. 981; Roccus, Anec., n. 21; 1 Emerig., oh. 8, § 5, p. 212; Targa, ch. 71; Molloy, b. 2, ch. 7, § 15, p. 288; Marsh. Insur., b. 1, ch. 3, § 1, p. 60; Anon., 2 Vern., 176; Planche v. Fletcher, Doug., 251; Gardiner v. Smith, 1 John. Cas., 141; Richardson v. Maine Insur. Co., 6 Mass., 102; Parker v. Jones, 13 Mass., 173; Pollock v. Babcock, 6 Mass., 234. The reason of the doctrine is obvious. If the voyage be lawful, the underwriters cannot be presumed to undertake risks occasioned by a violation of law by the owner or his agents; and in such case the law, notwithstanding the general terms of the policy, will exempt them from such losses. But if the trade is known to be illicit, and can be carried on only by smuggling, and the underwriters do not make an exception of the risk of illicit trade, there is the strongest presumption of their intention to take it. Their knowledge does not indeed add new terms to the policy, but it takes away any pretense for saying that the loss by seizure, which is an "arrest, restraint, or detainment of the sovereign" within the policy, was not contemplated by the parties.

In the present case it is clear that no illicit trade was intended to be covered

by the policy, for the trade was not supposed to be prohibited at the time. It is true that it was well known that Jamaica, as a colony of Great Britain, was restricted from foreign trade by the British colonial system. But it was as well known that authority had been given to the king to open the colonial ports under certain circumstances (*The Adams*, Edw., 289, 303; 46 Geo. 3, ch. 3; *The Vixen*, 1 Dodson, 136); and this authority was supposed still in existence and might be exercised and promulgated through the colonial governor. The intelligence in newspapers without doubt led both parties to the belief that this authority had then been, or would, before the arrival of the vessel, be rightfully exercised; and both parties proceeded in the insurance upon the ground that the trade would be lawful. In point of fact the port was not opened, and immediately upon the brig's arrival in port, she was seized and condemned for an illegal importation of goods, contrary to the navigation acts of Great Britain. These acts make it illegal to import any goods into any of the colonies except in ships, British built, and owned and navigated by British seamen to the extent of three-fourths of the crew. 12 Car. 2, ch. 18; 7 & 8 Will. 3, ch. 22. The libel against the Union and cargo proceeds upon these acts for the forfeiture. And it is perfectly clear by the whole current of authority that a voluntary arrival in port with a cargo constitutes an importation, within the purview of these and other revenue acts. *The Eleanor*, Edw., 135, 160; *The Adams*, Edw., 289, 298; *The Sarah*, 1 Dods., 77; *Hale on Customs*, Hargrave Law Tracts, 213; *The Paisley*, 1 Edw., Appx. E.

There can then be no doubt that the arrival at Jamaica being voluntary, and not from necessity or stress of weather, brought the case within the prohibitions of these laws; and that consequently the condemnation might be rightfully made upon this general ground, although the mistake of the master as to the trade being lawful was the sole cause of his going into port.

The question then is narrowed down to this consideration: whether the knowledge of the underwriters of the destination to Jamaica, under the circumstances, makes them liable for a loss by illicit trade, occasioned by mistake and ignorance and against the intentions of the owners. If the trade to Jamaica was prohibited universally, and this fact was understood by the underwriters, they would have been held to the risk of illicit trade. If the trade had been previously open, and was closed during the voyage, they might have been exonerated from that risk. The trade was not open at the time, but the parties contemplated that it would be during the voyage; and then comes the point, whether the underwriters took upon themselves the chance of its being open, and of course the risk of its being illicit.

It cannot be denied that the general words of the policy, coupled with the knowledge of the actual destination, fully authorized the voyage to Jamaica; as fully, indeed, in my judgment, as if the words had been inserted in the policy. And the case is put in the strongest manner, when it is asked, what would be the effect if the policy had been for a voyage in terms to Jamaica. I do not know that this would relieve us from a single difficulty, for the same question would still recur, whether under the circumstances it covered the risk of an illicit entry into the ports of that island.

There is not a single case where the underwriters have been held responsible for losses of this nature, unless they have in express terms, or by fair implication, assumed it. If the present policy had contained an express exception of losses by illicit trade, a condemnation for proceeding to Jamaica, although there had been no actual trading there, would have been within the

exception. The case of *Church v. Hubbard*, 2 Cranch, 187, 232 (§§ 601–5, *infra*), is an authority directly in point; and that has been followed in the supreme court of Massachusetts. *Higginson v. Pomeroy*, 11 Mass., 104. See, also, *Smith v. Delaware Ins. Co.*, 7 Cranch, 434. So that where the risk of illicit trade is not designed to be taken, the presumption is that the risk of proceeding to the port for this purpose is not taken. Is there any difference between a risk excluded by express words and a risk excluded by fair implication? If the underwriters are not presumed to take the risk of illicit trade, are they to be presumed from the same facts to take the risk of an illegal arrival or importation?

§ 595. *Authorizing a vessel to go to a foreign port is no permission to enter to engage in illicit trade, or to make inquiry.*

It is argued that the underwriters having insured the voyage to Jamaica must be presumed to warrant a right of entry into the port at least for the purpose of inquiry. That if they authorize the going to the port, they warrant by implication that the voyage to the port is lawful and thus assume the risk of seizure on this account. If this were so the argument would be exceedingly strong in favor of the plaintiffs. But the authorities do not seem to speak pointedly to such a conclusion.

§ 596. *Authorities reviewed.*

The fair result of the cases in England and in Massachusetts is that a denial of entry or an interdiction of commerce at the port of destination is not a risk within the common policy. *Hadkinson v. Robinson*, 3 Bos. & Pull., 388; *Lubbock v. Rowcroft*, 5 Esp., 50; *Parkin v. Tunno*, 11 East, 22; *Richardson v. Maine Ins. Co.*, 6 Mass., 102, 115. The decisions in New York do indeed maintain a different doctrine. See *Suydam v. Marine Ins. Co.*, 1 John., 181; *Schmidt v. United Ins. Co.*, 1 John., 249; *Craig v. United Ins. Co.*, 6 John., 226. The supreme court of the United States has held that a restraint by blockade after the commencement of the voyage is a peril within the policy (*Olivera v. Union Ins. Co.*, 3 Wheat., 183; §§ 609–10, *infra*); and it was also decided, in conformity with the English cases, that the breaking up of the voyage for fear of capture, because the port of destination was shut, is not a peril within the policy. It was there said, "that the underwriter does not warrant that the vessel shall have a right to trade at the port of destination, but only that notwithstanding the perils insured against the vessel shall proceed to such port." *Smith v. The Universal Ins. Co.*, 6 Wheat., 176 (§ 830, *infra*). But this language was used in a case where the underwriters were expressly exempted from losses by illicit trade, so that it is in no degree different from that held in *Suydam v. The Marine Insurance Co.*, in New York. 1 John., 181. The precise point whether seizure for going into an interdicted port, which it is supposed might be open, is a risk within the common policy, does not appear to have arisen in England. In *Hadkinson v. Robinson*, 3 Bos. & Pull., 388, Lord Alvanley admitted that if the vessel had proceeded to Naples, and had been actually seized, the loss might have been within the policy. Chief Justice Parsons, in *Richardson v. The Maine Insurance Company*, 6 Mass., 102, 115, said, "if new regulations made during the voyage should render the trade illicit, and the master on his arrival should violate those regulations, and for that cause the property insured should be confiscated, the assurer will not be answerable, unless he had insured against seizure for illicit trade." This language may perhaps cover the case where the master ignorantly violates the new regulations; but it does not seem addressed to a

case where there is a present interdiction and an expected opening of the port during the voyage, contemplated by both parties at the time of the insurance. In *Pollock v. Babcock*, 6 Mass., 235, the court decided that if a vessel be insured to an interdicted port, and be seized at an intermediate port (to which she had gone from necessity during the voyage) on account of her destination, she not having in fact carried on, or attempted to carry on, an illicit trade, it is a loss within the common policy. The court seemed to consider that the going to the interdicted port was lawful, though it was unlawful to trade there. But it decided that if it was unlawful to go to the port, and that fact was unknown to both parties, still the insured was entitled to recover. It is somewhat singular that it was not decided whether from the facts of the case the underwriter did not take the risk of illicit trade by implication, for the report states that trade was generally known to be prohibited with the port. If they did take the risk then the loss was clearly within the policy. If they did not, it is somewhat difficult to reconcile this case with others on the same subject. The case, so far as it goes, does seem to countenance the doctrine that on a voyage supposed to be lawful by the parties, but not in fact so, the underwriters are liable for a confiscation for sailing on the voyage. In *Parker v. Jones*, 13 Mass., 173, both parties supposed the trade to be lawful to Curacao; but the property was condemned for a violation of the statute of 43 Geo. 3, regulating that trade, and the court held the underwriters not liable for the loss, upon the ground that they had not taken the risk of illicit trade. Yet there it might have been said that as the vessel was insured to Curacao, there was an implied undertaking that the property insured might be carried there, and that the risk of its lawful importation was assumed by the underwriters.

§ 597. *If both parties contemplate trade at foreign port as free, policy covers only ordinary risks, not seizure for entering.*

Not being able to find the doctrine established that an insurance to a port includes, on the part of the underwriters, the risk of going into the port in violation of law, except where the risk of prohibited trade is assumed, I do not feel at liberty to incorporate it into the construction of the policy. The true principle seems to me to be this: that the policy guaranties an indemnity in going to the port against all losses by the perils insured against; and unless the peril of illicit entry at the port be contemplated as one of the risks insured against the underwriters are not held. The risk of illicit entry is not presumed to be taken where the trade is not known to be prohibited and expected during the voyage to remain so. If both parties contemplate the trade as free, the policy covers only the ordinary risks. It is only when the trade is not expected to be carried on except by violation of the laws that the underwriters are presumed to take that risk upon themselves. The chance of illicit trade is never assumed unless it is clearly intended to be carried on.

It is asked, if the contingency of illicit trade was not contemplated in this case, what reason was there to insert the clause in the memorandum that the brig was bound to Jamaica. My answer is that it might be material information to the underwriters. They might wish to know the intended voyage; and if it were to an interdicted port, it might, even with the exception of prohibited trade, be a risk which they might not choose to assume. But the same memorandum informed the underwriters that if the brig was not allowed to sell at Jamaica she was to go to Cuba. This is a plain declaration that the owners did not mean to force an illicit trade at Jamaica, or an illicit entry

there. It was equivalent on their part to a notice that the brig, though bound to a British colony, was intended to sail only on a lawful voyage, and that the insurance was to cover it as such. And if the owners had concealed the fact of a destination to Jamaica from the underwriters, as the general words of the policy would lead them to presume the voyage was to lawful ports only, it might have been questionable if the concealment would not have avoided the policy. At all events, it would certainly have done so if there would have been any increase of premium or risk. The owners in this respect conducted themselves with the most entire good faith and frankness.

What would have been the effect if the memorandum had only said, "The Union is bound to Kingston, Jamaica," I pretend not to decide. It is supposed in the argument that it would then have clearly covered the risk of an illicit entry. But is this certain? If the parties contemplated only a lawful voyage, and the information led them to the belief that such a voyage was lawful, could the underwriters be presumed to take the risk of its possible illegality? The law does not say that the underwriter takes the risk of illicit trade, where he by mistake supposes it lawful, but where the trade being known to be illicit, he cannot be presumed from the nature of the voyage to have had any other object in contemplation.

Admitting even that the underwriters took the risk of the vessel's going to Jamaica to make inquiries, it is not shown that this was in point of law an illicit act. The very statute on which this condemnation was founded is for an illegal *importation* of goods, not for an inquiry before arrival in port. There is no British statute within my knowledge that makes it a cause of forfeiture to lie off a colonial port, or to make inquiries, if near the port, whether it be open or not. The statutes of Charles II. and William III. apply only to importations consummated by a voluntary arrival in port. Unless, therefore, an arrival in port were necessary for the purpose of inquiry, which can scarcely be pretended, the vessel might have gone *to*, though not *into*, the port of Kingston, and have been entirely protected by law. See *The Sarah*, 1 Dodson, 79. The master himself proceeded upon this supposition. He made inquiries off the port, and was told that the port was open; and this information, given falsely by design or mistake, was the real cause of his going into port.

It is certainly true that both parties must have contemplated that the ports of Jamaica might not be open, for the memorandum provides in that case for a voyage to another island. But the effect of this is to show, not that the underwriters meant to take the risk of the voyage being illicit, but that they meant to provide another voyage, if it should turn out to be illicit. They engage that the vessel may go to Jamaica, if allowed; if not, then she may go to Cuba.

In a case of this peculiar cast, I have searched the foreign jurists with a hope of meeting with some principles to illustrate it. But I cannot say that the search has resulted in anything satisfactory. Valin, after remarking that illicit trade is not covered by a policy, where the underwriter is not informed of the risk at the time of the insurance, says that his opinion is the same in cases where the insured is himself ignorant that the trade is prohibited. 2 Valin, lib. 3, tit. 6, Assur., art. 49, pp. 127, 128.

Upon the whole, my opinion is, after considerable hesitation, that the present policy, under all the circumstances of this case, did not cover the loss by the condemnation of the property for an illicit importation into Jamaica.

§ 598. *Quære, as to liability for master's misconduct.*

There is another point in the cause upon which it may be thought necessary, after the full argument at the bar, that I should express an opinion. It is that the loss was occasioned by the misconduct of the master in setting up a false pretense of distress, and that if the truth of the case had been stated, no condemnation could have been decreed. Whether in any case the underwriters are liable for a loss by any of the perils in the policy, the remote cause of which is the negligence and misconduct of the master and mariners, not amounting to barratry, is a vexed question upon which opposite opinions have been expressed by very distinguished courts. In England the point has recently received, after a solemn discussion, a decision in the affirmative (*Busk v. Royal Exch. Assurance Co.*, 2 Barn. & Ald.; 72; *Walker v. Maitland*, 5 Barn. & Ald., 171, Malynes, 111; *Law v. Hollingworth*, 7 D. & E., 160, Park. Insur., 6th edit., ch. 3, p. 83; *Carnuthers v. Sydebothom*, 4 Maule & Selw., 86, Marshall, Insur., ch. 12, § 6, p. 519; *id.*, § 3, p. 494); though it is not difficult to perceive that the former opinions inclined the other way. In New York the point has been unequivocally settled in the negative (*Vos v. United Ins. Co.*, 2 Johns. Cas., 180; *Grim v. Phoenix Ins. Co.*, 13 Johns., 451); and that appears to be the leading opinion also in Massachusetts (*Cleveland v. Union Ins. Co.*, 8 Mass., 308, 320; *Coffin v. Newport Mar. Ins. Co.*, 9 Mass., 446). The foreign jurists generally concur in exempting the underwriters from losses by the fault of the master, unless that risk is expressly assumed (2 Valin, lib. 3, tit. 6, Assur., art. 27, p. 79; Pothier, Assur., note 64; 1 Emerigon, ch. 12, § 17, p. 434; and see 2 Barn. & Ald., 80, 81, Miller on Insur., 136, 138, etc., Carvegis Dis., 142, n. 26, 27). In this diversity of doctrine, I desire to suspend my own judgment until the question is absolutely necessary to be decided. In the present case, I am not satisfied that the loss was occasioned by the misconduct of the master. The libel and condemnation are for an illegal importation; and it is said that if the arrival had been for the mere purpose of inquiry, and had been so asserted, it would have been no breach of the statutes restricting the colonial trade. But it appears to me that a voluntary importation of the goods, though under mistake or for the purpose of inquiry, is within the prohibitions of these statutes. The case of *The Sarah*, decided by Lord Stowell (then Sir William Scott), is directly in point (1 Dodson, 79; *The Vixen*, 1 Dodson, 136); and no judge ever understood the colonial laws better or administered them with more lenity. I am therefore spared the necessity of looking at the more general question, since whatever may be the extent of the misconduct of the master, it is not shown to have been the efficient cause of this loss.

As, however, upon a principal point, the reformation of the policy, my opinion proceeds upon a defect of jurisdiction in the court, I think the plaintiffs are entitled to have that question litigated in another forum, and shall therefore decree that the libel be dismissed without prejudice to any other suit.

SMITH v. DELAWARE INSURANCE COMPANY.

(Circuit Court for Pennsylvania: 8 Washington, 127-133. 1811.)

STATEMENT OF FACTS.—Action on a policy of insurance on goods shipped on an American vessel from Baltimore to Hamburgh, etc. The vessel not being able to reach either Hamburgh or Tonningen, put into Cuxhaven, where she

was seized for illicit trade, etc., by the French authorities, that nation then being in possession of the port. There was an abandonment, but the jury found that it was not made in time, and questions of law, which will appear in the opinion, were reserved by the court, especially the question whether the warranty against loss on account of illicit trade had been complied with.

Opinion by WASHINGTON, J.

The opinion of the court will be confined to the second question. It is contended by the counsel for the plaintiffs that this warranty extends only to illicit trading by sale, barter, or otherwise, which did not take place in this case, inasmuch as the vessel entered the Elbe, not with a view to trade, but from necessity, in consequence of the blockade, which prevented her from going to Tonningen; and that she was seized before she had broke bulk or done any act which amounted to a trading. That in fact the trade she contemplated was not illicit or prohibited, because the cargo had not come from a British colony, and consequently did not come within any of the French decrees in force at the time of the seizure. That the decree of the 6th of August merely required a certain document to accompany the cargo, which it was impossible the plaintiffs could have complied with, the decree not having been known, nor could it have been known in the United States at the time the vessel sailed; and finally that the law can never be so unjust as to punish any person for omitting to perform an impossibility.

§ 599. *If vessel does not enter upon the stipulated voyage, no recovery on a policy of insurance for that voyage.*

First, it is said that this vessel went to Cuxhaven from necessity and that she did not trade previous to the seizure. If the first branch of this argument were true, it would be at once destructive to the plaintiff's right of recovery. For, if the destination of this vessel was to Tonningen, and not to Hamburg, there never was an inception of the voyage insured, which was to Hamburg, with leave to touch at Tonningen; and consequently the policy never attached. It is true that the bill of lading and outward manifest are for Tonningen, and even the letter of instructions seemed to warrant the ending of the voyage at that place. But as no objection on this ground was made at the trial by the counsel for the defendants, it is fair to suppose that the defendants were satisfied that the termini of the voyage were, in reality, such as are mentioned in the policy. If so, it will be difficult to maintain the ground taken by the plaintiffs' counsel, that where a seizure is made within the territories of a foreign government, on account of illicit trade, the warranty is not broken, because it was made before the vessel had arrived at the port of her destination, or had an opportunity to do some act amounting to an actual trading. Where the policy is on the outward cargo, as in this case, it can seldom, if ever, fairly happen, that the seizure should not precede such a trading; since the illegality of the contemplated trade must be discovered, before the unloading or breaking bulk would be permitted. It is true that in such a case, if it appear that there has been no *mala fides*, but that the neutral has acted under an entire ignorance of the municipal law of the country where he intended to trade, humanity would seem to forbid a just nation from proceeding farther than to turn him away; yet, if a more rigid conduct is adopted, or if an intended breach of the law be proved or suspected, and the property is seized and condemned, justly or unjustly, but avowedly for a breach of such law, it is impossible for a reasonable doubt to exist that the loss has not happened on account of a prohibited trade. A different construction would render this

warranty, so hazardous to the insured, of very little consequence to him, and a mere nullity in respect to the insurers.

§ 600. *Assured, if he stipulate against loss from illicit trade, must bear unjust forfeiture on that ground.*

Secondly. It is said that this trade was not prohibited, and that the condemnation proceeded upon the ground of the want of a document to prove the origin of the cargo. In order to test the strength of this argument, let it be supposed that the decree of the 8th of August had been known in the United States before this vessel sailed. Would it, in that case, be contended that the want of the document required by this decree would not have amounted to a breach of the warranty? And if it would, it proves that, without the document, the trade was illicit and prohibited. But we understand the decree to amount to this—that articles, the produce of the colonies of Great Britain, are prohibited from being brought, upon any terms, into any place possessed by the French; and the produce of any other country is prohibited, which is not accompanied by a certificate of origin, no matter how conclusive the proof may be that it was not the growth of a British colony. In either case the trade is prohibited altogether, whether the decree containing the prohibition were known to the neutral or not. If, then, the knowledge or ignorance of the neutral, in respect to the decree, makes no difference in regard to the illegality of the trade, the whole question comes to the hardship and injustice to which the merchant is made the victim, as to which there can be but one opinion. But who is to be the sufferer in such a case? The insured, who consented to exempt the insurer from all loss which might happen on account of illicit trade; or the insurer, who, in estimating the premium for the risk he undertakes, has allowed to the insured what both parties supposed to be the value of this exemption? Most undoubtedly the former. In a case of a warranty of neutrality, the parties have a view to the law of nations and subsisting treaties; and the engagement of the insured is that the property is neutral to the purpose of being protected. It must, of course, be neutral, in fact, in appearance and in conduct. In fulfilling this engagement the insured can never be surprised by the want of all necessary documents, unless by his own neglect. But the warranty in this policy has a view to the municipal laws and ordinances of the country with which the trade is intended to be carried on, which the subjects or citizens of foreign countries are bound to observe, whether previously made known to them or not. Ignorance of such laws will be no excuse for a breach of them; and an engagement with a third person not to violate such laws cannot be satisfied by a plea which would be ineffectual in the country where the law was broken and the penalty incurred. The warranty against illicit trade amounts, in short, to a stipulation that the trade in which the insured engages shall be lawful to the purpose of being protected;—that is, that it shall not only be lawful in fact, but that it shall not become otherwise by the misconduct of the insured, or from the want of all necessary documents required by the laws of the country to legitimate it. For, what would it signify to the insurer whether the loss arose from the circumstance that the trade was prohibited altogether, or was prohibited unless accompanied by certain documents?

That the seizure and condemnation of property because it was unaccompanied by papers which the insured could not possibly know were required is to the highest degree unjust has already been admitted. But is this more unjust, or does it impose a greater hardship on the insured, than if a trade,

known to be lawful when the voyage commenced, should be prohibited but the day before the arrival of the vessel, and on this recent order or law she could be seized and condemned? And yet it can scarcely be doubted by any one but that in such a case the warranty would protect the insurer.

The truth is, that the insured, by such a warranty, takes upon himself every risk which can occur in consequence of the trade being prohibited, whether absolutely, or under any qualification, and whether known or unknown to him; and for an engagement attended with so much danger, especially during the present European war, he is entitled, and no doubt takes care, to indemnify himself by a proper diminution of the premium.

CHURCH v. HUBBART.

(2 Cranch, 187-239. 1804.)

ERROR to U. S. District Court, District of Massachusetts.

STATEMENT OF FACTS.—Action on two policies of insurance on the *Aurora*, at and from New York to one or two Portuguese ports on the coast of Brazil, and at and from thence back to New York. Both policies stipulated that the underwriters did not take the risk of illicit trade with the Portuguese.

The vessel cleared for the Cape of Good Hope, the plaintiff being on board as supercargo. She proceeded to Rio Janerio, sold some of her cargo, and then sailed for Para, anchoring four or five leagues from land. The plaintiff went on shore, alleging that it was for the purpose of obtaining wood and water, and to sell his cargo if permitted. He was arrested and imprisoned, and the vessel was seized and condemned.

To prove that trade with Para was prohibited, copies of laws of Portugal were offered, with the certificates of the American consul annexed, to the effect that the copies were correct translations. The sentence of the governor of Para, condemning the vessel, was also offered, with the certificate of the consul that it was a true translation. This evidence was admitted over plaintiff's objections.

§ 601. *Attempted illicit trade falls within an exemption of illicit trade.*

Opinion by MARSHALL, C. J.

If, in this case, the court had been of opinion that the circuit court had erred in its construction of the policies, which constitute the ground of action, that is, if we had conceived that the defense set up would have been insufficient, admitting it to have been clearly made out in point of fact, we should have deemed it right to have declared that opinion, although the case might have gone off on other points; because it is desirable to terminate every cause upon its real merits, if those merits are fairly before the court, and to put an end to litigation where it is in the power of the court to do so. But no error is perceived in the opinion given on the construction of the policies. If the proof is sufficient to show that the loss of the vessel and cargo was occasioned by attempting an illicit trade with the Portuguese; that an offense was actually committed against the laws of that nation, and that they were condemned by the government on that account, the case comes fairly within the exception of the policies, and the risk was one not intended to be insured against.

The words of the exception in the first policy are, "The insurers are not liable for seizure by the Portuguese for illicit trade." In the second policy the words are, "The insurers do not take the risk of illicit trade with the Portuguese." The counsel on both sides insist that these words ought to receive

the same construction, and that each exception is substantially the same. The court is of the same opinion. The words themselves are not essentially variant from each other, and no reason is perceived for supposing any intention in the contracting parties to vary the risk.

For the plaintiff it is contended that the terms used require an actual traffic between the vessel and inhabitants, and a seizure in consequence of that traffic, or at least that the vessel should have been brought into port, in order to constitute a case which comes within the exception of the policy. But such does not seem to be the necessary import of the words. The more enlarged and liberal construction given to them by the defendants is certainly warranted by common usage; and wherever words admit of a more extensive or more restricted signification, they must be taken in that sense which is required by the subject-matter and which will best effectuate what it is reasonable to suppose was the real intention of the parties.

In this case the unlawfulness of the voyage was perfectly understood by both parties. That the crown of Portugal excluded, with the most jealous watchfulness, the commercial intercourse of foreigners with their colonies was, probably, a fact of as much notoriety as that foreigners had devised means to elude this watchfulness and to carry on a gainful but very hazardous trade with those colonies. If the attempt should succeed it would be very profitable, but the risk attending it was necessarily great. It was this risk which the underwriters, on a fair construction of their words, did not mean to take upon themselves. "They are not liable," they say, "for seizure by the Portuguese for illicit trade." "They do not take the risk of illicit trade with the Portuguese;" now this illicit trade was the sole and avowed object of the voyage, and the vessel was engaged in it from the time of her leaving the port of New York. The risk of this illicit trade is separated from the various other perils to which vessels are exposed at sea, and excluded from the policy. Whenever the risk commences the exception commences also, for it is apparent that the underwriters meant to take upon themselves no portion of that hazard which was occasioned by the unlawfulness of the voyage.

If it could have been presumed by the parties to this contract, that the laws of Portugal, prohibiting commercial intercourse between their colonies and foreign merchants, permitted vessels to enter their ports, or to hover off their coasts for the purposes of trade, with impunity, and only subjected them to seizure and condemnation after the very act had been committed, or if such are really their laws, then indeed the exception might reasonably be supposed to have been intended to be as limited in its construction as is contended for by the plaintiff. If the danger did not commence till the vessel was in port, or till the act of bargain and sale, without a permit from the governor, had been committed, then it would be reasonable to consider the exception as only contemplating that event. But this presumption is too extravagant to have been made. If, indeed, the fact itself should be so, then there is an end of presumption, and the contract will be expounded by the law; but as a general principle, the nation which prohibits commercial intercourse with its colonies must be supposed to adopt measures to make that prohibition effectual. They must, therefore, be supposed to seize vessels coming into their harbors, or hovering on their coasts, in a condition to trade, and to be afterwards governed in their proceedings with respect to those vessels by the circumstances which shall appear in evidence. That the officers of that nation are induced occasionally to dispense with their laws does not alter them, or legalize the trade

they prohibit. As they may be executed at the will of the governor, there is always danger that they will be executed, and that danger the insurers have not chosen to take upon themselves.

§ 602. *A nation may seize vessels without its territories for attempts at illicit trade.*

That the law of nations prohibits the exercise of any act of authority over a vessel in the situation of the *Aurora*, and that this seizure is, on that account, a mere marine trespass, not within the exception, cannot be admitted. To reason from the extent of protection a nation will afford to foreigners to the extent of the means it may use for its own security does not seem to be perfectly correct. It is opposed by principles which are universally acknowledged. The authority of a nation within its own territory is absolute and exclusive. The seizure of a vessel within the range of its cannon by a foreign force is an invasion of that territory, and is a hostile act which it is its duty to repel. But its power to secure itself from injury may certainly be exercised beyond the limits of its territory. Upon this principle the right of a belligerent to search a neutral vessel on the high seas for contraband of war is universally admitted because the belligerent has a right to prevent the injury done to himself by the assistance intended for his enemy; so too a nation has a right to prohibit any commerce with its colonies. Any attempt to violate the laws made to protect this right is an injury to itself which it may prevent, and it has a right to use the means necessary for its prevention. These means do not appear to be limited within any certain marked boundaries which remain the same at all times and in all situations. If they are such as unnecessarily to vex and harass foreign lawful commerce, foreign nations will resist their exercise. If they are such as are reasonable and necessary to secure their laws from violation, they will be submitted to.

In different seas, and on different coasts, a wider or more contracted range in which to exercise the vigilance of the government will be assented to. Thus in the channel, where a very great part of the commerce to and from all the north of Europe passes through a very narrow sea, the seizure of vessels on suspicion of attempting an illicit trade must necessarily be restricted to very narrow limits; but on the coast of South America, seldom frequented by vessels but for the purpose of illicit trade, the vigilance of the government may be extended somewhat further; and foreign nations submit to such regulations as are reasonable in themselves, and are really necessary to secure that monopoly of colonial commerce which is claimed by all nations holding distant possessions.

If this right be extended too far, the exercise of it will be resisted. It has occasioned long and frequent contests, which have sometimes ended in open war. The English, it will be well recollected, complained of the right claimed by Spain to search their vessels on the high seas, which was carried so far that the *guarda costus* of that nation seized vessels not in the neighborhood of their coasts. This practice was the subject of long and fruitless negotiations, and at length of open war. The right of the Spaniards was supposed to be exercised unreasonably and vexatiously, but it never was contended that it could only be exercised within the range of the cannon from their batteries. Indeed, the right given to our own revenue cutters to visit vessels four leagues from our coast is a declaration that in the opinion of the American government no such principle as that contended for has a real existence.

Nothing, then, is to be drawn from the laws or usages of nations, which

gives to this part of the contract before the court the very limited construction which the plaintiff insists on, or which proves that the seizure of the Aurora, by the Portuguese governor, was an act of lawless violence. The argument that such act would be within the policy, and not within the exception, is admitted to be well founded. That the exclusion from the insurance of "the risk of illicit trade with the Portuguese" is an exclusion only of that risk to which such trade is by law exposed will be readily conceded. It is unquestionably limited and restrained by the terms "illicit trade." No seizure not justifiable under the laws and regulations established by the crown of Portugal, for the restriction of foreign commerce with its dependencies, can come within this part of the contract, and every seizure which is justifiable by those laws and regulations must be deemed within it.

§ 603. *Foreign laws are facts to be proved by competent evidence like other facts.*

To prove that the Aurora and her cargo was sequestered at Para, in conformity with the laws of Portugal, two edicts and the judgment of sequestration have been produced by the defendants in the circuit court. These documents were objected to on the principle that they were not properly authenticated, but the objection was overruled, and the judges permitted them to go to the jury. The edicts of the crown are certified by the American consul at Lisbon to be copies from the original law of the realm, and this certificate is granted under his official seal.

Foreign laws are well understood to be facts which must, like other facts, be proved to exist before they can be received in a court of justice. The principle that the best testimony shall be required which the nature of the thing admits of; or, in other words, that no testimony shall be received which presupposes better testimony attainable, by the party who offers it, applies to foreign laws as it does to all other facts. The sanction of an oath is required for their establishment, unless they can be verified by some other such high authority that the law respects it not less than the oath of an individual.

§ 604. *Consular certificate evidence, when.*

In this case the edicts produced are not verified by an oath. The consul has not sworn; he has only certified that they are truly copied from the originals. To give to this certificate the force of testimony, it will be necessary to show that this is one of those consular functions to which, to use its own language, the laws of this country attach full faith and credit. Consuls, it is said, are officers known to the law of nations, and are intrusted with high powers. This is very true, but they do not appear to be intrusted with the power of authenticating the laws of foreign nations. They are not the keepers of those laws. They can grant no official copies of them. There appears no reason for assigning to their certificate respecting a foreign law any higher or different degree of credit than would be assigned to their certificates of any other fact.

It is very truly stated that to require respecting laws or other transactions, in foreign countries, that species of testimony which their institutions and usages do not admit of, would be unjust and unreasonable. The court will never require such testimony. In this as in all other cases, no testimony will be required which is shown to be unattainable. But no civilized nation will be presumed to refuse those acts for authenticating instruments which are usual, and which are deemed necessary for the purposes of justice. It cannot be presumed that an application to authenticate an edict by the seal of the nation

would be rejected, unless the fact should appear to the court. Nor can it be presumed that any difficulty exists in obtaining a copy. Indeed, in this very case the very testimony offered would contradict such a presumption. The paper offered to the court is certified to be a copy compared with the original. It is impossible to suppose that this copy might not have been authenticated by the oath of the consul as well as by his certificate.

It is asked in what manner this oath should itself have been authenticated, and it is supposed that the consular seal must ultimately have been resorted to for this purpose. But no such necessity exists. Commissions are always granted for taking testimony abroad, and the commissioners have authority to administer oaths, and to certify the depositions by them taken. The edicts of Portugal, then, not having been proved, ought not to have been laid before the jury.

§ 605. *Foreign judgments authenticated, how.*

The paper offered as a true copy from the original proceedings against the Aurora is certified under the seal of his arms by D. Jono de Almeida, de Mello de Castro, who states himself to be the secretary of state for foreign affairs, and the consul certifies the English copy which accompanies it to be a true translation of the Portuguese original.

Foreign judgments are authenticated: 1. By an exemplification under the great seal. 2. By a copy proved to be a true copy. 3. By the certificate of an officer authorized by law, which certificate must itself be properly authenticated.

These are the usual, and appear to be the most proper, if not the only, modes of verifying foreign judgments. If they be all beyond the reach of the party, other testimony inferior in its nature might be received. But it does not appear that there was any insuperable impediment to the use of either of these modes, and the court cannot presume such impediment to have existed. Nor is the certificate which has been obtained an admissible substitute for either of them.

If it be true that the decrees of the colonies are transmitted to the seat of government, and registered in the department of state, a certificate of that fact under the great seal, with a copy of the decree authenticated in the same manner, would be sufficient *prima facie* evidence of the verity of what was so certified; but the certificate offered to the court is under the private seal of the person giving it, which cannot be known to this court, and of consequence can authenticate nothing. The paper, therefore, purporting to be a sequestration of the Aurora and her cargo in Para ought not to have been laid before the jury.

Admitting the originals in the Portuguese language to have been authenticated properly, yet there was error in admitting the translation to have been read on the certificate of the consul. Interpreters are always sworn, and the translation of a consul not on oath can have no greater validity than that of any other respectable man. If the court erred in admitting as testimony papers which ought not to have been received, the judgment is of course to be reversed and a new trial awarded. It is urged that there is enough in the record to induce a jury to find a verdict for the defendants, independent of the testimony objected to, and that, in saying what judgment the court below ought to have rendered, a direction to that effect might be given. If this was even true in point of fact, the inference is not correctly drawn. There must be a new trial, and at that new trial each party is at liberty to produce new

evidence. Of consequence this court can give no instructions respecting that evidence.

The judgment must be reversed, with costs, and the cause remanded to be again tried in the circuit court, with instructions not to permit the copies of the edicts of Portugal and the sentence in the proceedings mentioned to go to the jury, unless they be authenticated according to law.

GRAY v. SIMS.

(Circuit Court for Pennsylvania: 8 Washington, 276-280. 1814.)

STATEMENT OF FACTS.— This is an action for a return of the premium on a policy on a brig sailing from Philadelphia to Calcutta and back in 1810. She returned with a cargo of British goods, and ship and cargo were seized and forfeited, but the forfeiture was afterwards remitted. There was a verdict for the plaintiff subject to the opinion of the court.

Opinion by WASHINGTON, J.

This case presents a question somewhat novel, from the particular circumstances of it; although it is fully within certain well-established principles of law, by which it may, without much difficulty, be decided. The question is whether the policy was void, upon the ground that the trade in which this vessel, during the voyage insured, was to be employed, was or might be forbidden by law. Before arriving at the immediate decision of this question, we lay down the following positions, which, if not admitted, may easily be proved: 1. That if the commerce in which a vessel is to be engaged, during the voyage insured, be contrary to the laws of this country or to the law of nations, a policy upon the ship equally with that upon the cargo, the peculiar subject of interdiction, is void.

§ 606. *If traffic is unlawful so is the voyage.*

It is true that the insurance upon the ship is strictly an insurance upon the voyage, which, independent of the traffic in which she is engaged, may be perfectly lawful. But if the traffic be forbidden by the laws of this country, the voyage, connected with such traffic, becomes on that account unlawful. The voyage is identified with the trade for the sake of which it was undertaken; and the ship is the instrument with which the trade is carried on, and without which the law could not be violated. The law, therefore, considers the ship *in pari delicto* with the prohibited cargo, and a policy made upon her for the voyage equally undeserving of its aid to enforce the performance of its stipulations.

In the next place, we take it for granted that the object of this voyage was the importation of goods from Calcutta or Madras into the United States; because it is inconceivable that the owner of the ship would encounter the heavy expenses of an East India voyage without a view to profit; which could only arise by bringing home, as he in fact did, a return cargo. There is no ground for presuming that the intention of the owner was to trade between Calcutta and Madras, or any other ports; because the voyage insured was from Philadelphia to Calcutta and back, merely with liberty to touch and trade at Madras on the outward and homeward voyages. Any other trading, therefore, would have deprived the insured of the protection of the policy. If the real intention of the voyage can be discovered, either by the nature of it, or by other evidence, and the object appears to be an illicit trading, the legal consequence will be the same as if it had appeared on the face of the policy. If,

then, this policy had been effected after the 2d of February, 1811, the case would have come precisely within the rule which declares that the law will not lend its aid to enforce the performance of a contract made in contravention of its own regulations.

§ 607. — *rule supra applied.*

This leads immediately to the material question in this cause: Does the above rule apply to the policy under consideration, the same having been underwritten a few weeks prior to the 2d of February, 1811, and before the non-importation law came into operation against Great Britain? The difference between a policy made prior to the 2d of February, 1811, and one made subsequent to it, is, that in the latter case, the subject of the contract was immediately and absolutely illegal; whereas, in the former, the illegality of it depends upon a contingency. But nevertheless, the underwriter promises to the insured an indemnity against loss upon a traffic which the laws of his country may forbid, and *whether it should be forbidden or not*. He engages to protect a trade which is to be carried on in defiance of any law which may be passed to interdict it. And is this a contract which can show its face in a court of justice, whose duty it is to enforce the laws of the country?

It was contended, with great ingenuity, by the plaintiff's counsel, that at the time this policy was underwritten the importation of goods from a British port into the United States was lawful; and, consequently, that the policy having once attached, the right of the insured to the premium became perfect, and could not be defeated by any thing *ex post facto*. Now, it may safely be admitted that the importation was lawful at the time this insurance was effected, and yet it will not follow that the policy attached; or if it did, that the right of the insurer to the premium could, under any possible circumstance, be enforced. The importation was lawful at the time the insurance was made; and yet the contract was illegal, because it stipulated to protect a prohibited trade. It was impossible that an importation of goods from Calcutta could be made into the United States within the period of time which would elapse between the 17th of December, 1810, and the 2d of February, 1811, and, consequently, it was to be made after the latter day; and if it should then be prohibited, still the underwriter was bound to indemnify the insured against all risks to which he might be exposed in making such illegal importation. The contract was illegal, because it looked to a period beyond that when the importation might be contrary to law, and engaged to protect it, although such should be the case. The policy, therefore, never did attach. Neither is it correct to lay it down as a general rule, without exception, that if the policy once attach, the right to the premium becomes indefeasible. It does so, we admit, notwithstanding any act of the insured or of his agents. But if the contract be legal when it is made, and the performance of it rendered illegal by a subsequent law, the parties are both of them discharged from its obligations. The insured loses his indemnity, and the insurer his premium. This is totally unlike the case of *Odlin v. Pennsylvania Ins. Co.* [2 Wash., 312; §§ 831-34, *infra*], because, in that, the embargo law did not forbid, but only suspended, the performance of the contract. The voyage and trade were not condemned, but merely postponed.

§ 608. *A return of the premium will not be ordered when the performance of the contract has become illegal after it was entered into.*

It was contended by the plaintiff's counsel that the contract should be construed to protect the importation, only in case it should be lawful; but not so

if it should be forbidden by the non-importation law coming into force. This would be to set up an implied warranty on the part of the insured, to destroy the protection which the policy promises him, and for which the premium was paid. A warranty which is totally inconsistent with the express stipulations of the policy cannot, with any propriety, be implied. The insurer, in this case, engaged to indemnify the insured against all losses which might happen to the ship on her voyage. The object, therefore, of the insured was to be protected on that voyage at all events; and the protection was expressly and unconditionally promised by the underwriter. The supposed warranty, therefore, would be entirely contradictory to the obvious intention of both parties; and for that reason it cannot be implied. Upon the whole, we are of opinion that the law is in favor of the defendants, and that judgment be rendered for them.

OLIVERA v. UNION INSURANCE COMPANY.

(8 Wheaton, 188-196. 1818.)

ERROR to U. S. Circuit Court, District of Maryland.

STATEMENT OF FACTS.—On the 29th day of December, in the year 1812, the plaintiffs, who are Spanish subjects, caused insurance to be made on the cargo of the brig called the *St. Francis de Assise*, “at and from Baltimore to the Havanna.” Besides the other perils insured against in the policy, according to the usual formula, were “all unlawful arrests, restraints and detainments of all kings,” etc. The cargo and brig were Spanish property and were regularly documented as such. The vessel sailed from Baltimore and was detained by ice till about the 8th day of February, in the year 1813, when, being near the mouth of the Chesapeake Bay, the master of the brig discovered four frigates, which proved to be a British blockading squadron. He, however, endeavored to proceed to sea. While making this attempt he was boarded by one of the frigates, the commander of which demanded and received the papers belonging to the vessel and indorsed on one of them the words following: “I hereby certify that the bay of Chesapeake, and ports therein, are under a strict and rigorous blockade, and you must return to Baltimore and upon no account whatever attempt quitting or going out of the said port.” The brig returned, after which the master made his protest and gave notice to the agent of the owners in Baltimore, who abandoned “in due and reasonable time.” The underwriters refused to pay the loss, on which this suit was brought. It appeared, also, on the trial, that the vessel had taken her cargo on board and sailed on her voyage before the blockade was instituted. On this testimony the plaintiffs’ counsel requested the court to instruct the jury that if they believed the matters so given to them in evidence the plaintiffs were entitled to recover. The court refused to give this instruction and the jury found a verdict for the defendants, the judgment on which was brought before this court on a writ of error.

Opinion by MARSHALL, C. J.

On the part of the plaintiff in error it has been contended that the assured have sustained a technical total loss, by a peril within that clause in the policy which insures “against all unlawful arrests, restraints and detainments of kings,” etc. He contends, 1st. That a blockade is “a restraint” of a foreign power. 2d. That, on a neutral vessel, with a neutral cargo, laden before the institution of the blockade, it is “an unlawful restraint.”

§ 609. *A blockade is a "restraint" of vessels within a blockaded port.*

The question whether a blockade is a peril insured against is one on which the court has entertained great doubts. In considering it, the import of the several words used in the clause has been examined. It certainly is not "an arrest," nor is it "a detainment." Each of these terms implies possession of the thing by the power which arrests or detains, and in the case of a blockade the vessel remains in the possession of the master. But the court does not understand the clause as requiring a concurrence of the three terms in order to constitute the peril described. They are to be taken severally, and if a blockade be a "restraint," the insured are protected against it although it be neither an "arrest" nor "detainment."

What, then, according to common understanding, is the meaning of the term "restraint?" Does it imply that the limitation, restriction or confinement must be imposed by those who are in possession of the person or thing which is limited, restricted or confined; or is the term satisfied by a restriction created by the application of external force? If, for example, a town be besieged, and the inhabitants confined within its walls by the besieging army, if in attempting to come out they are forced back, would it be inaccurate to say that they are restrained within those limits? The court believes it would not; and if it would not, then with equal propriety may it be said, when a port is blockaded, that the vessels within are confined or restrained from coming out. The blockading force is not in possession of the vessels inclosed in the harbor, but it acts upon and restrains them. It is a *vis major*, applied directly and effectually to them, which prevents them from coming out of port. This appears to the court to be, in correct language, "a restraint," by the power imposing the blockade; and when a vessel, attempting to come out, is boarded and turned back, this restraining force is practically applied to such vessel.

Although the word, as usually understood, would seem to comprehend the case, yet this meaning cannot be sustained, if in policies it has uniformly received a different construction. The form of this contract has been long settled, and the parties enter into it without a particular consideration of its terms. Consequently, no received construction of those terms ought to be varied.

It is, however, remarkable, that the industrious researches of the bar have not produced a single case, from the English books, in which this question has been clearly decided. In the case of *Barker v. Blakes*, 9 East, 283, which has been cited and relied on at the bar, one of the points made by the counsel for the underwriters was, that the abandonment was not made in time, and the court was of that opinion. Although, in this case, it may fairly be implied, from what was said by the judge, that a mere blockade is not a peril within the policy, still this does not appear to have been considered, either at the bar or by the bench, as the direct question in the cause, nor was it expressly decided. The opinion of the court was, that the blockade constituted a total loss, which was occasioned by the detention of the vessel; but that the abandonment was not made within reasonable time after notice of that total loss. In forming this opinion, it had not become necessary to inquire whether the blockade, unconnected with the detention, was, in itself, a peril against which the policy provided. The judgment of the court could not be, in the most remote degree, influenced by the result of this inquiry; and, consequently, it was not made with that exactness of investigation which would probably have been employed had the case depended on it. It is also to be observed that the

vessel did not attempt to proceed towards the blockaded port, but lay in Bristol when the abandonment was made. The blockading squadron, therefore, did not act directly on the vessel, nor apply to her any physical force. It is not certain that such a circumstance might not have materially affected the case. This court, therefore, does not consider the question as positively decided in *Barker v. Blakes*.

The decisions of our own country would be greatly respected were they uniform, but they are in contradiction to each other. In New York it has been held that a blockade is (*Schmidt v. Union Ins. Co.*, 1 John., 249), and in Massachusetts that it is not (*Richardson v. Marine Ins. Co.*, 6 Mass., 102; *Brewer v. Union Ins. Co.*, 12 Mass., 170), a peril within the policy. The opinions of the judges of both these courts are, on every account, entitled to the highest consideration. But they oppose each other, and are not given in cases precisely similar to that now before this court. The opinion that a blockade was not a restraint was held by the courts of Massachusetts, but was expressed by the very eminent judge who then presided in that court in a case where the vessel was not confined within a blockaded port by the direct and immediate application of physical force to the vessel herself.

Believing this case not to have been expressly decided, the court has inquired how far it ought to be influenced by its analogy to principles which have been settled.

It has been determined in England that if the port for which a vessel sails be shut against her by the government of the place, it is not a peril within the policy. In *Hadkinson v. Robinson*, a vessel bound to Naples was carried into a neighboring port by the master, in consequence of information received at sea that the port of Naples was shut against English vessels. In an action against the underwriters the jury found a verdict for the defendant, and, on a motion for a new trial, the court said "a loss of the voyage, to warrant the insured to abandon, must be occasioned by a peril acting upon the subject-matter of the insurance immediately, and not circuitously, as in the present case. The detention of the ship at a neutral port, to avoid the danger of entering the port of destination, cannot create a total loss within the policy, because it does not arise from any peril insured against." 3 Bos. & Pull., 388.

It will not be denied that this case applies in principle to the case of a vessel whose voyage is broken up by the act of the master, on hearing that his port of destination is blockaded. The peril acts directly on the vessel not more in the one case than in the other. But, if, in attempting to pass the blockading squadron, the vessel be stopped and turned back, the force is directly applied to her, and does act directly, and not circuitously.

Without contesting or admitting the reasonableness of the opinion that the loss of the voyage occasioned by the detention of the ship by her master in a neutral port is not within the policy, it may well be denied to follow as a corollary from it, that a vessel confined in port by a blockading squadron, and actually prevented by that squadron from coming out, does not sustain the loss of her voyage from the restraint of a foreign power, which is a peril insured against.

Lubbock v. Rowcroft, 5 Esp., 50, which was decided at *nisi prius*, is in principle no more than the case of *Hadkinson v. Robinson*. Having heard that his port of destination was blockaded by or in possession of the enemy, the master stopped in a different port, and the insured abandoned. The loss was

declared to be produced by a peril not within the policy. It is unnecessary to repeat the observations which were made on the case of *Hadkinson v. Robinson*.

An embargo is admitted to be a peril within the policy. But, as has been already observed, the sovereign imposing the embargo is virtually in possession of the vessel, and may, therefore, be said to arrest and detain her. Yet, in fact, the vessel remains in the actual possession of the master or owner, and has the physical power to sail out and proceed on her voyage. The application of force is not more direct on a vessel stopped in port by an embargo, than on a vessel stopped in port by a blockading squadron. The danger of attempting to violate a blockade is as great as the danger of attempting to violate an embargo. The voyage is as completely broken up in one case as in the other, and in both the loss is produced by the act of a sovereign power. There is as much reason for insuring against the one peril as against the other, and if the word restraint does not necessarily imply possession of the thing by the restraining power, it must be construed to comprehend the forcible prevention of her proceeding on her voyage. If so, the blockade is in such a case a peril within the policy.

§ 610. *Restraint by blockade of a neutral vessel laden before the port was blockaded, an unlawful restraint.*

The next point to be decided is the unlawfulness of this restraint. That a belligerent may lawfully blockade the port of his enemy is admitted. But it is also admitted that this blockade does not, according to modern usage, extend to a neutral vessel found in port, nor prevent her coming out with the cargo which was on board when the blockade was instituted. If, then, such a vessel be restrained from proceeding on her voyage by the blockading squadron, the restraint is unlawful. The *St. Francis de Assise* was so restrained, and her case is within the policy.

It has been contended that it was the duty of the neutral master to show to the visiting officer of the belligerent squadron his right of egress by showing not only the neutral character of his vessel and cargo, but that his cargo was taken on board before the institution of the blockade. This is admitted, and it is believed that the bill of exceptions shows satisfactorily that these facts were proved to the visiting officer. It is stated that the vessel and cargo were regularly documented; that the papers were shown, and that the cargo was put on board, and the vessel had actually sailed on her voyage before the institution of the blockade.

There is, however, a material fact which is not stated in the bill of exceptions with perfect clearness. The loss in this case is technical, and the court has decided that such loss must continue to the time of abandonment. 4 Cranch, 29, 202, 370. It is not necessary that it should be known to exist at the time of abandonment, for that is impossible; but that it should actually exist, a fact which admits of affirmative or negative proof at the trial of the cause. Upon the application of this principle to this case, much diversity of opinion has prevailed. One judge is of opinion that this rule having been laid down in a case of capture is inapplicable to a loss sustained by a blockade. Two judges are of opinion that proof of the existence of the blockade having been made by the plaintiff, his case is complete; and that the proof that it was raised before the abandonment ought to come from the other side. A fourth judge is of opinion that, connecting with the principle last mentioned the fact stated in the bill of exceptions, that the abandonment was "in

due and reasonable time," it must be taken to have been made during the existence of the technical loss. Four judges, therefore, concur in the opinion that the plaintiffs are entitled to recover; but as they form this opinion on different principles, nothing but the case itself is decided: That is, that a vessel within a port blockaded after the commencement of her voyage, and prevented from proceeding on it, sustains a loss by a peril within the policy, and if the vessel so prevented be a neutral having on board a neutral cargo received before the institution of the blockade, the restraint is unlawful.

Judgment reversed.

§ 611. **Perils insured against.**—In a suit on a policy of insurance, the plaintiff must prove a loss from one of the perils insured against. In this case the vessel was boarded by a privateer, and money on board was taken, for which the plaintiff recovered; but the court charged the jury that a loss by embezzlement by the crew, not being insured against, could not be recovered. *Hicks v. Fitzsimmons*, 1 Wash., 279; *Swan v. Union Ins. Co.*,* 3 Wheat., 168.

§ 612. **"Danger of the seas."**—Losses by "danger of the seas" are such as are of an extraordinary nature, or arise from irresistible force which cannot be guarded against by the ordinary exertions of human skill and prudence. The mere rolling of a vessel by a cross sea is not such a danger. *The Schooner Reeside*, 2 Sumn., 567.

§ 613. **Same — Ordinary facts.**—If the loss of a vessel arose from the ordinary circumstances of a voyage, or from ordinary sea damage, or wear and tear, the underwriter is not liable. *Coles v. Marine Ins. Co.*,* 3 Wash., 159.

§ 614. It is not enough to prove that there were storms during the voyage; the loss must be traced to their influence. *Ibid.*

§ 615. **Same — Seaworthiness.**—There is no rule which makes the seaworthiness of a vessel at the beginning of a voyage evidence that the necessity for subsequent repairs arose from some extraordinary peril. *Donnell v. Columbian Ins. Co.*,* 2 Sumn., 366.

§ 616. **Expense consequent on peril insured against.**—Any and every expense borne by and chargeable upon the owner of the thing insured, as a direct and immediate consequence of a peril insured against, is covered by the policy. *Hall v. Washington Ins. Co.*,* 5 Law Rep., 200.

§ 617. **Collision.**—A collision between two ships on the high seas, whether it results from accident or negligence, is in all cases deemed a peril of the seas within the words of a policy of insurance. *Ibid.*

§ 618. **Semble**, that a different rule prevails in the French law, making the underwriter liable for those losses by collision, only, which are occasioned by accident or the fault of the other party. *Ibid.*

§ 619. The American ship *Columbia*, by the mistake or fault of her mate and crew, collided with the English bark *Ritchie*. The master of the *Columbia*, for his owners, paid the owners of the *Ritchie* a certain sum, by way of compromise. *Held*, that the underwriters of the *Columbia* were liable for the sum so paid, as well as the damages for the repairs and losses on the *Columbia*, occasioned by the collision. *Ibid.*

§ 620. **Sea-water.**—Where a policy of marine insurance provides for a separation and sale of the damaged part only of a cargo of barley insured, in case of partial loss by sea-water, a quantity of barley shipped in sacks cannot be treated as if shipped in bulk, so as not to be divided. *Neidlinger v. Insurance Co.*,* 18 Blatch., 297.

§ 621. There is no liability from vapor arising from the sea-water which has come in contact with one sack, so far as such vapor or the dampness thereof affects the barley in another sack, with which other sack sea-water has not otherwise come in contact. *Ibid.*

§ 622. **Causa proxima.**—It is the proximate cause of the loss, alone, which determines the liability of the insurer — not the remote cause. *The Schooner Manhasset*,* 3 Ct. Cl., 76.

§ 623. If a ship insured is so disabled by a storm that she becomes unmanageable, and her boat is thereby lost, and the loss is properly attributable to the crippled condition of the ship by the storm, the underwriter is liable, though the loss of the boat did not occur during the storm. *Potter v. Ocean Ins. Co.*, 3 Sumn., 27 (§§ 995-1002).

§ 624. **Same — War risk.**—Where a vessel, insured against "war risk," was compelled, by a gale, to anchor and remain exposed to the enemy's fire, which cut her cable, so that she drove ashore, and was captured and destroyed, though the perils of the sea were the remote cause of her loss, the proximate cause lay in the act of the enemy, and the insured are entitled to recover. *The Manhasset*,* 3 Ct. Cl., 76.

§ 625. The term "war risk," in a policy of insurance, cannot be extended so as to mean more than "acts of the public enemy," or, at most, the casualties of war. The government

does not become an insurer against its own acts. *Bogert's Case*,* 2 Ct. Cl., 159; 8 id., 18. War risks are covered if there is no warranty of neutrality. *Straas v. Marine Ins. Co.*,* 1 Cr. C. C., 343; *Hodgson v. Marine Ins. Co.*,* 1 Cr. C. C., 460.

§ 626. **Barratry.**—To entitle the plaintiff to recover on a policy of insurance the loss must be caused by one of the perils insured against. The assured cannot recover for loss by barratry unless the barratry produced the loss; but it is immaterial that the loss so produced occurred during the continuance of the barratry or afterwards. *Swan v. Union Ins. Co.*,* 3 Wheat., 168. See *Andrews v. Essex Ins. Co.*, 3 Mason, 6 (§§ 589-98).

§ 627. If the act of the master was intended for the benefit of the owner it cannot be barratry. *Dederer v. Delaware Ins. Co.*,* 2 Wash., 61.

§ 628. Acts of the master may be illegal, and yet if not criminal or fraudulent they will not be barratrous. *Ibid.*

§ 629. If the ship is seaworthy for the voyage, the underwriter will be liable for any loss proximately caused by the perils insured against, though the loss may have been remotely occasioned by the negligence or misconduct, not amounting to barratry, of the master or crew. But the assured cannot recover for a loss caused by his own wrongful act, or the wrongful act of his agent. *Williams v. New England Ins. Co.*,* 3 Cliff., 244.

§ 630. Where the general owner of a ship retains possession and command, and contracts to carry a cargo on freight for the voyage, the charter-party is to be considered as a mere af-freightment sounding in covenant, and the freighter is not clothed with the legal responsibility of ownership. In such case the general owner is owner for the voyage. Hence if he be the master he cannot commit barratry. *Marcadier v. Chesapeake Ins. Co.*, 8 Cr., 89 (§§ 910-18).

§ 631. **Same—Special case.**—If, when the vessel touched at Nassau, the leak was such that a prudent and discreet master, of competent skill and judgment, would have deemed it necessary to examine and repair the leak before proceeding on the voyage, and the jury find that the disaster was occasioned by his omission to do so, and would not otherwise have happened, the plaintiff is not entitled to recover. *Taney, C. J.*, in *Adderly v. American Ins. Co.*,* *Taney*, 126.

§ 632. **Contra**, if a master of competent skill and judgment would have considered the vessel seaworthy notwithstanding the leak, and so omitted to examine or repair the vessel. *Ibid.*

§ 633. **Incompetency of crew.**—*Semble*, that if a master set sail on a voyage with a crew in such a state of intoxication as disables them, at the time, from the proper performance of the ship's duty, and any disaster arise therefrom, any loss from that disaster would be unrecoverable from the underwriters under our common policies of insurance. *United States v. Hunt*, 2 Story, 120.

§ 634. **Unlawful voyage.**—A contract of insurance made on a voyage which is opposed to the common, statute or maritime laws of the country where it is effected is void. The plaintiff, whether he is insurer or insured, is turned out of court, not because he is more in fault than the defendant, for they are *in pari delicto*, and, in such a case, *potior est conditio possidentis*. *Craig v. United States Ins. Co.*,* *Pet. C. C.*, 417.

§ 635. **Contemplated illegal act.**—The validity of a contract of maritime insurance cannot be affected by a mere contingent, future contemplated illegal act in the progress of voyages covered by the policy, if the voyage is otherwise, in its origin, concoction and accomplishment, perfectly legal. A mere intention to do an illegal or other act which would avoid the policy if done, but which has never been consummated by any act, will not *per se* vitiate the policy. There is, in all cases of this sort, a *locus poenitentiae*; the act and intent must be coupled together. In order to make the voyage utterly void in its origin, it is necessary that the place of the voyage itself and the main object of the enterprise should be absolutely illegal. The voyage should be originally and absolutely, in whole or in part, illegal as to trade and objects, and not a mere contingent intention to do some collateral act in the course of a legal voyage or trade, which, if done, might be illegal. The illegality should not only be contingently contemplated, but there should be some overt act in progress. *Clark v. Protection Ins. Co.*, 1 Story, 123 (§§ 579-88).

§ 636. Although the insured ship when lost was sailing under circumstances rendering her liable to forfeiture, this would not make the policy void. *Ocean Ins. Co. v. Polleys*, 13 *Pet.*, 163.

§ 637. **Same—Usage.**—No acts justified by usage of trade, and done to avoid confiscation, can avoid a policy on a ship. *Livingston v. Maryland Ins. Co.*, 7 Cr., 506 (§§ 395-408).

§ 638. **Same—Increase of risk—Capture.**—If the plaintiff do any act which increases the risk of capture and detention according to the common practice of the belligerent, it may avoid the policy. It is not necessary that the risk thus increased should be the risk of *rightful* capture by the law of nations. *Ibid.*

§ 639. **Illicit trade.**—For an American citizen to sail under a British license during war be-

tween Great Britain and the United States is illegal. *Craig v. United States Ins. Co.*,* Pet. C. C., 410.

§ 640. *Same*—*Capture*.—Action on a policy on goods on the *Little William* from Philadelphia to Tonningen, or Hamburg, if not blockaded, warranted American property, proof to be made here. The captain was instructed by letter to proceed to Hamburg if he could obtain permission from the cruising vessel at the entrance of the Eyder, but on no account to attempt it unless well assured that the blockade of the Elbe was raised. The vessel was captured by a British cruiser six hundred miles from Tonningen and with the cargo condemned. The captain did not deliver his letter of instructions to his captors until some days after he had delivered the ship's papers. *Held*, that the instructions to the captain did not have the effect to increase the risk of capture and that the assured was entitled to recover. *Sperry v. Delaware Ins. Co.*,* 2 Wash., 248.

§ 641. A vessel might lawfully sail to a port in the West Indies, known to be blockaded, until warned off. It would not be necessary to make inquiries elsewhere than of the blockading force. *Maryland Ins. Co. v. Woods*,* 6 Cr., 29.

§ 642. It is not illicit trade for a ship chartered by a belligerent to buy and take wood from the enemy. *Graham v. Pennsylvania Ins. Co.*,* 2 Wash., 118.

§ 643. *Same*—*Breach of warranty*.—A general warranty against engaging in illicit trade is not broken by illicit trade unaccompanied by seizure, or by an unfounded seizure for supposed illicit trade. Seizure and illicit trade must concur. *Graham v. Pennsylvania Ins. Co.*,* 2 Wash., 118, in which the nature of the particular trading was considered and held not illicit.

§ 644. *Same*—*Stress of weather*.—A vessel was forced by stress of weather to put into a French port in the West Indies, and a part of the cargo was unloaded to make repairs. The French authorities prohibited the loading of the cargo or its sale except for the products of the island. The cargo was disposed of for such productions. *Held*, that this was not such a trading as, under the non-intercourse act of 1798, would render a policy of insurance on the new cargo void. *Hallett v. Jenks*, 3 Cr., 210.

§ 645. *Unlawful arrests*.—If a policy insures against "unlawful arrests, restraints and detainerments," the word "unlawful" applies as well to restraints and detainerments as to arrests; and in such a case a detainment by a force lawfully blockading a port is not a peril insured against by a policy containing a warranty of neutrality. *McCall v. Marine Ins. Co.*,* 8 Cr., 59.

§ 646. The judgment of a foreign court, that there was no probable cause for the seizure of a vessel for alleged violation of the revenue laws of the foreign state is conclusive, in the absence of fraud, in an action upon a policy upon the ship, exempting the underwriters from liability for loss arising in consequence of seizure on account of illicit trade. *Magoun v. New England Ins. Co.*, 1 Story, 158 (§§ 839-40).

§ 647. *Dispute of sovereignty*.—During the pendency of a contest between our government and a foreign power concerning the sovereignty of certain lands, claimed by the foreign power and disputed by our government, our courts are bound to accept and enforce the position of our government. Hence, if a vessel of the United States has been seized by such foreign power for trading contrary to its laws with such lands, an underwriter here, who has insured the vessel, cannot say that it was engaged in illegal trade, or that the master, by persisting in trade there, after warning by the officers of such foreign power, was guilty of barratry. *Williams v. Suffolk Ins. Co.*,* 13 Pet., 415; 3 Sumn., 270.

VI. THE VOYAGE.

SUMMARY—"At and from," §§ 648-650, 652.—*Terminus of voyage*, § 651.—*Destination; stopping place; usage*, §§ 653-655.

§ 648. A policy of insurance on a vessel "at and from" an island protects her in sailing from port to port of island to take in cargo. *Dickey v. Baltimore Ins. Co.*, § 656.

§ 649. A policy for \$10,000 upon a voyage "at and from A. to St. T. and two other ports in the W. I., and back to her port of discharge in the United States, upon all lawful goods laden or to be laden, beginning the adventure upon the goods from the landing at A., and continuing the same until they shall be safely landed at St. T. and the United States aforesaid," is an insurance upon every successive cargo taken on board in the course of the voyage out and home, so as to cover the risk of return cargo, proceeds of the sale of the outward cargo. *Columbian Ins. Co. v. Catlett*, §§ 657-63.

§ 650. Such a policy covers an insurance of \$10,000 during the whole voyage out and home, so long as the assured has that amount of property on board, without regard to the fact that a portion of the original cargo may have been safely landed at an intermediate port before the loss in question. *Ibid*.

§ 651. In the case of a policy at and from a port, the construction of it as to the time when the insurance attaches depends upon circumstances. If the vessel be in a foreign port, in the course of a voyage, it attaches from her first arrival there; if in a domestic port, then from the date of the policy. If the vessel has been long in port without regard to any particular voyage, it attaches from the time preparations are begun for the voyage insured. If the assured becomes owner while the vessel is lying in port, the policy does not attach until the ownership begins. *Seamans v. Loring*, §§ 664-69.

§ 652. If in a policy "at and from," the assured unreasonably delay to begin the risk on the voyage, the underwriter is discharged. *Ibid.*

§ 653. If a vessel insured until she reach a certain port, being at anchor there twenty-four hours in safety, cannot get to the destined and usual place of discharge in the port because she is too deep and must be lightened, and, to aid in prosecuting the voyage, cargo is put into lighters, such discharge of cargo does not make the place the port of destination; it is only a stopping place in the voyage. *Simpson v. Pacific Ins. Co.*, §§ 670-72.

§ 654. In an action upon a policy on goods to be landed at Leghorn, *held*, that under the usage of trade, landing them at the Lazaretto fulfilled the policy. *Gracie v. Marine Ins. Co.*, § 673.

§ 655. "To port in Cuba" cannot be shown by usage to mean to *ports* in Cuba. (*S. P.*, *Hearn v. Equitable Ins. Co.*, * 3 Cliff., 328.) *Hearn v. New England Ins. Co.*, §§ 674-79.

[NOTES.— See §§ 680-689.]

DICKEY v. BALTIMORE INSURANCE COMPANY.

(7 Cranch, 327-332. 1813.)

ERROR to U. S. Circuit Court, District of Maryland.

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.— This action was brought on a policy, insuring the *Fabius* at and from New York to Barbadoes, and at and from thence to the Island of Trinidad, and at and from Trinidad back to New York. The *Fabius* arrived at the port of Spain, in the Island of Trinidad, on the 21st of October, in the year 1806, where she remained until the 5th of December, when she sailed, under a special license from the proper authorities, for Fort Hyslop, another port in the island, for the purpose of procuring and taking in a part of her return cargo, and with a view of returning to the port of Spain, that being the only port in the Island of Trinidad at which vessels arriving from other places were permitted to enter, or from which those destined on foreign voyages were permitted to clear. While on her voyage to Fort Hyslop, the *Fabius* was lost by the danger of the seas; and the question is, whether this loss is within the policy.

§ 656. *Sailing "at and from" port to port of an island.*

Were this a case of the first impression; were it to be decided for the first time on the intention of the parties, to be collected solely from the words of the contract, some contrariety of opinion might undoubtedly be looked for, and it is uncertain what might be the opinion of the court.

Strictly speaking, a vessel is not at an island while sailing from one port to another of the same island; yet it is difficult to resist the persuasion that something more is meant by an insurance at and from an island than by an insurance at and from a port. The words, at and from an island, and at and from a port, are not synonymous, and yet in effect the same meaning would often be given to them, if the privilege of sailing from one port to another, for the purpose of completing the cargo, should not be granted by the policy. An insurance to an island may terminate at the first port, and the expression may be adopted from the uncertainty at what port the vessel insured may first arrive; but it seems difficult to put any other construction on an insurance at and from an island, or to assign any other motive for the risk being so

described, than that it is a license to use the different ports of the island for the purpose of obtaining the return cargo. This particular policy furnishes strong reason for this construction. It is difficult to read it without feeling a conviction that the intention of the contract was to insure the whole voyage from and to New York, and to have the liberty of the islands of Barbadoes and Trinidad. There being but one port in the island of Trinidad, at which a vessel was permitted to enter or clear, takes away every inducement for inserting in the policy the words at and from the island of Trinidad, rather than the words at and from the port of Spain, in the island of Trinidad, unless those words secure the liberty of going to other ports, for the purpose of completing the cargo, and of returning to the port of Spain to clear out for New York.

But the words of this policy are not now to receive their first construction. In *Camden v. Cowley*, mentioned in 1 Marshall, 166, a ship was insured from London to Jamaica generally, and by a subsequent policy she was insured at and from Jamaica to London. The ship having touched and stayed for some days at one port of Jamaica was lost in coasting the island, but before she had delivered all her outward cargo at the other ports of the island.

In an action on the homeward policy, the claim of the insured on the underwriters was resisted, not on the principle that the words at and from did not imply a permission to use all the ports of the island, not on the principle that sailing from one port to another was a deviation, but on the principle that the risk on the outward policy had not terminated, and that consequently the risk on the homeward policy had not commenced when the loss happened. A verdict was found against the underwriters, and a new trial was refused.

In *Bond v. Nutt, Cowp.*, 601, the insurance was made on a ship at and from Jamaica to London, warranted to sail before the 1st of August, 1776. The ship sailed from St. Ann's, in Jamaica, on the 26th of July, for Bluefields, also in Jamaica, in order to join a convoy there. She was detained at Bluefields by an embargo, until the 6th of August, when she sailed with the convoy, but being separated from it was captured. On this policy, a verdict was given in favor of the underwriters, under the direction of Lord Mansfield, and a motion for a new trial was resisted on two grounds: 1st. That a departure from St. Ann's was not a departure from Jamaica. 2d. That going to Bluefields was a deviation, that being out of the course of the voyage from St. Ann's to London.

After great consideration, the court was unanimously of opinion in favor of the motion.

Lord Mansfield, in giving his opinion, said, "as neither party knew from what part of the island the ship would sail, they used the words at and from Jamaica, which protected her in going from port to port, till she sailed." He also said, "had the insurance been at and from St. Ann's, the going round the island to Bluefields, would have been a deviation."

In *Thelusson v. Furguson, Doug.*, 346, an insurance was made "at and from Gaudaloupe to Havre, warranted to sail on or before the 31st December." The vessel took in her cargo at Point Petre in Gaudaloupe, and, for the purpose of obtaining convoy, sailed on the 24th of October to Basseterre, where there is no port, but only an open road. She was there detained till the 10th of January, when she sailed with convoy, but was captured on the return voyage. The plaintiffs obtained a verdict. A motion was made for a new trial, which was refused. Lord Mansfield said, "under an insurance" at and

from such a place as Gaudaloupe or Jamaica, the word "at" comprises the whole island, and under that word the ship is protected in going from port to port, round the coast of the island. The underwriters not being satisfied with this decision, another action was afterwards brought on the same policy against Staples, also an underwriter. But upon that action, the only point insisted on was, that the vessel had not sailed by the stipulated day.

It appears, then, to be the settled doctrine of the courts of England, that an insurance "at and from an island," such as those in the West Indies generally, insures the vessel while coasting from port to port of the island, for the purpose of the voyage insured. It is dangerous to change a settled construction on policies of insurance. It is the opinion of this court that the circuit court erred in not giving the instruction prayed for by the counsel for the plaintiff, and that the judgment be reversed, and the case remanded to that court with directions to give the instructions prayed for by the plaintiffs, as stated in the bill of exceptions filed in the cause.

COLUMBIAN INSURANCE COMPANY v. CATLETT.

(12 Wheaton, 383-407. 1827.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This is a writ of error to the circuit court of the District of Columbia, sitting at Alexandria.

The original action was upon a policy of insurance, dated the 16th of February, 1822, whereby the Columbian Insurance Company insured the plaintiff \$10,000, lost or not lost, at and from Alexandria to St. Thomas, and two other ports in the West Indies, and back to her port of discharge in the United States, upon all kinds of lawful goods and merchandise, laden or to be laden on board the ship called the Commerce, etc.; beginning the adventure upon the said goods and merchandise from the loading at Alexandria, and continuing the same until the said goods and merchandise shall be safely landed at St. Thomas, etc., and the United States. The goods and merchandise to be valued as interest may appear. The policy contained the usual risks; and the premium agreed on was three and three quarters per cent., to return half per cent. for each port not used or attempted, and no loss happens. There are other provisions in the policy, which will be hereafter commented on. The breach alleged in the declaration is a total loss by perils of the seas, with the usual averments of notice and non-payment.

The trial was had upon the general issue, and a verdict found by consent for the plaintiff, for \$10,000, subject to the opinion of the court upon the demurrer to evidence filed in the case. It was further agreed that if it should be the opinion of the court that the plaintiff was not entitled to recover the full amount of the insurance, but is entitled to an average loss, then a reference to ascertain that average, or to modify the amount of the verdict in any other respect as to the sum, should be made to an auditor, and judgment should be given for the sum finally reported and confirmed by the court, subject, however, to the exceptions of either party to any opinion of the court on that subject. The reference was accordingly made, and, upon the coming in of the auditor's report, the court pronounced its opinion and gave judgment for the plaintiff for \$7,656.57, with interest from the 14th of October, 1822.

From the demurrer to evidence it appeared that the ship sailed from Alexandria on her voyage about the 14th of February, 1822, having on board a

cargo of two thousand two hundred and ninety-seven and one-half barrels of flour, of the invoice price of \$16,887.32, both ship and cargo being owned by the plaintiff. On the 21st of March she arrived in safety with her cargo at St. Thomas, having met with no accident; and she continued at that port until the 30th of May following, for the purpose of selling her cargo, and for no other cause. During this period the master, who was also consignee, sold by retail five hundred and nine and one-half barrels; being limited by his instructions to \$8 per barrel, and not being able to procure that price for the residue of the cargo, he sailed on the 31st of May for Cape Haytien with it, and had also on board some doubloons, amounting to \$480, part of the proceeds of the former sales. He might have sold his whole cargo, at from \$7.50 to \$7.75, at St. Thomas. The five hundred and nine and one-half barrels of flour sold at St. Thomas, according to the invoice price, amounted to \$3,512.99, leaving the value of the cargo on board, exclusive of the doubloons, at the time of sailing from that port, according to the invoice, at \$12,328.25.

On the 6th of June the ship, with her cargo, arrived off Cape Haytien, and, the captain having gone on shore, the ship stretching too far in, took the ground and was wrecked. In consequence of this disaster, one hundred and fifty-five barrels of flour were totally lost, one thousand six hundred and thirty-three were got on shore, part without injury, but the greater part damaged, and the whole was sold. The gross amount of the sales at Cape Haytien was \$9,381.34; the expenses of salvage, including commissions on sales, \$4,124.72; the proportion of the captain's expenses attaching on the cargo, \$285.78. Of the proceeds of the sales at Cape Haytien, the sum of \$4,953.89 was invested in coffee, which was shipped to Baltimore, where it produced only \$3,517.40. The plaintiff makes a claim for freight of the outward cargo of \$2,104.25, as a proper deduction from the proceeds.

As soon as the plaintiff heard of the loss, he sent the following letter to the insurance company, under date of the 5th of July, 1822: "Gentlemen, having received a letter from Captain M'Knight (the master), informing me that the ship Commerce was lost, I abandon the proportion of the cargo that your office was interested in. Respectfully," etc. The captain's protest, and the survey of the ship, were also exhibited to the company on the 14th of August. The abandonment was never finally accepted by the directors, but sundry negotiations took place between them and the plaintiff, which, however, led to no effectual arrangement.

§ 657. *Policy on ship's cargo "from A. to B. and back to her port of discharge" covers return cargo.*

The first question arising in this case is upon the true construction of the policy itself as to the voyage insured. Is it an insurance upon the original cargo only, from the time of its loading until its final discharge, or is it an insurance upon every successive cargo which is taken on board in the course of the voyage out and home, so as to cover the risk of a return cargo, the proceeds of the sales of the outward cargo? The argument in behalf of the defendant is, that the risk applies upon the terms of the policy only to the original cargo, laden at Alexandria. The terms of the policy are, on a voyage, "at and from Alexandria to St. Thomas and two other ports in the West Indies, and back to her port of discharge in the United States, upon all lawful goods and merchandise laden or to be laden on board the ship, etc.; beginning the adventure upon the said goods and merchandise, from the lading at Alexandria, and continuing the same until the said goods and merchan-

dise shall be safely landed at St. Thomas, etc., and the United States aforesaid." It is supposed that those words tie up the adventure to the original cargo shipped at Alexandria, because the risk is to attach on the same at that port, and to continue on the same until safely landed at St. Thomas, etc., and the United States. Perhaps a very strict grammatical construction might lead to such a conclusion. But policies have never been construed in such a strict and rigid manner. The instrument itself is somewhat loose in its form, and has always received a liberal construction with reference to the nature of the voyage and the manifest intent of the parties. What is the nature of the present voyage? It is upon the face of the policy plainly an insurance upon all lawful goods, not only for the outward voyage to the West Indies, but for the homeward voyage to the United States. The underwriters must be presumed, equally with the assured, to know the nature and course of such a voyage. It is for the purpose of trade, and the exchange of the outward cargo, by sale or barter, for a return cargo of West India productions. If we could shut our eyes to the knowledge of this fact, belonging, as it does, intimately to the history and commercial policy of the nation itself, as disclosed in its laws, the whole evidence in the case furnishes abundant proofs of its notoriety. The true meaning of the policy is to be sought in an exposition of the words, with reference to this known course and usage of the West India trade. The parties must be supposed to contract with a tacit adoption of it as the basis of their engagements. The object of the clause under consideration may be thus rationally expounded, as intended only to point out the time of the commencement and termination of the risk on the goods, successively, and at different periods of the voyage, constituting the cargo. It would be pushing the argument to a most unreasonable extent, to suppose that the parties deliberately contracted for risks on a homeward voyage, on goods which, according to the known course of the trade and the very nature of the commodities, were not and could not be intended to be brought back to the United States. We are of opinion that the policy was for the whole voyage round, and covered any return cargo taken on board at any of the designated ports in the West Indies. This is not like the cases cited at the bar, where a policy on goods at and from a particular port, beginning the adventure from the loading thereof, has been held not to cover goods taken on board at an antecedent port. Those are all cases of insurance upon a single passage, unaffected by any known course or usage of trade to explain the intentions of the parties.

§ 658. *Delay at port not a deviation unless excessive.*

The next question is whether the delay at St. Thomas for seventy days was not so unreasonable as to constitute a deviation. Without question, any unreasonable delay in the ordinary progress of the voyage avoids the policy on this account. But what delay will constitute such a deviation depends upon the nature of the voyage and the usage of the trade. It may be a very justifiable delay to wait in port and sell by retail, if that be the course of business, when such delay would be inexcusable in a voyage requiring or authorizing no such delay. The parties, in entering into the contract of insurance, are always supposed to be governed in the premium by the ordinary length of the voyage and the course of the trade. That delay, therefore, which is necessary to accomplish the objects of the voyage according to the course of the trade, if *bona fide* made, cannot be admitted to avoid the insurance. In the present case it is proved that the stay at St. Thomas was solely for the purpose of selling the cargo, and for no other cause. But it is said that a sale might

have taken place at St. Thomas, of the whole cargo if the orders of the owner had not contained a direction to the master limiting the sale at St. Thomas to the price of \$8, and that this limitation was the sole cause of the delay, and was unreasonable; that the master ought, under the circumstances, to have sold at a lower price, or have immediately elected to go to another port. We are of a different opinion. In almost every voyage undertaken of this nature, where different ports are to be visited for the purposes of trade and to seek markets, it is almost universal for the owner to prescribe limits of price to the sales. Such limitations have never hitherto been supposed to vary the insurance or the rights of the party under it. It cannot be that the master, if entitled to go to a single port only, is bound to sell at whatever sacrifice, as soon as he arrives at that port, and within the period at which he may unload, and sell, and reload a return cargo. He must, from the very nature of the case, have a discretion on this subject. If he arrives at a bad market, he must have a right to wait a reasonable time for a rise of the market, to make suitable inquiries, and to try the effect of partial and limited sales. He is not bound to sell the whole cargo at once, whatever be the sacrifice, and thus frustrate the projected adventure. In short, he must exercise, in this as in all other cases, a sound discretion, for the interest of all concerned; and, if it be fairly and reasonably exercised, it ought not to be deemed injurious to rights secured by the policy. It is as much the true interest of the owner to sell in a reasonable time and with all proper dispatch, as it is for the underwriters. To be sure, if the owner should limit the price to an extravagant sum, or the master should delay after all reasonable expectations of a change of market were extinguished, such circumstances might properly be left to a jury to infer a delay amounting to a deviation. And here, again, as on the former point, it may be remarked that every underwriter is presumed to know the ordinary course of the trade and to regulate his proceedings accordingly.

But it is said that there is no sufficient evidence of the use of trade in the present case. It is to be remembered that this is a case which comes before this court upon a demurrer to evidence. The plaintiff was not bound to have joined in the demurrer without the defendant's having distinctly admitted, upon the record, every fact which the evidence introduced on his behalf conduced to prove; and that when the joinder was made without insisting on this preliminary, the court is at liberty to draw the same inferences in favor of the plaintiff which the jury might have drawn from the facts stated. The evidence is taken most strongly against the party demurring to the evidence. This is the settled doctrine in this court, as recognized in *Pawling v. United States*, 4 Cranch, 219, and *Fowle v. The Common Council of Alexandria*, 11 Wheat., 320. The testimony in the present case does not in direct terms (as has been justly stated at the bar) establish the general usage of the West India trade. The witnesses do not generally speak to a usage, *eo nomine*. But it cannot be denied that its scope and object are to establish the usage, by an enumeration of facts and voyages, by persons experienced in the trade and referring to their own knowledge and general information. It thus conduces indirectly to prove the usage; and as it is altogether one way, it is certainly such that a jury might infer a usage from it. And if so, this court may infer it. We consider it, then, as a fair deduction from this testimony, that considerable delays in port in the West India trade are not uncommon, for the purpose of taking the advantages of the market, and that sales by retail are within the usage. There are no facts from which this court can infer that the delay

in the present case was unreasonable or unusual; and, consequently, we cannot admit that the delay amounted to a deviation. The case of *Oliver v. Maryland Ins. Co.*, 7 Cranch, 487 (§§ 733-34, *infra*), is in no respect inconsistent with this doctrine. One question in that case was, whether the delay at Barcelona, for the purpose of taking in a return cargo, was a deviation. The court below instructed the jury that it was not, if the vessel did not remain longer in that port than the usage and custom of trade at that place rendered necessary to complete her cargo. This court was of opinion that the instruction was in substance correct. The only difficulty which arose was from the terms of the instruction, which seemed to limit the right, not to the time necessary to take in the cargo, but to a particular period regulated by the usage of trade. The chief justice there said: "There is some doubt spread over the opinion in this case, in consequence of the terms in which it is expressed. The vessel might certainly remain as long as was necessary to complete her cargo, but it is scarcely to be supposed this was regulated by usage and custom. The usages and customs of a port or of a trade are peculiar to a port or trade. But the necessity of waiting, where a cargo is to be taken on board, until it can be obtained, is common to all ports and all trades. The length of time frequently employed in selling one cargo and procuring another may assist in proving that a particular vessel has or has not practiced unnecessary delays in port, but can establish no usage by which the time of remaining in port is fixed. The substantial part of the opinion, however, appears to have been, and seems so to have been understood, that the plaintiff could not recover unless the jury should be of opinion that the vessel did not remain longer at Barcelona than was necessary to complete her cargo, of which necessity the time usually employed for that purpose might be evidence." This case, therefore, recognizes the right to wait in port for the purpose of selling one cargo and procuring another, and the reasoning is employed solely to avoid a criticism founded upon some ambiguity of phrase peculiar to that case. On the other hand, the cases cited at the bar abundantly prove that the usage and course of trade are very material to determine whether the delay be unreasonable or not. *Salvador v. Hopkins*, 3 Burr., 1707; *Vallance v. Dewar*, 1 Campb., 503; *Ougier v. Jennings*, 1 Campb., 505, n. *Phillips' Insur.*, 182, 183.

The next question is, whether there has been a total loss. And this divides itself into two distinct considerations: first, whether the facts of the case created a right of abandonment as for a technical total loss; and, secondly, if so, whether there has been a legal abandonment by the assured.

§ 659. *Frustration and breaking up of voyage, requiring sale of cargo, a total loss.*

Upon the first point there is not much room for difficulty. The insurance was not for a single passage, but for the round voyage out and home. The cargo, in the course of the outward voyage and before it was terminated (for the master had still an election to go to another port after his arrival at Cape Haytien), was permanently separated from the ship by the total wreck of the latter. It was a perishable cargo and much injured by the accident, though it does not appear to be to the amount of one-half its value; and it was liable to still further deterioration. There was a necessity, then, for an immediate sale at Cape Haytien, and the further prosecution of the voyage with that ship or that cargo became impracticable. It was completely frustrated. Under such circumstances, we are of opinion that, according to the established doctrine of the commercial law, it was a clear case of a technical total loss,

on account of the breaking up of the voyage. It is a much stronger case than that of *Dorr v. New England Ins. Co.*, 4 Mass., 231, or *Hudson v. Harrison*, 3 Brod. & Bing., 97, where the court held the losses total.

§ 660. *Requirement of sixty days' notice of abandonment will not prevent immediate abandonment without notice, when.*

Was there, then, a due and legal abandonment? The letter of abandonment is admitted to have been sent in due season, and, in its terms, it amounts to a cession of the property. Under ordinary circumstances it would furnish nothing upon which to suspend a doubt. The difficulty arises from two clauses in the particular form of policy used by this company. One is in the following terms: "In case of loss, the same shall be paid in sixty days after proof and adjustment thereof, without any deduction, except the amount of the premium, if then unpaid." The other is: "It is hereby agreed that the insured shall not abandon to the insurers until sixty days have elapsed after having given notice to them of his intention so to do, and of the loss or event which may entitle the insured thereto." The suit was not brought until after more than one hundred and twenty days had elapsed from the abandonment made by the letter of the 5th of July. No question, therefore, arises on this head. But the argument is that the notice of abandonment must, by the terms of the policy, precede the actual abandonment sixty days, and that, in the present case, either no notice at all of such intention has been given, or there has been no actual abandonment at the end of that period. The letter of the 5th of July must either operate as a notice of abandonment, or as actual abandonment; if the former, then there has been no act of abandonment following up the notice; if the latter, then it was made too soon, and contrary to the terms of the stipulation. Such is the stress of the argument.

In construing these clauses, it is material to consider the intention of the parties, as expounded by the general principles of law applicable to the contract. By these principles, the assured, upon an abandonment in due season, for a technical total loss, acquires an immediate right of recovery against the underwriters. He is not bound to wait until they have signified their acceptance or refusal of the abandonment, if it be valid, nor, if accepted, is he bound to wait for payment, but he may immediately commence an action against them. The object of the first clause is, in the case of an undisputed loss, to obtain a delay of payment for sixty days after the adjustment. But, from its very terms, it can only apply to the case where there has been proof of loss, and also an adjustment. If proof of the loss has been offered, and no adjustment made, as in case of a disputed loss, the clause has been supposed, in the cases cited at the bar, not to apply. *Vos v. Robinson*, 9 Johns., 192; *Allegre v. Maryland Ins. Co.*, 6 Harr. & J., 408. The underwriter is, then, understood to waive the privilege. The true object of the second clause is to postpone the absolute right of abandonment until sixty days after notice of the loss, so as to enable the underwriters to have time for deliberation upon the acceptance or rejection of it, when made, and to avail themselves of all intermediate events for their benefit. It is wholly unnecessary to consider whether the assured, after a notice of abandonment, can retract, if the underwriters choose to insist upon accepting it; or whether, if, instead of a mere notice, he tenders an unequivocal abandonment, which is accepted by the underwriters within the sixty days, he has, nevertheless, a right to withdraw it, if, within the same period, events turn up in his favor. The present case does not present any facts leading to such a question. The clause is mani-

festly introduced into the policy for the advantage of the underwriters, and not of the assured. But there is no necessity for giving any very strict interpretation to it to accomplish the fair objects of its provisions. If Mr. Catlett had written a letter to the company, stating to them that he thereby gave notice to them of the loss, and his intention to abandon, and had then added therein that at the termination of the sixty days they were to deem that letter an absolute abandonment, there could scarcely be a doubt that such a letter would have been sufficient to satisfy the requirements of the clause. It would give to the underwriters the full benefit of it. If he had written at the same time two letters, one containing a notice of his intention to abandon, and the other that he made an abandonment, to take effect at the end of the sixty days after the notice, the same legal result would seem to be justified. The clause does not insist upon an abandonment being made *in presenti*, by an instrument dated at the expiration of the sixty days, but only that it shall not, in point of law, be obligatory as an abandonment until that period. This seems to us a fair and rational exposition of the intention of the clause. In what respect does the letter of the 5th of July differ from the legal results above stated? It is written with reference to the known language and stipulations of the policy, and it must now be interpreted as it must have been understood, and, indeed, looking to the subsequent proceedings of the company, we may say, as it was understood by both parties. Neither of them seems to have acted upon the supposition that any other or more formal act of abandonment was necessary. The letter gives notice of an intention to abandon, because, in its terms, it includes an actual abandonment. It has a tacit reference to the clause in the policy, and must be deemed as a notice to abandon, and, at the same time, a declaration that it shall operate as an abandonment in the case, as soon as by law it may. In our judgment it was a continuing act of abandonment, and became absolute at the end of the sixty days. It was an abandonment *in presenti* to take effect *in futuro*. Neither the form of the notice nor the abandonment is prescribed in the clause. They may be in one or two instruments; they may be in direct terms, or by fair and natural inference. It matters not how they are given or executed; it is sufficient, in point of fact, that they have been given or executed. Our opinion accordingly is that, upon the true interpretation of this last clause in the policy, the letter of the 5th of July was a sufficient notice of an intention to abandon, and that, at the expiration of the sixty days, it operated as an actual abandonment.

§ 661. *How the loss is to be determined.*

The abandonment, then, having been duly made, the next question that arises is, how the loss is to be apportioned. The argument on behalf of the company is, that as part of the cargo was landed at St. Thomas, the amount risked by them is to be diminished by their proportion of the cargo so landed. In short, that the loss is now to be made up by them with reference to the value of the whole cargo on board when the risk first attached, and not with reference to the value on board at the time of the loss, notwithstanding it exceeded the amount insured. We are of a different opinion. We think the true intent and object of the policy was to cover an insurance of \$10,000 during the whole voyage out and home, so long as the assured had that amount of property on board. This is not a policy for a voyage to St. Thomas only, in which case the argument might justly apply. But it is a policy to two other ports on the outward voyage, and also for the homeward voyage. The

language of the policy is, that the underwriters insure \$10,000 at and from Alexandria, and two other ports in the West Indies, and back to the United States. The premium is apportioned accordingly, for a half per cent. is to be returned "for each port not used or attempted;" and the contemplation of the parties manifestly is, that the premium should be paid during the round voyage upon the full sum insured, and that the assured should have the full benefit of the insurance so long as he had \$10,000 on board. The intermediate landing of a portion of the cargo in the course of the voyage was wholly immaterial in the understanding of the parties, so long as the value on board was sufficient to cover the insurance. If the clause, usual in policies in the eastern states as to priority of insurance, had been here incorporated and there had been a subsequent insurance, this, as the prior policy, must have first attached to the extent of the sum insured during the whole voyage. If there had been a subsequent insurance without any such clause, it might form a case for contribution among the various underwriters, but would in no shape affect the rights of the assured. The loss, therefore, must be apportioned between the parties, in the proportion which the sum insured bears to the amount of value on board at the time of the loss; that is, as \$10,000 bears to \$12,328.25.

§ 662. *Pro rata freight not a charge on salvage money abandoned to underwriters.*

The next question is, whether the freight for the outward voyage is to be deducted from the salvage and allowed the assured, who was owner of the ship as well as the cargo. The amount reported by the auditor is not disputed, and the controversy is whether it is a charge upon the salvage in the hands of the underwriters. In point of fact, no freight was or could be payable in this case, for the plain reason that the assured was owner of the ship, and there could, therefore, be no lien upon the cargo or its proceeds for the same. But in point of law the case is not supposed to be varied by this circumstance; for if the freight would be a proper charge on the salvage if a third person were owner of the ship, in the hands of the insured, there is no reason why it should not be allowed when the assured is owner. We consider the law on this point as conclusively settled. As between the owner of the ship and the owner of the cargo, the former has a lien upon the cargo for all the freight which becomes due and payable to him, whether it be a full or *pro rata* freight. But freight is a charge upon the cargo, against which the underwriters do not, in any event, whether of abandonment with salvage, or of partial loss, undertake to indemnify the owner of the cargo. In order to obtain the salvage, when in the hands of the ship-owner, it may become necessary for the underwriters to pay the amount of the freight, for which they have a lien, as it may to pay any other charge created by the act of the owner of the cargo. But this does not change the nature or extent of the responsibility of the underwriters. As between themselves and the assured, they have a right to deduct the amount so paid from the loss, or to recover it in any other manner, as money paid for the use of the latter. This doctrine was expressly held by the court of king's bench, in *Baillie v. Modigliani*, Marshall, Ins., 736, and was confirmed in the fullest manner in this court, in *Caze and Richaud v. Baltimore Ins. Co.*, 7 Cranch, 358 (§§ 483-89, *supra*).

§ 663. *Not necessary to aver abandonment in the declaration.*

It only remains to notice an objection made to the form of the declaration. It is said that there is no averment in the declaration that any preliminary proofs of loss were offered to the company, nor of any promise to pay in sixty

days after such proofs, according to the terms of the policy, nor that any abandonment or notice was given to the underwriters. It was, in our judgment, wholly unnecessary to aver the latter facts. The abandonment and notice thereof are but matters of evidence to establish the fact of a total loss, which is expressly averred in the declaration. As to the other part of the objection, it proceeds upon a mistake of the terms of the declaration. There is an express avèrment, after the allegation of the loss, that the company, on, etc., at, etc., had notice thereof, and by means thereof became liable, etc., and in consideration thereof promised that they would pay the plaintiff the sum due, "according to the tenor and effect of the said policy of insurance." This is a sufficient avèrment of a promise to pay according to the stipulations of the policy, and conforms to the general course of precedents in pleading.

Upon the whole, it is the opinion of this court that the judgment of the court below, so far as it allowed the freight of \$2,041.25 to the assured, is erroneous and ought to be reversed; and that, in all other respects, it ought to be affirmed.

MR. JUSTICE JOHNSON concurred with the court "in all the points decided in this cause, except that which relates to freight." He said that "in cases of absolute total loss, no freight can be earned; but in that of a technical total loss, it is well known that freight may be earned. It was not disputed in the argument that freight, in this case, was earned; and the sufficiency of the abandonment to cast the loss upon the underwriters is now decided. It is true, the underwriters did not accept the abandonment, and have not, by any express act, accepted the salvage, but they are doing it now, when they lay claim to the proceeds of the salvage remitted to Catlett. If they do not mean to be incumbered with the freight, let them withdraw their claim to the remittance, and Catlett then remains in possession of the cargo, subject to his lien for freight. The case must then be considered as one in which the freight is earned, and both the abandonment and salvage accepted, but the proceeds of the latter remitted to the ship-owner, and by him retained for freight. The question will be, whether, in such a case, the underwriter, who has thus been compelled in effect to pay the freight, can recover it, in any form of action, from the insured?" His conclusion was as follows: "Upon the whole, I never was clearer in any opinion in my life, than that the decision now rendered against the allowance of freight in this adjustment is not to be sustained by either principle or authority."

The following additional opinion was subsequently rendered by MR. JUSTICE STORY:

In consequence of the former opinion delivered in this cause, the parties have found it necessary to readjust the auditor's report in several particulars not suggested at the former argument. Indeed, upon that argument, the parties assumed that the report was perfectly correct, except as to the item of freight. We have examined the report, and are satisfied that the original plaintiff is entitled to recover the sum of \$6,626.18, with interest from the 14th of October, 1822, which is the residue of the sum of \$10,000 insured by the company, deducting the premium note and the proportion of salvage belonging to the underwriters, which has been received by the original plaintiff; and the judgment of the circuit court is to be reformed accordingly.

SEAMANS v. LORING.

(1 Mason, 127-146. 1816.)

STATEMENT OF FACTS.—This was an action brought by the plaintiff, as indorsee of the executors, etc., of Amos M. Atwell, an insurance broker, to recover a premium note signed by the defendants, and dated the 7th of February, 1814, for the sum of \$1,401, payable to the said Atwell, or order, in ninety days after date. The cause was tried upon the general issue, when the following facts appeared:

The policy for which the premium note was given was underwritten in the office kept by Mr. Atwell, at Providence in Rhode Island, on the 7th day of February, 1814. By the policy, "Messrs. Loring and Curtis, of Boston, for Leonard Jarvis, the 3d, or whom it may concern, do make insurance, and cause him or them to be insured, lost or not lost, arrived or not arrived, the sum of \$2,800, on the brig Fame and appurtenances, and on her cargo on board, at and from Bergen, in Norway, to Boston, or a port of discharge in the United States, and until the cargo is safely landed. The brig Fame was an English vessel, captured by a privateer and sent into Norway, and it is not known whether she has been condemned as prize or not; in case of loss, payable to said Loring and Curtis only, or their order, whereof is master for this present voyage Justus B. Lockwood, or whoever else shall go master in the said vessel, etc., beginning the adventure upon the said brig Fame, appurtenances, and cargo, at Bergen as aforesaid," etc. In the margin, the insurance was declared to be on vessel \$600, and on cargo \$2,200. The premium was fifty per cent. At the close of the policy was the following clause:

"And it is the express condition of this policy, that the subscribers hereto shall be discharged from every risk, in case the same property should be wholly assured by any policy or policies, actually prior to this. But should any part of the same property remain unassured by such prior policy or policies, or if the sum assured by this policy should exceed the true value of the property at risk, then the first subscribers hereto, and those next in succession, shall be held to bear and take the risk of the sum written by each respectively, until the real amount of the property at risk shall be fully assured, and the subsequent subscribers to this, *and policies of a later date*, shall be discharged from every risk. But every subscriber, though discharged from the risk, shall be entitled to one-half per centum on the sum written by him. But in all cases of return premium, one-half per cent. to be retained by the assurers."

The insurance was effected under the following circumstances: Mr. Leonard Jarvis had in his hands funds belonging to the defendants, which he was desirous of remitting to the United States, but not finding any convenient mode, he entered into a negotiation with Mr. Preble, of Paris, whereby he agreed to advance him one hundred thousand francs, and take his bills of exchange, indorsed by Mr. Daniel Parker, of Paris, and drawn on the defendants, for the amount. Mr. Preble was, at that time, owner of the privateer True-Blooded Yankee, which had sent several prizes into Bergen, in Norway, and among others, the brig Fame and cargo; and it was agreed that the said brig and cargo should be sent to Boston, under the control of Jarvis, and in his name consigned to the defendants, who were, out of the proceeds, to pay the amount of the bills so drawn on them. Mr. Jarvis, by a letter dated Paris, November 10, 1813, wrote the defendants, giving them information of this negotiation, and in his letter are the following paragraphs: "Mr. Preble has,

in Norway, at his disposition, about one hundred and fifty thousand yards of Irish linen, and one thousand two hundred yards of table linen, together with a fine brig of two hundred tons, prize to the privateer to which he is agent. I have agreed to advance him one hundred thousand francs, upon the following conditions: 1st. That I should have the entire control over it, and expedite it to Boston in my name, as security for the advance I made, consigning it to you, and giving you orders for the insurance, covering the amount. At foot you will find note for insurance, that you will not fail to have effected, as Preble would by no means be uncovered." Note for insurance — "\$30,000, covering the premium, on brig Fame and cargo, at and from the port of Bergen in Norway, to that of Boston in America, warranted to sail during the winter, for account and risk of Leonard Jarvis, 3d. If you can leave out the warranty, without much affecting the rate of premium, it would be better."

The defendants applied to Mr. Atwell to procure the insurance, by a letter dated on the 1st of February, 1814, and in that letter they stated the commendations, bestowed by Mr. Jarvis upon Capt. Justus Lockwood, who was to be the master for the voyage and upon the vessel; and among other things, that it "is expected she will sail about the 1st of January, so that we may look for her in all February. Her cargo will consist of linens; the vessel was captured, be believe, by the True-Blooded Yankee." The letter further stated the form of the policies underwritten upon the same vessel and cargo, for the same voyage, in Boston, and then adds: "We have effected upwards of \$37,000, at the public and private offices;" and afterwards, "we may wish to have \$23,000 done, instead of \$15,000, if you can effect it." In another letter of the defendants to Mr. Atwell, dated the 5th of February, they state (and give the particulars) that \$41,000 had then been underwritten in Boston and Salem. Between the date of this letter and the effecting of the policy at Providence, there was an additional sum underwritten on the prior policies, so that on the 7th of February, 1814, those policies, which were on the same voyage, and precisely in the same terms with the Providence policy, covered, in the aggregate, the sum of \$43,700, on vessel and cargo, viz.: \$9,190 on the vessel, and \$34,510 on the cargo.

The brig Fame arrived at Bergen, in Norway, in March, 1813, and her cargo was immediately taken out and put into the government stores. As soon as the negotiation between Messrs. Jarvis and Preble was completed, in November, 1813, Capt. Lockwood was dispatched by them from Paris to Bergen, and he received orders before his departure, from Mr. Preble, to sell the brig and cargo at public sale, payable in undoubted bills on Paris, and that if Mr. Jarvis should instruct him to purchase the brig, and about one hundred and fifty-one thousand yards of linen, he (Lockwood) might draw on Mr. Preble for the amount. Accordingly Mr. Jarvis did so instruct Lockwood to purchase the brig and linens, and draw on Mr. Preble, as had in fact been previously arranged between himself and Mr. Preble. Mr. Lockwood was farther instructed, that if he purchased the brig and linens for Mr. Jarvis, to put her under American colors, take the command of her as master, ship said linen on board, with a sufficient quantity of iron to ballast her, and proceed to Boston, and there deliver the vessel and cargo to the defendants.

Mr. Lockwood did not arrive in Bergen until April, 1814, when he found the brig stripped, and moored in one of the outer harbors of Bergen. The linens were then in Mr. Janson's store, under the seal of the government, who re-

fused to permit the brig to leave the port, and either the brig or linens to be sold. Sometime afterwards liberty was obtained from the government to sell the white linens, and accordingly they were sold by public auction, and generally bought in by Capt. Lockwood, for the account of Mr. Jarvis; and finding the prices good, he proceeded to sell the same linens by retail. The government, however, still withheld the brown linens, asserting that they were wanted for the use of their soldiers. Mr. Jarvis having received information of these facts, in the autumn of 1814, made a direct contract with Mr. Preble for the sale of the vessel and cargo, and determined immediately to proceed to Bergen. Accordingly Mr. Preble, in October, 1814, executed a bill of sale of the brig to Mr. Jarvis, and sent directions to his agents at Bergen, to deliver over the cargo to him, and to account with him for the proceeds already sold. In November, 1814, Mr. Jarvis arrived in Bergen, and there found Capt. Lockwood, selling the white linens by retail at a good price, and engaged in negotiation with the government respecting the price to be paid by them for the brown linens, which were still in the stores, under the government seals. Mr. Jarvis being about to return to Paris, gave instructions to Capt. Lockwood to have the brown linens sold by public auction, and bought in on his account, in the same manner that the white linens had been (which, it was stated, could have been procured to be done, by a little management with the officers of the government), and to sell the same by retail, unless the whole could be sold at an advantageous price. But, just on the eve of his departure, the negotiation with the government was completed and they agreed to purchase the brown linens at a great price, and Mr. Jarvis ratified the sale.

At this time all further thoughts of performing the original voyage to Boston were laid aside. Mr. Jarvis returned to Paris and again returned to Bergen in March, 1815. In the meantime the government had, by the intervening peace, become dissatisfied with their bargain, and finally agreed to return the brown linens to Mr. Jarvis and to pay him £1,000 sterling as a remuneration for his loss. The proposal was accepted, and the brown linens were accordingly restored. Mr. Jarvis then directed the brig and brown linens to be sold by public auction, with a view to change the apparent property, and they were accordingly sold, and the brig and a great part of the linens were purchased, upon his account, by a Mr. Hans Reimer, of Bergen. The brig was then put under Swedish colors, her name changed to the *Waren*, and she had a Norwegian register and other documents and a Norwegian master and crew. Mr. Jarvis, at first, intended to send the brig, with the residue of the linens, to France; but the return of Bonaparte from Elba induced him to give up this voyage. He next projected a voyage to the West Indies, and finally determined to send the vessel to the United States. Accordingly the remaining linens were, in the latter part of May, 1815, put on board of the brig, documented as a Swedish vessel. She sailed on the voyage about the 22d of June and arrived in Boston in August, 1815. The cargo was stated, in the invoice to be shipped by Mr. Jarvis, on account and risk of Messrs. Loring and Curtis, and consigned to them. The invoice value of the cargo (which was sworn to be the true value) was \$16,258.16, and the value of the vessel \$2,862, to cover which, at fifty per cent. premium, would require double the amount, viz., \$5,724 on the vessel and \$32,516 on the cargo; in the whole \$38,240.32.

In consequence of information received by the defendants from Mr. Jarvis of the state of the property, the defendants, between the 20th and 24th of

December, 1814, procured a memorandum to be underwritten upon eight of the policies, which covered the sum of \$28,300, in substance as follows: "It is agreed that the delay in the sailing of the *Fame* from Bergen shall not be considered as a deviation, the assured warranting that she shall sail for the United States on or before the 1st day of February, 1815. The assured also warrant that the goods were sound at the time of the shipment. If the *Fame* does not sail before the 2d day of February, and the risk ends without a loss, the whole premium is to be returned, excepting a reasonable compensation for the risk which shall have accrued." These policies were afterwards canceled upon payment of one-half per cent. All the other policies were also canceled in March and April, 1815, except the Providence policy, upon the payment of one-half per cent.

The underwriters on the policy, at Providence, were applied to for the purpose of agreeing to a like memorandum, but they declined inserting it.

§ 664. *Policy "for whom it may concern" will protect the property of a foreigner, where there is nothing inconsistent with that idea.*

Opinion by STORY, J. (after stating the facts).

The first question is, whose interest is assured by the terms of the policy? The policy was effected by Messrs. Loring and Curtis, for Leonard Jarvis, 3d, or whom the same "may concern." It will, therefore, by its terms cover the interest of L. Jarvis, or any other person, having an interest in the vessel and cargo, who has given an authority for such insurance. There is no warranty or representation of an American character, and the insurance may avail for any foreigner who has authorized it to be made on his own account. *Hodgson v. Marine Ins. Co.*, 5 Cranch, 100. But the insurance cannot inure in favor of any person who had an interest in the cargo, unless Messrs. Loring and Curtis had an authority from him for that purpose. *Steinback v. Rhinelander*, 3 John. C., 269.

§ 665. *The letter of instructions held to authorize an insurance for L. Jarvis only.*

The letter of instructions, under which this insurance was effected, is now before us, and the construction of it is a question of law. I am of opinion that it authorized an insurance to be made for L. Jarvis only; and that an insurance for the captors, or for Mr. Preble, was not authorized by it. There is nothing in the letter which imports that L. Jarvis is acting as agent for the captors, or for Mr. Preble, in making the insurance; on the contrary, he speaks in reference to an interest which he had acquired in the vessel and cargo by virtue of advances made upon the credit of that fund; and the language in the close of the letter is perfectly satisfied by the obvious interest that Mr. Preble had, in having an insurance made by Jarvis to the amount of his interest, without supposing that he authorized any insurance directly on his own account. And in respect of proof of authority to make insurance, I think that it should not be gathered from loose expressions or inferences in letters of third persons, but should distinctly appear in some communication between the parties or their indisputable agents. Assuming, therefore, that a mere prize agent, as such, has, without any special authority for that purpose, a right to insure for the benefit of the captors (*Le Cras v. Hughes*, 1 Marsh. Ins., 84, 108; *Craufurd v. Hunter*, 8 T. R., 13; *Lucena v. Craufurd*, 3 Bos. & Pull., 75; *id.*, 5 Bos. & Pull., 323; *id.*, 1 Taunt., 325; *Stirling v. Vaughan*, 2 Camp., 225; *Routh v. Thompson*, 11 East, 428), still as that insurance does not appear to have been authorized by such agent, it cannot avail for the captors.

It is argued that the words "whom it may concern" have no effect, unless they are made to cover the interest of Mr. Preble. If that were true, and they were thus to be deemed mere surplusage, it would not vary the legal result. But, in this policy, the words seem to me to have an appropriate use. Under all the circumstances of this case, as the advances were made to Mr. Preble out of the funds of Messrs. Loring and Curtis, by Jarvis, as their agent, by adopting his acts, and making the insurance, it might be that thereby the interest, whatever it was, that was acquired under the contract between Preble and Jarvis, might be deemed to be theirs and not Jarvis'. In this view, it might have been a moot point (if the policy had been for Jarvis only) whether he had an interest to which it could attach; and therefore the words "for whom it may concern" were properly added to cure a doubt; and they are sufficient to cover any interest of Messrs. Loring and Curtis in the vessel and cargo.

§ 666. *Ownership of property; title to vessel passes only by writing; rule as to cargo.*

The next consideration respects the nature of the interest covered by the policy. It is on "the brig Fame and her cargo on board." It can, therefore, cover no interest except in the vessel and cargo; and the question is, whether Jarvis, or Messrs. Loring and Curtis, were the owners of the vessel and cargo, or of any interest therein.

The original contract between Preble and Jarvis certainly was not intended to convey the general ownership, even admitting that Preble was the entire owner of the vessel and cargo, which is certainly not in proof, but, for the purposes of this trial, seems conceded by the parties. That contract was, that the vessel should be put under the control and management of Jarvis, and consigned to Loring and Curtis; and out of the proceeds of the sale, after her arrival in the United States, they were to pay a bill of exchange, drawn upon them, for their own use. The surplus was to be for the benefit of Preble, or the captors. The utmost interest, then, intended in the first instance to be conveyed, was a *lien* on the vessel and cargo, to the extent of the advances made by Jarvis. To pass the title to a vessel, it is indispensable that there should be some written transfer of the vessel. This is required by the law of nations, as well as the municipal law of this country. A vessel will not pass by a mere delivery, without a document of sale; the latter is considered as an indispensable muniment of title. The Sisters, 5 Rob., 155; Abbott on Shipping, ch. 1, p. 1. And I think that a lien for general advances cannot be acquired, unless by an hypothecation or other conveyance in writing for this purpose; and if it were otherwise, it is clear that the lien could not be complete, having a *situs in re*, until possession was acquired under the contract. I should hold, therefore, that no ownership in the vessel was acquired until the bill of sale to Jarvis in October, 1814, if it were necessary to rest this cause on that point; but it may well be disposed of, even assuming the more favorable position for the plaintiff, that an interest was acquired as soon as the contract for advances was consummated, by an actual possession by Capt. Lockwood, in April, 1814.

As to the cargo, a different consideration may, in some respects, prevail. The title may pass by mere delivery of the goods under a contract of sale, or a lien may be acquired for advances by mere possession under a contract for that purpose. But it is of the very essence of a lien on goods that possession accompanies it. The contract in October, 1813, was clearly executory, both as to vessel and cargo. It was contemplated by the parties that the interest

of Jarvis was to be acquired under a public sale at Bergen of the vessel and cargo, which were to be bought in on his account, and conveyances were to be made to him. Until such conveyances, he was not deemed to be the ostensible owner, nor his control of the vessel complete. And the subsequent agreement and sale, in November, 1814, is perfectly consistent with this construction of the original contract. If, therefore, Jarvis did acquire a lien on the vessel and cargo under the contract for advances, followed up by possession, I think that he may be rightfully considered as the special owner of them to the extent of these advances; and as such might protect himself by an insurance to that extent. *Russel v. Union Ins. Co.*, 4 Dall., 421.

§ 667. *Policy "at and from" attaches, when; varying situations of vessel.*

The next question is, at what time, if ever, did the policy attach? The insurance is, "at and from," etc. What is the true construction of these words in policies must, in some measure, depend upon the state of things, and the situation of the parties, at the time of underwriting the policy. If at that time the vessel be abroad in a foreign port, or expected to arrive at such port in the course of a voyage, the policy by the word "at" will attach upon the vessel and cargo from the time of her arrival at such port. *Smith v. Steinbach*, 2 Caines, C., 158; *Garrigues v. Coxe*, 1 Binn., 592; *Chitty v. Selwyn*, 2 Atk., 359; *Cambden v. Cowley*, 2 W. Black., 417; 1 Marsh. Ins., 262; *Bird v. Appleton*, 8 T. R., 562; *Bell v. Bell*, 2 Camp., 475; *Hull v. Cooper*, 14 East, 479; *Horneyer v. Lushington*, 15 East, 46; *Annen v. Woodman*, 3 Taunt., 299; *Patrick v. Ludlow*, 3 John. C., 10. If, on the other hand, the vessel has been a long time in such port without reference to any particular voyage, the policy will attach only from the time that preparations are begun to be made with reference to the voyage insured. *Kemble v. Bowne*, 1 Caines, 75, 79; *Chitty v. Selwyn*, 2 Atk., 359; *Gladstone v. Clay*, 1 Maule & Selw., 418. And if the party insured acquired the ownership subsequent to such time, and before the date of his policy, then the policy will attach only from the time of acquiring such ownership. If, on the other hand, the ship be at a home port at the time of effecting such insurance, the policy seems generally to be deemed to attach only from the date of the policy. *Forbes v. Wilson*, 1 Marsh. Ins., 155, 261; *Smith v. Steinbach*, 2 Caines, C., 158.

In all these cases the law looks to the known and admitted predicaments of the parties at the time of the insurance and construes the contract with reference to such facts; and a uniform construction of the words, without reference to such circumstances, would often produce the most incongruous and mischievous results.

In the present case the vessel was in a foreign port, not in the course of a voyage, but moored and stripped, without any destination for any particular voyage. She arrived at that port in March, 1813, and her cargo was about that time unladen. The captors, or their agents, had not at that time, nor at any other time before the contract with Mr. Jarvis in December, 1813, the slightest intention of undertaking a voyage to Boston. If this policy then were construed to attach from the moment of the first arrival of the *Fame* at Bergen, it would wholly defeat the intention of all the parties to this insurance. The captors or their agents never authorized any such insurance upon their own account, and it would, therefore, be a mere nullity. Neither Mr. Jarvis nor Messrs. Loring and Curtis had at that time acquired any interest in the property, and the assured must have a subsisting interest at the time when the policy, by its terms, would attach, otherwise it will be void for want

of an insurable interest. Such an interest, subsequently acquired, would not aid them; and it may be added that there would have been such a concealment of material facts, whether innocently or otherwise is not important, that the underwriters would have been completely discharged. My opinion is, that, under the circumstances, this policy, by its terms, did not attach at the arrival of the *Fame* at Bergen; that it could not attach on the vessel earlier than the period in which the assured acquired the special or general ownership of the vessel; nor, if that was previous to the effecting of the policy, until some act was done, or preparation made, with reference to the voyage. If the ownership was acquired subsequently to the date of the insurance, and before preparations for a voyage, the same rule will apply; if, while preparations were making for the voyage, the policy will attach only from the time of acquiring the ownership. And in these cases it is always an important inquiry whether there has been a concealment of facts material to the risk, or a delay in acquiring the ownership, or in preparing for, and sailing on the voyage, which ought to discharge the underwriter. As to the cargo, it is clear from the terms of the policy that the policy could not attach on it until it was actually put on board for the voyage. The word "cargo" *ex vi termini* means goods on board of the vessel; and in this policy, it is not even on "cargo" generally, but on "cargo on board."

We may now apply these principles to the facts of this case. Assuming that the ownership of the vessel was acquired in April, 1814, by the possession of Capt. Lockwood, the policy did not immediately attach on the vessel, but only from the time when preparations were made for the voyage. It is clear from the evidence that no such preparations were made by Capt. Lockwood on his arrival at Bergen. He then found the cargo under the seals of the government, and they refused to allow the cargo to be put on board the vessel or the vessel to depart from the port. No sale of the vessel was ever made by him by public auction so as to constitute Mr. Jarvis the ostensible owner; and, in the autumn of 1814, having obtained leave, he sold the white linens by public auction and bought them in for Mr. Jarvis, and then proceeded to sell them on his account by retail. When Mr. Jarvis arrived at Bergen in November, 1814, he confirmed these acts of Lockwood, ratified the sale of the brown linens to the government, and totally abandoned all further thoughts of the voyage. The very substratum of the voyage, the whole cargo of linens, was voluntarily disposed of; and it was not until his second return to Bergen, in March, 1815, when the brown linens were returned by the government, and after having two other voyages in view, that Mr. Jarvis concluded to resume the original voyage to Boston. Preparations for this purpose were made in May, 1815, and the cargo was then, for the first time, put on board.

Under these circumstances the policy did not attach on vessel or cargo, until that time. There is no pretense that this delay was justified by necessity; and therefore the underwriters could not have been held under the policy. In fact, as to them, there was a complete non-inception of the voyage insured. It was not a deviation, for that supposes the voyage to have commenced. But there was a delay, which to all intents and purposes made the voyage a new one which they never had insured. The very representation under which they had underwritten was of a voyage immediately to be performed, and not of a voyage to commence *in futuro*, at any period when it might suit the convenience of the assured to prosecute it.

§ 668. *Existing over-insurance, leaving nothing for new policy to attach upon. Cancellation of the prior insurance after insurance of second policy immaterial. Construction of policy.*

But there is another point, which, if the evidence be believed, and it is exceedingly strong, and as far as I recollect perfectly uncontradicted, completely disposes of the cause, let the other points be as they may. It is the point that there was an over-insurance before the date of the present policy, the whole interest being, as it is asserted, but \$38,240.32, and the whole prior insurance being \$43,700. If the jury are satisfied that such was the fact, then it is my opinion that the present policy never attached for want a subject-matter upon which it could operate, notwithstanding the prior policies were canceled or defunct before the risk commenced.

The prior policies were all underwritten upon the same voyage and in the same terms; their priority, therefore, was according to their respective dates, and nothing done by the parties to those policies after the execution of the present policy could alter the relative situation of the parties to this policy. The rights of the latter were fixed by the terms of their own contract. The memorandum, therefore, entered upon the prior policies in December, 1814, by which those policies, from non-compliance with the warranty, were discharged on the 2d day of February, 1815, before the risk commenced, has no effect upon the present policy; and, as between the parties in the present suit, those policies are to be considered in the same manner as if no such memorandum or cancellation had ever been made. It is not competent for the assured thus to change the legal predicament of the underwriters on a policy. The clause in this policy referring to the effect of prior policies is perfectly unambiguous in its terms. When it speaks of the property's being assured by policies "actually prior to this" policy, it speaks with reference to such policies as subsisted at the real date of this policy. It does not refer to any subsequent acts or agreements between the parties by which those policies might, or might not, attach upon the subject-matter. If the property which the assured has in the subject-matter of insurance would be completely covered by those policies, supposing them still in existence, it is quite immaterial to the subsequent underwriters, whether the assured choose to hold or release those policies. The language of the clause, as to subsequent insurers, manifestly refers their responsibility to the date of their policies, and confirms the construction which has been stated. Upon any other construction great inconveniences and even frauds might arise; and in case of a subsequent increase of risk, there would be great temptations for prior underwriters to collude with the assured, and discharge themselves, and charge the subsequent insurers. All that is required by the terms of the contract is, that the property should be wholly assured by a prior insurance for the same voyage; but whether that insurance ultimately protects the party or not, is a question with which the contract does not at all intermeddle.

§ 669. *Change of colors and documents increasing risk discharges underwriter.*

I do not think it necessary, considering the predicament of this case, to press another point, which has been made at the argument. From the terms of the policy, the vessel is warranted to be an English prize vessel; and if, by changing her colors and documents, and giving her a Swedish character, before the policy attached, the risk was materially increased, the underwriters were completely discharged. (Verdict for the defendants.)

Motion for new trial on account of a misdirection of the court upon the point as to the effect of the memorandum upon and cancellation of the prior policies.

Opinion by STORY, J.

I remain of the same opinion, which was expressed at the trial, upon the point now in question. Every subsequent reflection has confirmed me in the belief of the correctness of that opinion. There is no case in the books in which this point has come solemnly in judgment; but it seems to have been taken for granted in various discussions of courts of law that the construction for which we contend was the true one. Mr. Justice Kent has sufficiently stated the true meaning of the clause. *New York Ins. Co. v. Thomas*, 3 John. C., 1. An insurance prior in date is to exonerate the underwriter, and entitle the assured to a return of premium; an insurance subsequent in date is to have no effect at all upon the present policy. *Lee v. Mass. Fire and Marine Ins. Co.*, 6 Mass., 208; *Brown v. Hartford Ins. Co.*, 3 Day, 58. On the whole, the district judge concurs with me in the opinion that the motion for a new trial must be overruled.

SIMPSON v. PACIFIC MUTUAL INSURANCE COMPANY.

(Circuit Court for Massachusetts: 1 Holmes, 186-142. 1872.)

Opinion by SHEPLEY, J.

STATEMENT OF FACTS.—This suit is against the defendant, as underwriter, on a policy of insurance upon the ship *Live Oak*, for a voyage from Cardiff to New Zealand, Callao, Chinha Islands, and thence to Valencia, Spain. The policy was to terminate on the arrival of the ship at Valencia, in the kingdom of Spain, and being at anchor twenty-four hours in safety. Proofs of loss were exhibited to the defendant April 25, 1868. Payment is refused, on the ground that the risk had terminated before the ship was lost.

The ship arrived on the 7th day of December, 1867, at the anchorage ground, which is open and exposed, outside of the artificial harbor of Valencia. At this anchorage ground vessels of large draught anchor and lie, until they are lightened sufficiently to pass the bar at the entrance of an outer artificial basin, formed by stone walls projected into the sea, where they are further lightened, until they can pass the bar at the entrance of the inner artificial basin or harbor, where the discharge of the cargo is completed by lighters. Vessels are never discharged completely at the anchorage ground.

On the 8th day of December lighters came and began to discharge, and continued to do so on the 9th, by which the vessel was lightened about one foot. On the morning of the 10th there were signs of a heavy gale, and the master received orders from the captain of the port to send down the top-gallant-yards and masts, and to have axes in readiness to cut away the masts.

Afterwards the master started for the shore, and was informed that the captain of the port had ordered the pilots to bring the ship into the outer harbor, and that a steam-tug was coaling for the purpose. The master protested to the pilots and to the captain of the port, whose authority in such cases is supreme, against this being attempted, considering that, as the sea was very high, the danger of being driven ashore, if the ship remained at anchor, was much less than that of taking the bottom in crossing the bar. But the officers of the port insisted. The tug went to the ship, made fast and attempted to tow her in. Near the end of the breakwater three heavy seas.

came in together; the first broke between the ship and the tug, throwing the latter ahead with such force as to cause the bitts to which the hawsers were fastened to give way. The ship immediately struck the bottom, her keel came up, in twenty minutes she had seventeen feet of water in her hold, soon filled, and began to break up, and was totally lost. None of the crew had been discharged.

The question presented for adjudication is, whether, on the facts which appear in this case, the ship is to be considered as having arrived at Valencia, and been at anchor twenty-four hours in safety before she was wrecked. If she had, the risk had terminated; if she had not, the defendant is liable.

§ 670. *When a vessel arrives at port of discharge.*

A vessel arrives at a port of discharge when she comes, or is brought, to the place where it is intended to discharge her, and where is the usual and customary place of discharge. When a vessel is insured to one or two ports, and sails for one, the risk terminates on her arrival there.

§ 671. *Risk ends after vessel has been moored twenty-four hours in safety, when.*

If a vessel is insured to a particular port of discharge, and is destined to discharge cargo successively at two different wharves, docks, or places, within that port, each being a distinct place for the delivery of cargo, the risk ends when she has been moored twenty-four hours in safety at the first place. But if she is destined to one or more places for the delivery of cargo, and delivery or discharge of a portion of her cargo is necessary, not by reason of her having reached any destined place of delivery, but as a necessary and usual nautical measure, to enable her to reach such usual and destined place of delivery, she cannot properly be considered as having arrived at the usual and customary place of discharge, when she is at anchor for the purpose only of using such means as will better enable her to reach it.

§ 672. *Reaching harbor, what. Authorities reviewed.*

If she cannot get to the destined and usual place of discharge in the port, because she is too deep and must be lightened to get there, and, to aid in prosecuting the voyage, cargo is thrown overboard or put into lighters, such discharge does not make that the place of arrival; it is only a stopping place in the voyage.

When the vessel is insured to a particular port of discharge, arrival within the limits of the harbor does not terminate the risk, if the place is not one where vessels are discharged and voyages completed. The policy covers the vessel through the port navigation as well as on the open sea, until she reaches the destined place.

In *Meigs v. The Mutual Marine Ins. Co.*, 2 Cush., 453, the court say: "Reaching the harbor, therefore, cannot be arriving, within the meaning of the policy; and if it do not mean that, it must mean that particular place or point in the harbor which is the ultimate destination of the ship. Until that point is reached, the voyage is not ended, and the ship has not arrived; though she may be obstructed and delayed in her progress through the harbor, and for want of water or by adverse wind or other causes, be obliged to come to anchor, and remain at anchor twenty-four hours, and to take out some portion of her cargo. While she is properly pursuing her course to the place of her ultimate destination and of completed and final unloading, and until she reaches that place, and has been moored there in safety twenty-four hours, she is insured and protected by the policy."

In *Brown v. Tierney*, 1 Taunt., 516, a vessel bound for Pillaw had arrived at Pillaw Roads, where ships bound for Pillaw which draw much water usually bring to, and unload some part of their cargo to lighten them sufficiently for passing the bar. Although the ship had arrived at the place where she was to begin unloading, and had reached her port of discharge, yet, inasmuch as it was not proved to be ever the practice wholly to discharge a ship in Pillaw Roads, but only to lighten her sufficiently to enable her to enter the harbor, it was decided that the ship was to be considered "as much at open sea as ever she had been."

In *Samuel v. The Royal Exchange Assurance Co.*, 8 B. & C., 119, a vessel insured from Sierra Leone to London, and upon which the insurance was to endure until she had been moored in good safety twenty-four hours, arrived on the 18th of February, and the captain having orders to take her into the King's Dock at Deptford, moored her near the dock gates. On account of ice in the river, the ship could not enter the dock until the 27th, and then, in warping her towards the dock, a rope broke, she grounded and was totally lost. Lord Tenterden held that the place where the vessel was moored not being the place of her ultimate destination, the policy did not expire when she had been there in safety twenty-four hours.

In the case of *Brereton v. Chapman*, 7 Bing., 559, it was held that the lay-days allowed by a charter-party for a ship's discharge are to be reckoned from the time of her arrival at the usual place of discharge, though she should, for the purposes of navigation, discharge some of her cargo at the entrance of the port, before arriving at the usual place of discharge.

In the case of *Whitwell v. Harrison*, 2 Exch., 127, the vessel was chartered to take on board a cargo of timber at Quebec and to proceed therewith to Wallasey Pool, in the river Mersey, or as near thereto as she could safely get, and there discharge her cargo. The vessel arrived as near to Wallasey Pool as she could safely get, and did actually begin to discharge her cargo accordingly, discharging her crew altogether, and leaving none of them on board for the purpose of further navigation. It appeared in evidence that the captain always intended ultimately to carry the vessel into Wallasey Pool with as much of the cargo on board as she could carry over the shallow part intervening between his original anchorage and the Pool. But it was also clearly established that the discharge of the cargo was going on in due course, and that if the water were not sufficient, and no accident had occurred, the whole cargo would have been discharged in the place where the vessel was moored. The court decided that as the ship was bound either to Wallasey Pool, or as near thereto as she could safely get, that that was the intended place for the discharge of her cargo, and that therefore the vessel had clearly arrived at the port of her discharge. Alderson B., in delivering the judgment of the court, distinguishes the case of *Whitwell v. Harrison* by saying: "The case of *Brereton v. Chapman*, 7 Bing., 559, does not appear to us at all to affect this question. There the vessel was still in progress to the ultimate place of the discharge of her whole cargo, and all that was done was to put on board lighters a portion of the cargo in order that the vessel might be enabled thereby, without delay, to proceed with them to the usual place of discharge. There the whole crew remained on board, and the vessel was in all respects, really continuing her voyage."

In the case of *Whitwell v. Harrison*, the case turned upon the facts that the vessel had arrived at one of the places of discharge specified in the charter-

party as the intended places for the discharge of the cargo, and that the discharge of the cargo was going on in due course, and not merely for the purpose of further navigation. *Whitwell v. Harrison*, therefore, differs in no degree from the earlier cases which decide that the place at which a vessel unloads the whole or part of her cargo for the purpose of discharge will be the place of the termination of a risk to a port of discharge. But neither *Whitwell v. Harrison*, nor any other case which we have been able to find, decides that a place at which a vessel unloads part of her cargo, in order to lighten the vessel and enable her to proceed with the residue, would be the place of the termination of the risk to a port of discharge.

The recent case of *Bramhall v. Sun Ins. Co.*, 104 Mass., 510, was decided upon the following state of facts, as stated in the opinion of Judge Gray (p. 517): "It is clear that the *George Washington* had safely arrived at her port of discharge in Spain, and been there moored twenty-four hours in good safety before the loss sued for. She proceeded to Valencia to discharge, and anchored at that port in an open roadstead, exposed, indeed, on one side to the winds and seas, but with good anchorage and holding ground. She was fully entered at the custom-house, and the master lodged her papers with the consul of the United States, as required by law, notified the consignees of his readiness to discharge, dismissed part of her crew, retaining only enough to protect the ship, and himself left the ship and returned to the United States before the loss. The ship drew too much water to come into the basin, and the place of her anchorage is found to have been the place at which ships of her draught are usually discharged, by means of lighters furnished by the consignees at the expense of the ship, by stevedores from the shore, and without the assistance of the crew, although such vessels, 'discharging at the anchorage, generally, but not uniformly, come into the basin after sufficiently reducing their draught, for greater convenience of lightering and taking in ballast.' As soon as lighters were furnished by the consignees, three days after she reached her anchorage, the ship began to discharge, lay at anchor there for more than three weeks, and discharged one-third of her cargo."

The facts in the case before the court are clearly distinguishable from the facts agreed in *Bramhall v. Sun Ins. Co.* In that case the place of the vessel's anchorage was found to have been the place at which ships of her draught are usually discharged. In this case it is clearly proved that vessels are never completely discharged at the anchorage ground, but only lightened sufficiently to enable them to reach the inner harbor. In several other particulars, more or less important, the cases differ.

But the substantial difference in the two cases, as agreed by the parties and established by the proofs in the case, consists in this: that in *Bramhall v. Sun Ins. Co.* it was agreed by the parties, and found by the court, that the anchorage ground where the *George Washington* unladed a portion of her cargo; where the master dismissed part of the crew and himself left the ship to return home to the United States; where the ship lay at anchor for more than three weeks, and discharged a third of her cargo before the loss,— was a usual and destined place of discharge; while in the case before the court it most clearly appears, from the facts agreed and proved in the case, that the lightering of the *Live Oak* at the anchorage ground was only to lighten her in order to enable her to get to her place of destination.

The question presented in this case, therefore, is the precise question stated by the court in the case of *Meigs v. Mutual Marine Ins. Co.*, 2 Cush., 452, 453,

where they say, "The simple question, therefore, is, whether the ship, being destined to the wharf as the place of unloading, but being obliged to anchor after coming within the harbor, for the purpose of lightening, to enable her to get up to the wharf, there not being sufficient water for her to reach the wharf with the cargo all in, is to be considered as having arrived within the meaning of the policy, upon reaching the place of anchoring for the purpose of lightening."

Upon the facts as agreed in the case of *Bramhall v. Sun Ins. Co.*, we would not undertake to decide, as contended for by the plaintiff's counsel, that the decision in that case is not in harmony with the authorities before referred to. But, upon the facts as agreed and proved in this case, it seems to the court clear, both upon principle and authority, that the *Live Oak* cannot properly be considered as having arrived and been moored in good safety for twenty-four hours before the loss.

Judgment for plaintiff.

GRACIE v. MARINE INSURANCE COMPANY OF BALTIMORE.

(8 Cranch, 75-84. 1814.)

ERROR to U. S. Circuit Court, District of Maryland.

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This case arose on a policy of insurance, bearing date the 19th of June, 1807, for \$20,000 on the cargo of the ship *Spartan*, "at and from Baltimore to Leghorn," the risk to commence on the loading, and to continue "until the said goods shall be safely landed at Leghorn aforesaid." The policy contained, in the printed part, the usual stipulation that the assured, in case of loss, shall labor, etc., for the preservation and recovery of the goods, to the expense of which the assurers would contribute according to the rate of the sum insured; in the policy is inserted, in writing, the words "warranted free from particular average." The vessel sailed from Baltimore in June, 1807, and on the 15th of August arrived in the port of Leghorn.

According to the laws and usages of the place, ships arriving at that port, and their cargoes, were obliged to perform a quarantine of thirty days before admission of the cargo, or of any person on board, into the city; the ships performing it in the port, the cargoes in a certain Lazaretto, erected for that purpose on the shore of the port, about half a mile from the city. Some specified articles were excepted from this rule, but the cargo of the *Spartan* did not come within the exception. On the arrival in port of a vessel liable to quarantine, the officers of government took possession of the cargo, and removed it in public lighters to the Lazaretto. Freight was earned upon the depositing of the cargo in the Lazaretto, but payment of it, though often made before, could not be enforced until after the expiration of the quarantine, and until payment, the lien for the freight continued on the goods. The duties also accrued in the Lazaretto, and until they were paid the goods could not be removed thence into the city.

The goods remained in the custody of the officers of government until the expiration of the quarantine, during the continuance of which neither the master of the ship, nor the consignees, had any power to interfere with, or even see them, but under a permit from the local authorities; such permits were commonly allowed the consignees, who might take samples, and sell by those samples while the goods were performing quarantine.

After quarantine was performed and an order from the master obtained, the goods were received at the Lazaretto by the owner or consignee, and transported at his risk and expense into the city. This transportation was most usually made by water; but there was a road along which light goods might be, and frequently were, carried. Even when goods were sold during the quarantine, they were removed at the risk and charge of the vendors.

In conformity with these regulations the cargo of the Spartan was placed in the Lazaretto. While it remained there, performing quarantine, a body of French troops took possession of the city, seized the Lazaretto, sequestered the goods there deposited, and refused to give them up until a ransom, amounting to fifty-three per cent. on their estimated value, should be paid for them. This ransom the owners or consignees were compelled to pay in order to obtain restitution of their goods. This action is brought to recover it from the underwriters. Judgment was rendered in the circuit court for the defendants, which judgment is now brought before this court by a writ of error.

The plaintiff in error contends: 1st. That the placing of the goods in the Lazaretto was not "a landing in safety at Leghorn," and a termination of the voyage. 2d. If the loss happened during the continuance of the risk, the plaintiff is not prevented from recovering by the warranty in the policy against particular average.

In support of his first point, he contends that "Leghorn," in the policy, means the city and not the port of Leghorn. 2d. That the Lazaretto being substituted for the ship for the greater safety of the goods, their situation, as it respects all parties, while performing quarantine in the Lazaretto, is precisely the same as if performing quarantine in the ship. This argument is supposed to be much strengthened by the facts that freight cannot be demanded until quarantine is performed, and that the lien for the freight continues after the landing of the goods. 3d. That a landing in safety must be such a landing as places the goods at the disposal of the owner or consignee.

§ 673. "*Leghorn*" means the port of that place by usage.

However true it may be, in general, that when we speak of Leghorn we speak of the city which bears that name, it does not follow that the same meaning is attached to the word when used in a policy. The insurance is, "at and from Baltimore to Leghorn." Now if, as is admitted, Baltimore means the port of Baltimore, it would seem not unreasonable to suppose that, in the same instrument, Leghorn means the port of Leghorn, the place which is the ultimate destination of the vessel on board which the goods are laden. The voyage is understood to be terminated when the vessel arrives at her port of destination, and has been moored there in safety for twenty-four hours. But it will be conceded that the termination of the voyage, as to the ship, does not necessarily terminate the risk on the goods. This risk may continue when the voyage as to the ship is ended. Its duration depends on the intention of the parties, and this intention must be found in their contract.

This brings us to consider the argument that the goods, while performing quarantine in the Lazaretto, remain at the risk of the insurer, in like manner as if performing quarantine in the ship. The words of the policy being: "Beginning the adventure on the said lawful goods and merchandises, from and immediately following the lading thereof on board of said vessel at Baltimore aforesaid, and so shall continue and endure until the said goods and merchandises shall be safely landed at Leghorn aforesaid." The risk con-

tinues until the goods be safely landed, although the voyage, as to the ship, might be terminated previous to their landing.

In ordinary cases, where the government does not interfere between the parties, this risk would continue until the goods should be landed in safety at the usual place, and at the disposal of the consignee. If it were usual to receive goods at the Lazaretto, or at any other place on the shore of the port, it would be the duty of the owner or consignee to receive them there; and a landing at such place, it is admitted, would be a landing at Leghorn.

If, on the other hand, the goods, while performing quarantine, remained on board the ship and could not be landed, it is not to be doubted that they would remain at the risk of the insurer. How then, it is asked, can the substitution of the Lazaretto for the ship alter this risk? A substitution made, not by the act of the parties, but of the government of the country. A substitution which does not alter the rights of the parties, since it leaves the lien of the master for his freight unimpaired, and gives no power over the goods to the owner or consignee. A substitution beneficial to the insurer, since it diminishes the risk on the goods.

Whatever might be the effect of this reasoning, if the establishment of the Lazaretto, and the laws of quarantine, had been of so recent a date as not to have been in the contemplation of the parties to the contract, as to which the court gives no opinion, this cause may well be decided upon the usage found in this case, a usage of ancient date and of general notoriety. It existed and was known to exist when this contract was formed. When the parties stipulated that the adventure should continue till the goods were landed in safety at Leghorn, they knew that the place of landing was the Lazaretto, and that the landing would be made under the direction and control of the local authority. This, then, must be considered as the landing contemplated in the policy. It is the landing which terminates the risk. Had the parties intended to continue the risk during the continuance of the goods in the Lazaretto, they would have inserted in the policy words manifesting that intention. Instead of terminating the adventure on the landing, a fact which they knew must take place at the Lazaretto thirty days before the goods could be delivered to the owner or consignee, they would have continued it till the goods should be landed in safety and should perform their quarantine.

The court is of opinion that, under this policy, the goods in the Lazaretto were not at the risk of the underwriters, and consequently that there is no error in the judgment of the circuit court. It is affirmed, with costs. (*a*)

HEARN v. NEW ENGLAND MUTUAL MARINE INSURANCE COMPANY.

(Circuit Court for Massachusetts: 3 Clifford, 318-328. 1870.)

Opinion by CLIFFORD, J.

STATEMENT OF FACTS.—Policies of insurance against marine risks are liberally construed, as they are regarded as commercial instruments in the strictest sense.

(*a*) The case of *Gracie v. Maryland Insurance Company*, 8 Cranch, 84, differed from the above only in the particular that a part of the cargo remained on board the ship until the arrival of the French troops, when the departure of the vessel was prohibited by the general, and the ransom made. It was held that this circumstance did not vary the case; because, omitting all other considerations, the loss within the risk being on only a part of the cargo, is a partial loss, and is affected by the warranty against particular average loss. The judgment was affirmed, with costs.

Such instruments, where their terms are ambiguous, may be explained by parol evidence of the usages of trade; but where the terms employed are clear and precise in themselves, the principles which govern their construction do not vary from those which are applicable to other mercantile instruments, and no evidence of any usage or custom can be admitted to explain, alter or impair the terms of the contract as made by the parties. *Oelricks v. Ford*, 23 How., 63; *Bliven v. Screw Co.*, 23 How., 431; 1 Arn. (2 Am. ed.), 64.

Insurance was effected in this case at Boston on the 9th of May, 1866, in the sum of \$5,000 "on charter of the barque Maria Henry, at and from Liverpool to port in Cuba, and at and thence to port of advice and discharge in Europe." When the application for the policy was made, the barque was at Liverpool, and it appears that she loaded at that port with a cargo of coal, and, having been regularly cleared from that port, proceeded thence without difficulty on her outward voyage to the port of St. Jago de Cuba, where she discharged her outward cargo, and that, having discharged her outward cargo, she sailed thence to Mansanilla, another port in Cuba, and there took on board a cargo of the products of the island, and on the 13th of September sailed thence for Europe *via* Falmouth for orders, and on the 18th of the same month was totally lost on her homeward voyage by perils of the sea. Due notice of the loss was given to the defendants, and the loss is admitted as alleged, but the defendants refused to pay the amount insured, or any part of the same, upon the ground that the barque, without any justifying cause, departed from the prescribed course of the voyage as described in the policy on which the action is founded. Reference was made in that proposition to the fact that the vessel, after she went to St. Jago de Cuba and there discharged her outward cargo, proceeded thence to Mansanilla for a return cargo before she sailed for Europe; but the plaintiff contended that going to a second port in Cuba did not constitute a deviation, as it is the usage for vessels bound from Liverpool and back, to discharge at one port and then to proceed to a second port for a return cargo.

§ 674. *Usage not to be shown to vary meaning of clear language.*

Nothing of the kind is expressed in the policy of insurance, if the words are to be taken in their ordinary signification; but the theory of the plaintiff is that such is the usage of the trade, and he insisted that parol evidence of such usage was admissible, and that the language of the policy should, in view of that evidence, be construed as conferring that right. Deviation in marine insurance is understood to mean a voluntary departure without necessity or reasonable cause from the regular and usual course of a specified voyage insured, which in this case was to port in Cuba, and at and thence to port of advice and discharge, as plainly and explicitly expressed in the policy. Whenever a deviation of that kind takes place, the voyage is determined and the underwriters are discharged from any responsibility. *Park on Ins.*, 294; *Elliot v. Wilson*, 4 Brown, Parl. Cas., 470.

§ 675. *"To port in Cuba" cannot be shown by usage to mean "to ports in Cuba."*

Different language is sometimes employed, as where the voyage is described as one from the port of departure to Cuba or to the island of Cuba, but the terms of the policy in the case before the court are "at and from Liverpool to port in Cuba, and at and thence to port of advice and discharge," showing a contract complete in itself, and one expressed in plain, clear and unambiguous language, employing no terms of art nor any word or phrase of doubtful mean-

ing. Unambiguous as the language is, the court cannot impute to the parties any other intention than that which they have expressed, as the court must do, to hold that port means ports, or port or ports, or to a port of discharge, and also to a second port for a return cargo and at and thence "to port of advice and discharge." Precisely the same question was presented in the case of *Brown v. Tayleur*, 4 Ad. & Ell., 241, and the court held that the word "port" in such a policy could not be construed to mean ports, nor port or ports, and that the going to a second port in such a case constituted a deviation, the judges giving their opinion *seriatim*, and all concurring in the conclusion. *Sea Ins. Co. v. Gavin*, 4 Bligh, N. S., 578; *Same Case*, 2 Dow & Clark, 125. Evidence of usage, such as the plaintiff assumes in argument that he has offered in this case, if admissible for any legitimate purpose, must be expected to have the effect, and, if fully believed, ought to have the effect, to induce the court to decide that a policy of insurance covering a voyage to a single port in Cuba may be construed, and if the evidence of such usage is full to the point, must be construed to cover not only that voyage, but also a voyage to a second port for a return cargo, even though it be necessary, in order to accomplish the purpose, to make a coasting voyage to the opposite side of that large and highly commercial island. Suppose, for example, the master in this case had gone to Matanzas, on the north side of the island, as his port of discharge, he might, under the theory of the plaintiff, have afterward gone to Trinidad for a return cargo, which is on the southern side of the island. Every policy of insurance, if properly drawn, describes the place of the ship's departure, and also the place of destination, and the reason why a deviation discharges the underwriter is, that if the voyage is changed after the ship sails, the voyage becomes a different one, and not that against which the insurer has undertaken to indemnify. But in the case supposed, the insurer would be held responsible for a voyage from Matanzas to Trinidad, though no such voyage is mentioned in the policy.

Custom or usage is sometimes supposed to be admissible to show that the parties to a written instrument had something in their contemplation more than is expressed in what they have reduced to writing; but Lord Denman well said, in the case of *Trueman v. Loder*, 11 Ad. & Ell., 589, that the cases go no further than to permit the explanation of words used in a sense different from their ordinary meaning, or the addition of known terms not inconsistent with the written contract. Extrinsic evidence of custom and usage is doubtless admissible in certain cases where the transaction is of a commercial character, to annex incidents to written contracts in respect to which the contracts are silent, but such evidence cannot be properly received if it is inconsistent with the terms of the written instrument, whether such inconsistency appears by the express terms of the written contract or by reasonable implication from the same as applied to the subject-matter. *Hutton v. Warren*, 1 Mees. & W., 475; 1 Smith's Lead. Cas., 387. Apply that rule, and it is clear that evidence of usage, if offered to show that the barque might go to one port to discharge and to a second for a return cargo, ought not to be admitted, as it is plainly inconsistent with the written contract, which is to port and at and thence to the return port.

§ 676. *When usage may be shown.*

Few cases are to be found where the rule under consideration is better stated and explained than in the case of *Spartali v. Benecke*, 10 C. B., 222, in which the opinion is delivered by the chief justice of the common pleas. He admits

that evidence as to the usages of trade is admissible in two classes of cases:

1. Where the evidence is offered to prove that the words in which the contract is expressed in the particular trade to which the contract refers are used in a peculiar sense, and different from what they ordinarily import. 2. That the evidence is also admissible for the purpose of annexing incidents to the contract in matters upon which the contract is silent, but he remarks, what it is important to observe, that both these rules are subject to the limitation or qualification that the peculiar sense or meaning which it is proposed by the evidence to attach to the words of the contract must not vary or contradict, *either expressly* or by implication, the terms of the written instrument. Such evidence is admitted for the purpose of defining what would otherwise be indefinite, or to interpret a peculiar term, or to explain what is obscure, or to ascertain what is equivocal, or to annex particulars and incidents which, though not mentioned in the contract, were connected with it, or with the relations growing out of the same; but in all these cases the evidence is admitted with a view of giving effect as far as can be done to the presumed intention of the parties. *Humfrey v. Dale*, 7 Ell. & Bl., 273; *Myers v. Sarl*, 3 Ell. & Ell., 318.

Proof of usage may be admitted to explain a word, term or phrase of doubtful or equivocal meaning, but it cannot be admitted to add to a word of a known and certain signification a meaning beyond what it plainly imports, for the purpose of adding a new and different obligation to a written contract. *Phillipps v. Briard*, 1 Hurls. & Nor., 25. Usage may be relied on, says Lord Campbell in the case of *Hall v. Janson*, 4 Ell. & Bl., 510, to show the sense in which an expression found in a written contract is used in a particular trade, but to let in verbal evidence of a usage for the purpose of contradicting and nullifying an express written contract would be contrary to all principle, and has been forbidden as often as the attempt has been made. Commercial usage, said Judge Story, in the case of *The Reeside*, 2 Sum., 567, can never be resorted to, to control or vary the positive stipulations in a written contract, and *a fortiori* not to contradict them. An express contract of the parties, he held, was always admissible to supersede, vary or control a usage or custom, but he denied in the most explicit terms that a written contract could be controlled, varied or contradicted by a usage or custom. Three decisions of the supreme court, delivered within the last twelve years, affirm the same rule. *Bliven v. Screw Co.*, 23 How., 431; *Insurance Companies v. Wright*, 1 Wall., 470. "When we have satisfied ourselves," said Mr. Justice Miller, in the last case cited, "that the policy is susceptible of a reasonable construction on its face without the necessity of resorting to extrinsic aid, we have at the same time established that usage or custom cannot be resorted to for that purpose." 2 Greenl. Ev., §. 251. Omission (in a contract), say the court, in the case of *Thompson v. Riggs*, 5 Wall., 679, may be supplied in some cases by the introduction of such proof, but it cannot prevail over or nullify the express provisions and stipulations of the contract. So where there is no contract, usage will not make one, as it can only be admitted either to interpret the meaning of the language employed by the parties in the absence of express stipulations, or where the meaning is equivocal or obscure.

Decided cases also of high authority and of recent date from the reported decisions of the state courts may be referred to, in which it is held that the clear and explicit language of a contract, mercantile or otherwise, cannot be enlarged or restricted by proof of usage or custom. Strong doubts are ex-

pressed by the court in the case of *Seccomb v. Prov. Ins. Co.*, 10 Allen, 314, whether in any case it would now be deemed to be competent to offer evidence to show that a description of a voyage in a policy which is susceptible of a clear and definite exposition in conformity to the interpretation of the words as established by adjudicated cases, has another and different meaning by mercantile usage from that which has been so recognized and settled. Mercantile usage, say the court in that case, in order to be received as explanatory or in aid of the exposition of a policy of insurance, must not, on the one hand, tend to increase materially the risk assumed by the insurers, nor, on the other hand, to deprive the assured of the indemnity which the words of the contract fairly interpreted secure to him in case of loss. Examined in the light of these rules, as given substantially in the case last cited, the court is of the opinion that the usage relied on by the plaintiff, if the evidence offered showed that it exists as he supposes, would not be admissible to avoid the effect of the deviation, as, if admitted, it would enlarge the voyage insured as described in the policy, and would materially increase the risk cast upon the underwriters beyond what the language employed warrants the court in believing they had in contemplation when the contract was executed. *Dickinson v. Gay*, 7 Allen, 36; *Hone v. Mutual Safety Ins. Co.*, 1 Sandf., 149.

§ 677. *Usage not admissible to contradict rules of law.*

Authorities to show that evidence, even of general usage, is never admissible to contradict the settled rules of law cannot be necessary, as they are all one way from the earliest period to the present time; and that remark is just as applicable to a commercial contract as to one where the construction of the instrument is governed by the principles of the common law. *Rankin v. Am. Ins. Co.*, 1 Hall, S. C., 619; 2 Pars. Mar. L., 58; 1 Duer on Ins., 177-233; *Edie v. East India Co.*, 2 Burr., 1216; *Homer v. Dorr*, 10 Mass., 26; *Frith v. Barker*, 2 Johns., 327. Parol evidence of usage may be admissible to explain what is doubtful, but it is never admissible to contradict what is plain. *Blackett v. Assurance Co.*, 2 Crompt. & Jor., 249; *Cox v. Heisley*, 19 Penn. St., 247. Incidental matters, it is said, may be supplied by usage where the policy is silent, but the policy in this case is not silent as to the matter in question, as the description of the voyage is plain and unambiguous,—on charter at and from Liverpool to port in Cuba, and at and thence to port of advice. *Vandervoort v. Smith*, 2 Caines R., 160; 1 Pars. Ship & Ad., 83; 2 Phil. Ev. (ed. 1859), 789; *Steward v. Scudder*, 4 Zab., 96; *Foley v. Mason*, 6 Md., 37. Where the contract is clear, certain and distinct it is not subject to modification by proof of custom. Such a contract disposes of all customs and usages by its own terms, and by its terms alone is the conduct of the parties to be regulated, and their liability to be determined. *Simmons v. Law*, 3 Keyes, 219; *Wescott v. Thompson*, 18 N. Y., 367.

§ 678. *Authorities reviewed.*

Certain cases are cited by the plaintiff, which, it is suggested, support the opposite theory, but when carefully examined it will be found that they do not have any such tendency. *Warre v. Miller*, 4 Barn. & Cress., 693; *Cruikshank v. Janson*, 2 Taunt., 301; *Dickey v. Ins. Co.*, 7 Cranch, 327. At and from Grenada to London was the description of the voyage in the first case, and at and from Jamaica in the second, and at and from Trinidad in the case decided in the supreme court. Evidence was introduced in the first case showing that there was but one custom-house for the whole island of Grenada, and inasmuch as the voyage insured was at and from Grenada, and not at and from a

port in Grenada, the court decided that the island must be considered as all one place, and that there was no deviation, although the vessel went to three places to discharge. Nothing different is asserted in the second case, and in the third the court decided that where the voyage as described in the policy is "at and from an island," the vessel may sail from port to port to take in cargo; but the decision has no application to the case at bar, as the voyage described in this case is *to port* in Cuba and at and thence to port of advice, which shows that the two cases are in no respect analogous. Underwriters are presumed to be acquainted with the course of the trade they insure and with its peculiarities, and the court decided, in the case of *Noble v. Kenno-way*, 1 Doug., 510, that in that trade, which was the Labrador trade, greater delay in landing the cargo was customary than would be justifiable in most other adventures; but it is not perceived that the case has much bearing upon the question under consideration. *Vallance v. Dewar*, 1 Camp., 503. Undoubtedly, evidence of usage was also admitted to explain the terms of the contract in the case of *Salvador v. Hopkins*, 3 Burr., 1707, as suggested by the plaintiff, but the motion for new trial was overruled and the decision of the court placed expressly upon the ground that the evidence offered and admitted was not repugnant to the contract. Other cases of an analogous character are also referred to, where evidence of usage was admitted to explain some ambiguous phrase in the terms of the contract, to which the same answer may be given, that the evidence admitted did not contradict what was in writing. *Ude v. Walters*, 3 Camp., 15; *Hyde v. Willis*, 3 Camp., 200. Such evidence was also admitted in the case of *Gracie v. Marine Ins. Co.*, 8 Cranch, 75 (§ 673, *supra*), to show the boundaries and extent of a commercial port named in the policy as the port of destination, and it is quite clear that the ruling was correct, as the evidence tended to explain and not to contradict the terms of the policy; and a like ruling is found in the case of *Lowry v. Russell*, 8 Pick., 362, where the court overruled the objection to the evidence expressly upon the ground that it did not contradict the terms of the bill of lading. Reliance is also placed upon the case of *Bulkley v. Protection Ins. Co.*, 2 Paine, C. C., 89, but the case was decided wholly irrespective of any such question, as the evidence introduced failed to show that there was any such usage as the plaintiff supposed. The policy in that case described the voyage as from Ocrocoke to St. Bartholomew or St. Thomas, and at and from thence to Tobasco, and the court, and rightly, held that it did not authorize the assured to go to both ports, that he might go to either at his election, and that, having first stopped at the island of St. Bartholomew and afterwards proceeded to St. Thomas, it was a deviation. "That the policy only covers a voyage to one or the other of those islands," said the judge, "cannot admit of a doubt," and if the sentence stopped there the case would be consistent with the recent decision of the supreme court, and all the other modern decisions upon the subject; but he adds, in continuation of the same sentence, "unless justified by usage," leaving it to be inferred that his opinion was that the evidence of usage would be admissible to incorporate a different meaning into the contract. But he could hardly have intended what the words imply, as in the next sentence he says that "it was at the election of the assured to go to either, to the one or the other, but the language of the policy is too plain and explicit to admit of a construction that it authorized a voyage to both," in which latter view we entirely concur.

Support to the views of the plaintiff cannot be derived from the case of

De Peyster v. Sun Mutual Ins. Co., 19 N. Y., 276, as the court held, irrespective of usage, that the three additional ports allowed by the addition made to the policy included ports on the main, and referred to ports to be touched before finally leaving the main for the return voyage. Viewed in the most favorable light for the plaintiff, the court only allowed the evidence of usage to be received as explanatory of what was doubtful and not as contradicting any part of the contract.

§ 679. *Evidence examined.*

Submitted as the case was under the act of congress, which authorizes parties to waive a jury by stipulation in writing, the court will proceed to a brief examination of the evidence of usage offered by the plaintiff, and admitted *de bene* by the court. Vessels frequently go to a second port, as the evidence offered shows, for their return cargo, but it is equally well established by the same depositions that they always do so under an express stipulation in the charter-party so to do if required by the charterer, and not because any usage exists obliging them to go to a second port in cases where there is no stipulation to that effect. Evidence to support that theory of fact is found in the charter before the court, as it provides that the vessel "shall proceed to a safe port in Cuba for orders (Havana excepted), and there discharge the same [meaning the cargo], after which shall there ^{and} at one other usual place in the island, load," etc. Had that language been incorporated into the policy of insurance, the question would be one of easy solution, but the charter-party is a contract between the owners of the vessel and the charterer, and is not in any aspect of the case to be regarded as the contract between the insurers and the insured. They have made their own contract, and the court, in ascertaining what their rights are under it, must look at its terms. Such a policy of insurance may be made to cover the whole voyage or a part of it, as the parties find it for their interest to contract. Insurance to port in Cuba and at and thence to port of advice might have been all that the insured desired, as he might know that his vessel would load at port of discharge, and in that state of the case he might not be willing to pay the additional premium for the risk of insuring the voyage to a second port. Conjectures, however, are unnecessary, as the conclusive answer to the theory of the plaintiff is that he did not contract with the insurers for the privilege to go to a second port, and the evidence which he offered upon the subject of usage does not show the existence of any such usage as he supposes. The deponents testify that vessels almost always go to a second port, but all the witnesses, or nearly all of them, agree that they do so by virtue of an express stipulation in the charter-party requiring them to do so if the charterer so directs. They do not show that there is any usage which warrants a vessel in going to a second port under a policy of insurance where its terms are from Liverpool to port in Cuba and at and thence to port of advice. Instead of that, most of the witnesses who testify in answer to such an inquiry express most decided opinions that under such a policy the vessel would be restricted to the port of discharge. (a)

§ 680. *Time policy.*—Where a policy extends from a stated day to another stated day, the insurance covers the whole time and takes effect from the first date, though the insurance was effected after the vessel was lost, and the words "lost or not lost" are not in the policy. *Folsom v. Mercantile Ins. Co.*, 8 Blatch., 170 (§§ 386-88); S. C., 18 Wall., 237 (§§ 389-90).

(a) Same point decided in *Hearn v. Equitable Ins. Co.*,* 3 Cliff., 328, the policy reading "to a port of discharge in Cuba, and at and thence to port of advice."

§ 681. *Same — Construction.*— A time policy on a vessel insured her in the "coasting trade on the United States Atlantic coast," with permission "to use gulf ports not west of New Orleans." There was a printed restriction in the policy against using foreign gulf ports. The vessel was lost in the Gulf of Mexico west of New Orleans, in the course of a voyage from Maine to Morgan City, Louisiana, west of New Orleans. *Held*, that the underwriter was not liable. *New Haven Mill Co. v. Security Ins. Co.*, * 20 Blatch., 192.

§ 682. *Delay or interruption.*— Underwriters take no risk with regard to the length, retardation or interruption of a voyage, if it be subsequently resumed or be capable of resumption. *Jordan v. Warren Ins. Co.*, 1 Story, 342 (§§ 480-87).

§ 683. "At and from."— A policy on a ship, at and from a port, will attach though the ship be at the time undergoing extensive repairs, so as, for the purposes of the whole voyage, to be utterly unseaworthy. *McLanahan v. Universal Ins. Co.*, 1 Pet., 170 (§§ 352-59).

§ 684. What is a competent crew for the voyage, at what time such crew shall be on board, what is proper pilot ground, what are the course and usage of trade in relation to the master and crew being on board when the ship breaks ground for the voyage, are questions of fact. *Ibid.*

§ 685. Policy on a voyage "at and from Rio Janeiro to Santos, and two ports in South America, and at and from either of them to a port of discharge in the West Indies or Europe or the United States," upon goods "at and from Rio Janeiro" until "safely landed at Santos," etc., "valued at the sum insured" "on her cargo of salt, and on the proceeds, as interest may appear." *Held*, that these words do not justify an inference that the goods were to be laden at Rio Janeiro. *Gardner v. Columbian Ins. Co.*, * 2 Cr. C. C., 478.

§ 686. The cargo was lost between Rio and Santos, and the plaintiff recovered for the loss, though the cargo was laden at Cadiz. *Ibid.*

§ 687. *Terminal of risk.*— Where a policy names a place as one of the termini of a risk, the risk cannot be extended by an averment of the understanding and intention of the parties. *Hening v. United States Ins. Co.*, * 2 Dill., 26.

§ 688. An insurance upon "charter" is an insurance of the risk of losing the freight to be carried under a charter. *Ocean Ins. Co. v. Sun Ins. Co.*, * 8 Ben., 272.

§ 689. Where there are two charters, one of them having the same termini as the voyage described in the policy, and the other covering that and a further continuing voyage, and the policy merely insures "charter," and there is no explanation between the parties at the time of effecting the insurance as to which of the two charters is intended, the policy must be regarded as saying that the charter intended is a charter covering only the route of the voyage described in the policy. *Ibid.*

VII. WORDS OF EXCEPTION.

SUMMARY— *General rule*, § 690.— *Suspension of risk*, §§ 691, 692.— *Contact with sea water*, § 693.

§ 690. Words of exception in a policy are to be construed most strongly against the party for whom they are intended. But this rule is subject to another— "*verba intentionis, et non contra, debent inservire.*" *Palmer v. Warren Ins. Co.*, §§ 694-98.

§ 691. A policy on time contained the following clause: "Except during the term all ports and places in Mexico and Texas, also the West Indies, from July 15 to October 15, 1889," and the vessel sailed from New York for and arrived at St. Jago de Cuba within the excluded period, and was lost on her return in December following. *Held*, that the underwriters were liable, the loss not happening within the excepted period, and the clause not being an exception or exclusion of voyages, but only a suspension of the risk during such time as the vessel should be at the excepted ports. *Ibid.*

§ 692. A policy insured a ship at and from Honolulu via Baker's Island to a port of discharge in the United States, "the risk to be suspended while the vessel is at Baker's Island loading." The vessel was lost at that island, a place of danger, where she had gone for the purpose of loading, but before she was in fact loading. *Held*, that the underwriters were not liable. *Reed v. Insurance Co.*, §§ 699, 700.

§ 693. In an action upon a marine policy on goods, which excludes liability for dampness not arising from actual contact with sea water, the underwriter is not liable for damage done to grain by vapors arising from sea water in contact with other grain insured. *Neidlinger v. Insurance Co.*, §§ 701-704.

[NOTES.— See §§ 705-713.]

PALMER v. WARREN INSURANCE COMPANY.

(Circuit Court for Massachusetts: 1 Story, 860-870. 1840.)

Opinion by STORY, J.

STATEMENT OF FACTS.—The questions involved in the argument of the present case are of considerable novelty, and certainly are not unattended with difficulty. The policy is upon the brig *Spy*, for a year, "excluding during the term all ports and places in Mexico and Texas, also the West Indies, from July 15 to October 15, 1839, each at noon." During the year 1839 the vessel performed a voyage from Boston to St. Joseph's, Florida, and from thence to the Havana, and thence to New York. On the 12th of September, 1839, she sailed on a voyage from New York to St. Jago de Cuba, arriving there about the 1st of October, and sailed from thence on her return voyage to New York, on the 25th of October, and was wrecked on the 15th of December following, on a beach in Eaton's Bay, in Long Island Sound. The loss, for which the suit is brought, is that occasioned by this shipwreck.

§ 694. *Construction of exception of "ports and places" "from July to October."*

Now, upon this posture of the case, the question is, whether the insurance company are liable for the loss; and this depends upon the interpretation which is to be put upon the terms of the policy. The loss occurred in the progress of the return voyage from the West Indies, within the year for which the insurance was made, and without the limitation of the time excluded by the policy (between July 15 and October 15, 1839). The terms of the policy are susceptible of various interpretations. The clause of exclusion may be construed, first, to be a condition or warranty on the part of the insured that the brig, during the year, shall not be employed in any voyages to or from any port or places in Mexico, Texas, or to or from the West Indies, between July 15 and October 15; upon which construction it is clear that the underwriters would not be liable for the loss which has occurred. And this would be equally true whether we should treat it as a case of non-compliance with the condition of warranty, or as a deviation from the voyages insured. Or, secondly, the clause may be construed as allowing such voyages to and from Mexico, Texas and the West Indies during the excluded period, but exonerating the underwriters from all risks and liabilities for losses in the course thereof; which, in the events which have happened, would be equally fatal to the recovery in this suit, since the loss was in the course of the voyage from the West Indies, which was begun, although not completed, within the excepted period. Or, thirdly and lastly, the clause may be construed as merely 'excepting from the operation of the policy certain risks and losses, viz.: all risks and losses in ports and places in Mexico and Texas, and in the West Indies, between July 15 and October 15, 1839. In this last view the policy would be completely operative, and cover the present loss, since it would not fall within the excepted risks. The defendants, in effect, contend that the true import of the terms of the policy requires and justifies one or the other of the two first interpretations. The plaintiff, on the other hand, insists that the third and last is the only true and sound interpretation. It has become the duty of the court, therefore, in a case in which it is admitted on all hands that there is no authority directly in point, to endeavor to ascertain, as far as it may, the real intentions of the parties in the language used, and to give

such an interpretation as seems most consonant to that intention and to the general principles of law.

§ 695. *Words to be construed against party in whose favor they run.*

In the argument it has been thought of some importance, in the construction of the clause, to ascertain, if there is any ambiguity in the language used, what is the rule of law as applicable to this case, by which instruments of all sorts, and particularly policies of insurance, are to be construed. I take the rule to be clearly established, as a general rule, that words of exception in any instrument are to be construed most strongly against the party for whose benefit they are introduced; and this rule has been expressly applied to words of exception in policies of insurance, as well in England as in this court. *Blackett v. Royal Exchange Ins. Co.*, 2 Crompt. & Jer., 224; *Donnell v. Columbian Ins. Co.*, 2 Sumn., 380, 381. See, also, *The Earl of Cardigan v. Armitage*, 2 Barn. & Cressw., 197, 206; *Bullen v. Denning*, 5 Barn. & Cressw., 847, 850, 851. *Verba fortius accipiuntur contra proferentem*. Now, for whose benefit are these words introduced? Clearly for the benefit of the underwriters, as they are to relieve them from risks for which they would otherwise be liable under the general words of the policy. They are not, in form or in substance, the words of the insured; but words of exception, used by the underwriters to exempt them from a liability from the general rule, which would otherwise attach upon them during the whole term of time for which the policy was to endure. The language of the supreme court of the United States, in construing an exception in the policy of insurance in *Yeaton v. Fry*, 5 Cranch, 335, is strongly in point as to the proper construction of the present policy. The court there treated the words of the exception as the words of the underwriters, and not of the insured, because they took a particular risk out of the policy, which, but for the exception, would be comprehended in the contract. So far, then, as the rule is to prevail upon the present occasion, it is unfavorable to the defendants. But it by no means follows that it supercedes all other rules of construction; for there is another rule to be observed: *Verba intentioni, non è contra, debent inservire*. Co. Litt., 36.

§ 696. *Grammatical sense considered.*

Another suggestion has been made, founded upon the grammatical sense of the words. It is said by the counsel on behalf of the plaintiff, that the clause in question is to be construed as an exception, and therefore equivalent to "excepted risks." This is met, on the other side, by the remark that the word used is "excluding," and not "excepting," and that in a grammatical sense, to exclude means to shut out and not to except; and therefore excluding is rather prohibiting. It is certainly true that in lexicographies, the word "exclude" has not ordinarily given to it, as one of its meanings, to "except." But nevertheless we shall find that one of the senses given to the word "except" is to "exclude." And in common parlance, the words are often used as equivalents. Policies of insurance are generally drawn up in loose and inartificial language, and indeed in the language of common life, and therefore are always construed liberally, and rarely, if it is possible, subjected to any nice, or narrow, or critical strictness, or any technical interpretation. We look rather to the intent than to grammatical accuracy in the use of language. If a policy of insurance were underwritten for a year on a ship, excluding the month of October, we should say that it was but an exception of that month. If a policy was on all the cargo on board a ship, excluding the fruit on board, we should deem it a mere exception of the fruit. On the other hand, if the words

were, excepting the fruit on board, we should as readily say that the fruit was excluded from the risks stated by the policy. But in neither case should we say that fruit was prohibited from being taken on board in the voyage. It does not appear to me, therefore, that any difficulty in the interpretation of the clause arises from any grammatical inaccuracy in the use of language. It will make no difference, in my judgment, in the present case, whether the word "excluding," in this policy, is interpreted in its more common sense of shutting out, or in the sense of "excepting," although I have no doubt that the latter is the true and appropriate sense in the clause of the policy under consideration.

§ 697. "*Excluding*" not a warranty, condition, or prohibition.

I confess that I have felt some difficulty in arriving at a satisfactory conclusion as to the true and proper interpretation of this clause. I have no doubt that the word "excluding" is not here used in any sense which makes the clause amount to a warranty, or to a condition, or to a prohibition. The language does not, in my judgment, justify such a construction. It is not the fair import of the terms, and to arrive at it we must force them out of their natural signification by an artificial straining.

§ 698. — *the exception relates to risks, not voyages.*

In *Yeaton v. Fry*, 5 Cranch, 335, 341, a similar attempt was made to construe an exception in the policy to be a warranty; but it was rejected by the supreme court of the United States. My difficulty is of another sort. It is, whether the clause amounts to an exception of *voyages* or an exception of *risks*. Construe it as an exception of voyages, and it will read as if written thus: "Excepting during the term all voyages to and from all ports and places in Mexico and Texas, also the West Indies, from July 15 to October 15, 1839, each at noon." On the other hand, construe it as an exception of risks, and it will read as if written thus: "Excepting all risks in all ports and places in Mexico and Texas, also in the West Indies, from July 15 to October 15, each at noon." After some hesitation I have come to the conclusion that the latter is the true and the natural and the easiest interpretation of the clause; and that it will satisfy the intention of the parties, so far as we can gather it from the words or apparent objects of the policy.

My reasons for this conclusion I will now proceed shortly to state. In the first place, it is a well known fact that greater risks ordinarily occur in ports and places in Mexico and Texas, either from the character of the harbors, or that of the government, than in other ports. The same remark applies to the West Indies, during what are commonly called the hurricane months, which are between the middle of July and the middle of October. It is not unnatural, therefore, to expect, under such circumstances, either that such risks should be excluded or that a higher premium should be paid. I entirely, therefore, accede to the argument, so strongly pressed in the present case, that the exception did cause a diminution of the premium, and without it the company would not have underwritten at all, or not without a higher premium.

The words, then, in effect, in my view, are words of exception or exclusion of what would otherwise be comprehended in the general terms of the policy. The policy is for the term of a year. The natural construction, then, of the exception is, that it excepts something already included. It is, then, an exception or exclusion of time, and not an exclusion of voyages; for no voyages are mentioned. The words are, "excluding during the term." If

the intention had been, in the first part of the clause, to exclude all voyages to or from ports and places in Mexico and Texas, we should naturally have expected the word "voyages" to be inserted in this very connection. But if it was intended only to exclude time, then the words stand well enough without any additional words; and their import is to exclude during the term all the time passed in ports and places in Mexico and Texas. But even if this part of the clause should be construed to exclude voyages to and from Mexico and Texas during the year insured, it would not follow that the other part of the clause is to receive the same interpretation. In the case of *Yeaton v. Fry*, 5 Cranch; 335, 341, the supreme court of the United States, upon a policy containing a clause, "all risks, blockaded ports and Hispaniola excepted," held the clause to be divisible, and applied the construction of it thus: that a voyage to Hispaniola was not insured; but a voyage to a blockaded port was, unless known to be blockaded, although it was in fact blockaded. The risk of loss from a known blockade was excepted, and not the voyage to the port itself. The same exposition might be applied here.

But, as the brig did not, in fact, go on any voyage to Mexico or Texas, it is unnecessary to insist on that. We may read the clause, then, as if it were, "excluding during the term the West Indies from July 15th to October 15th, each at noon." Now, here it is clear that voyages to and from the West Indies are not excepted generally; but the West Indies for a specified time only. The natural interpretation, then, of this clause is, that it excepts from the protection of the policy the time passed in the West Indies from July 15th to October 15th. I say this is the natural interpretation; for the insurance is for a year, the exception carved out of it is for three months, and these three months not universally, but only when the vessel is in the West Indies. If the vessel is not in the West Indies, the policy covers the whole term; so that West India ports or places, or West India risks, only, seem within the construction of the clause of the policy. Suppose the brig had sailed on a voyage to the West Indies on the 1st of July, and had been lost on the 10th of the same month; what words are there in the policy (supposing there to be no warranty, condition or prohibition, which I have already said there is not), which would prevent the owner from a recovery of the loss under this policy? I confess I can perceive none. The loss would be without the excepted period and not within it. Besides, it seems to me that policies on time are properly to have the same construction throughout, unless there be an irresistible presumption the other way. The very object of a policy on time is to avoid any designation of voyages or chances of deviation, and to leave the party at liberty to proceed on any voyages or adventures which he may choose. Exceptions, therefore, in the policy, if they admit of any other reasonable interpretation, ought not to be construed as cutting down the policy to particular voyages, excluding all others, but to be deemed exceptions of time and risks in particular ports or parts of voyages. Now, every word in the present policy is perfectly satisfied by the interpretation which I have given to it, without any straining of the words from their ordinary meaning, as words of exception or exclusion. But if we construe the clause the other way, as excluding all voyages to and from the excepted ports in Mexico and Texas, and all voyages to and from the West Indies begun before or continued after the excepted period, we are necessarily obliged to interpolate many words into the clause and to deflect the words from their common signification. In short, we are to construe a policy purporting to be a policy on time to be also a policy on

voyages, and the exception to be not of time and risks but of voyages to and from the excepted ports and places, as well as an exception of the time passed in them. It appears to me that this is not a reasonable or justifiable construction.

But, suppose the meaning of the excepted clause is ambiguous and admits of either construction, which is then to be adopted? The rule adverted to decides this. The exception is to be construed most strictly against the underwriters and most favorably to the insured.

Upon the whole, therefore, notwithstanding I have had some difficulty on the subject, my mind reposes on the construction which I have stated as the true, the natural and the appropriate meaning of the policy.

REED v. INSURANCE COMPANY.

(5 Otto, 28-33. 1877.)

APPEAL from U. S. Circuit Court, District of Maryland.

Opinion by MR. JUSTICE BRADLEY.

STATEMENT OF FACTS.—This is a cause of contract, civil and maritime, commenced by a libel *in personam* by Samuel G. Reed, the appellant, against the Merchants' Mutual Insurance Company of Baltimore, the appellee, to recover \$5,000, the amount insured by the latter on the ship *Minnehaha*, belonging to the libellant. The policy was dated the 14th day of January, 1868, and insured said ship in the amount named, lost or not lost, at and from Honolulu, *via* Baker's Island, to a port of discharge in the United States not east of Boston, with liberty to use Hampton Roads for orders, "the risk to be suspended while vessel is at Baker's Island loading." The ship was lost at Baker's Island, where she had gone for the purpose of loading, on the 3d day of December, 1868. The defense was that the loss occurred whilst the risk was suspended under the clause above quoted; also laches by reason of the delay in commencing suit, being more than four years after the cause of action accrued.

This case, upon the merits, depends solely upon the construction to be given to the clause in the policy before referred to, namely, "the risk to be suspended while vessel is at Baker's Island loading;" and turns upon the point whether the clause means while the vessel is at Baker's Island *for the purpose of loading*, or while it is at said island *actually loading*. If it means the former, the company is not liable; if the latter, it is liable.

§ 699. *A written contract may be read, in case of doubt, by the circumstances attending its execution.*

A strictly literal construction would favor the latter meaning. But a rigid adherence to the letter often leads to erroneous results and misinterprets the meaning of the parties. That such was not the sense in which the parties in this case used the words in question is manifest, we think, from all the circumstances of the case. Although a written agreement cannot be varied (by addition or subtraction) by proof of the circumstances out of which it grew and which surrounded its adoption, yet such circumstances are constantly resorted to for the purpose of ascertaining the subject-matter and the standpoint of the parties in relation thereto. Without some knowledge derived from such evidence, it would be impossible to comprehend the meaning of an instrument or the effect to be given to the words of which it is composed. This preliminary knowledge is as indispensable as that of the language in which the instrument

is written. A reference to the actual condition of things at the time, as they appeared to the parties themselves, is often necessary to prevent the court, in construing their language, from falling into mistakes and even absurdities. On this subject Professor Greenleaf says: "The writing, it is true, may be read by the light of surrounding circumstances, in order more perfectly to understand the intent and meaning of the parties; but as they have constituted the writing to be the only outward and visible expression of their meaning, no other words are to be added to it or substituted in its stead. The duty of the courts in such cases is to ascertain, not what the parties may have secretly intended, as contradistinguished from what their words express, but what is the meaning of the words they have used." 1 Greenl. Evid., sec. 277. Mr. Taylor uses language of similar purport. He says: "Whatever be the nature of the document under review, the object is to discover the intention of the writer as evidenced by the words he has used; and, in order to do this, the judge must put himself in the writer's place, and then see how the terms of the instrument affect the property or subject-matter. With this view, extrinsic evidence must be admissible of all the circumstances surrounding the author of the instrument." Taylor, Evid., sec. 1082. Again he says: "It may, and, indeed, it often does, happen, that, in consequence of the surrounding circumstances being proved in evidence, the courts give to the instrument thus relatively considered an interpretation very different from what it would have received had it been considered in the abstract. But this is only just and proper; since the effect of the evidence is not to vary the language employed, but merely to explain the sense in which the writer understood it." Id., sec. 1085. See *Thorington v. Smith*, 8 Wall., 1, and remarks of Mr. Justice Strong in *Maryland v. Railroad Co.*, 22 id., 105.

The principles announced in these quotations, with the limitations and cautions with which they are accompanied, seem to us indisputable; and, availing ourselves of the light of the surrounding circumstances in this case, as they appeared, or must be supposed to have appeared, to the parties at the time of making the contract, we cannot doubt that the meaning of the words which are presented for our consideration is that the risk was to be suspended while the vessel was at Baker's Island for the purpose of loading, whether actually engaged in the process of loading or not. Taking this clause in absolute literality, the risk would only be suspended when loading was actually going on. It would revive at any time after the loading was commenced, if it had to be discontinued by stress of weather or any other cause. It would even revive at night, when the men were not at work. This could not have been the intent of the parties. It could not have been what they meant by the words "while vessel is at Baker's Island loading." It was the place, its exposure, its unfavorable moorage, which the insurance companies had to fear, and the risk of which they desired to avoid. The whole reason of the thing and the object in view point to the intent of protecting themselves whilst the vessel was in that exposed place for the purpose referred to, not merely to protect themselves whilst loading was actually going on. Her visit to the island was only for the purpose of loading; as between the contracting parties, she had no right to be there for any other purpose; and, supposing that they intended that the risk should be suspended whilst she was there for that purpose, it would not be an unnatural form of expression to say, "the risk to be suspended while vessel is at Baker's Island loading." And we think that no violence is done to the language used, to give it the sense which all the cir-

cumstances of the case indicate that it must have had in the minds of the parties.

If we are right in this construction of the contract, there can be no uncertainty as to its effect upon the liability of the underwriters. The loss clearly accrued at a time when, by the terms of the policy, the risk was suspended. The ship sailed in ballast from Honolulu on or about the 7th of November, 1867, and arrived at Baker's Island on the afternoon of the 20th day of November, 1867. She came to her mooring in safety, and her sails were furled, shortly after which a heavy gale and heavy surf arose. The gale and surf continued with violence until the 3d of December, 1867, when the ship parted her moorings and was totally wrecked and lost. At no time after her arrival at Baker's Island was it possible to discharge ballast or receive cargo or to commence the progress of loading. The violence of the winds, current and waves, and their adverse course and direction, prevented the ship from slipping her cables and getting to sea, or otherwise escaping the perils that surrounded her.

These facts are indisputable; and they show that, when the loss occurred, the vessel was at Baker's Island for the purpose of loading. That the process of loading had not actually commenced is of no consequence. The suspension of the risk commenced as soon as the vessel arrived at the island and was safely moored in her proper station for loading.

§ 700. *Laches in swing in admiralty.*

The appellee, as a further defense, set up laches in bringing suit. The libel was not filed until more than four years had elapsed after the cause of action had accrued. The statute of limitations of Maryland requires actions of account, *assumpsit*, on the case, etc., to be brought within three years; and the counsel for the appellee insists that by analogy to this statute the admiralty court, having concurrent jurisdiction with the state courts in this case, should apply the same rule. We had occasion, in the case of *The Key City*, 14 Wall., 653, to explain the principles by which courts of admiralty are governed when laches in bringing suit is urged as an exception in cases cognizable therein. In view of the construction which we have given to the contract in this case, it is not necessary to pass upon the precise question now raised by the appellee.

It is also unnecessary to examine other questions which were mooted on the argument.

Decree affirmed.

NEIDLINGER v. INSURANCE COMPANY OF NORTH AMERICA.

(District Court for New York: 10 Benedict, 254-263. 1879.)

Opinion by BENEDIOT, J.

STATEMENT OF FACTS.—In October, 1876, the libelants obtained from the defendant, by open policy and certificates, insurance to the amount of \$17,600 upon twenty-one thousand and sixty-eight and forty-three forty-eighths bushels of barley from San Francisco to New York on the ship *Blue Jacket*. The policy was in the usual American form against perils of the seas. By the memorandum clause grain of all kinds was warranted by the assured "free from average unless general," and also "free from damage or injury from dampness, change of flavor, or being spotted, discolored, musty or mouldy, except caused by actual contact of sea water with the articles damaged, oc-

occasioned by sea perils." The memorandum was qualified by the certificates, which contained the words, "subject to twenty per cent. particular average."

The barley was shipped in sacks, and the bills of lading issued therefor described the property as so many sacks of barley. There was other barley in the ship—also shipped in sacks—and there was some pig lead, wool, rags, borax and other cargo. The barley was stowed in tiers, the lower tier resting upon a grain ceiling over the pig lead, old sails being spread for dunnage between the ceiling and the ground tier of barley. During the voyage and while the ship was in the South Atlantic, she sprung a leak through a peril of the seas, and thereby sea water was taken into the hold, which came in actual contact with those sacks of barley composing the lower tiers, and with some in the wings. In consequence of the leak, the vessel bore up for Rio, where she arrived on the 15th day of January, having experienced heavy weather, and having at times had from twenty-two to twenty-four inches of water in her hold. Upon arrival in Rio all the cargo except the barley composing the lower tier and some in the after end of the ship was taken out. The ship was then docked and repaired. The barley and other cargo taken out was then restowed in the ship, and on the 18th day of March the ship sailed for New York, where she arrived without further disaster on the 11th day of May. Upon discharging the cargo in New York, certain of the libelants' bags, especially those composing the lower tier, showed marks of sea water, and were caked and badly damaged by actual contact with sea water.

The evidence will not permit the conclusion that of the libelants' bags a greater number than five thousand three hundred and sixty were in actual contact with sea water. Indeed, it is quite evident that the number of bags so damaged was less than five thousand three hundred and sixty. The rest of the barley was bright in color, and to all external appearance merchantable. But by testing samples it was discovered that the malting quality of the barley had been destroyed, and in consequence it was unsalable as merchantable barley fit for malting. Accordingly all was sold at auction, when it brought a price far less than the market price of barley fit for malting. This action was then brought by the owners of the barley against the underwriters, to recover for the loss upon the barley insured by them, as ascertained by the auction sale.

In regard to the five thousand three hundred and sixty sacks above mentioned, it may, for the purposes of this case, be considered to have been proven that the damage was caused by actual contact of sea water with those sacks. In regard to the damage to the remainder, it may, for the purposes of this case, be considered to have been shown to have been caused by dampness in the ship's hold. The most favorable view for the libelants is to consider the evidence as warranting the inference that the sea water which leaked into the ship prior to her arrival at Rio, by creating a damp atmosphere in the hold caused germination to commence in the barley, which being thereafter checked by heat, left the barley dry, bright, and to all appearances sound, but incapable of further germination.

§ 701. *Damage to grain by vapors from other grain wet with sea water. "Actual contact" of water.*

It is conceded that the loss on the five thousand three hundred and sixty sacks is not sufficient to charge the underwriters—that loss not amounting to twenty per cent. of the property insured. But if to the loss on the five thou-

sand three hundred and sixty sacks there be added the loss on the remainder, arising from the destruction of the malting capacity, then the amount of loss is sufficient to warrant a recovery upon the policy. The question to be determined, therefore, is, whether the underwriter is liable upon the policy for damage to sacks of barley that were never reached by the sea water, assuming it to have been shown that such damage was caused by damp vapor arising from other sacks that were reached by the sea water which came into the vessel through a peril of the seas. Was such damage caused by actual contact of sea water with the articles damaged, within the meaning of the warranty in the policy contained? If so, the libelants are entitled to recover; otherwise not.

The question thus presented does not appear to have been passed on in the national courts of the United States. It has, however, been considered in the state courts, and the cases there adjudged deserve respectful attention. It will conduce to the understanding of those cases to notice the circumstances under which the warranty in question came to be inserted in policies of insurance, and then to examine in chronological order the adjudications made in regard to the effect produced by the provisions.

§ 702. *Authorities reviewed.*

In the year 1851 a question arose in the English courts in regard to the liability of an underwriter in a case where hides and tobacco had been shipped together, and the tobacco was injured in flavor by a fetid odor arising from the hides, which had been wet by sea water shipped during the voyage by peril of the seas. The policy contained no limitation of the underwriter's liability other than that contained in the ordinary memoranda, and the plaintiff recovered, upon the ground that the natural and almost inevitable cause of the flavor communicated to the tobacco was the access of sea water to the hides by a peril of the sea. Under such a policy it is not necessary, said Martin, B., "that sea water should be in absolute contact with the injured article." *Mantova v. Lond. Ins. Co.*, 6 Exch., 459.

In the same year the case of *Baker v. The Manufacturers' Ins. Co.* came before the supreme court of Massachusetts (12 Gray, 603), when the liability of the underwriter was asserted in respect to damage to delicate French goods arising from an extraordinary formation of steam and gases occasioned by an extraordinary access of sea water to the hold, caused by perils of the seas. In consequence of these decisions — as it has been supposed, and as the language of the warranty indicates — the warranty under consideration was thereafter inserted in policies, whereby the property insured is "warranted by the assured free from damage or injury from dampness, change of flavor, or being spotted, discolored, musty or mouldy, except caused by actual contact of sea water with the articles damaged occasioned by sea perils."

In 1858 the effect of this warranty came to be considered by the court of common pleas in the city of New York, in the case of *Woodruff v. The Commercial Ins. Co.*, 2 Hilt., 130, and upon that case the libelants in this action place their chief reliance. The action was upon a policy similar to the one here sued on, to recover for damage to wheat loaded in sacks. The evidence disclosed three kinds of injury. Some of the sacks were damaged by sea water leaking upon them; other sacks were damaged by dampness arising from the sacks that had been in actual contact with sea water; and there was damage caused by effluvia that arose from hides forming part of the cargo which had been wet by sea water through a peril of the sea. The judgment

of the court was that the underwriters were not liable for the damage caused by the effluvia from the hides, but were liable for the other damage.

The ground upon which the court based the distinction drawn between the damage caused by effluvia and that caused by dampness is to be found in the opinion delivered by Brady, J., where it is said: "If sea water be communicated by absorption, or makes its way upon any other principle of natural philosophy from the articles wet to any part of the same article, the actual contact contemplated by the policy is created." The same idea is conveyed by the language used in the opinion delivered by Judge Ingraham, when, in concurring with Judge Brady, he says: "The dampness referred to in the warranty is dampness to the article when it has come in contact with sea water."

From these expressions it may be inferred that no damage was considered by the court of common pleas to be chargeable to the underwriter, except such as appeared to have been caused by sea water that had been communicated from one bag to another by absorption, or upon some other principle of natural philosophy; and it seems difficult to understand how the court reached its result upon any other ground.

It is not stated in the opinions that the shipment, constituted as it was, of various sacks of wheat, was considered to be a single article; and unless the decision was that the sea water had passed to all the sacks allowed for in the judgment, it would seem that the sacks damaged by effluvia would have been placed in the same category with those damaged by the vapor of the water,—the effluvia, as well as the vapor, being the natural result of the sea water in the ship. If this be the ground of the distinction that was there made between the damp sacks and those damaged by effluvia only, the case affords little support to the libelants here, for in this case the question is in regard to bags of grain to which sea water was never communicated by absorption or otherwise.

But however the case of *Woodruff v. The Commercial Ins. Co.* may be understood, its weight as authority in favor of the libelants is more than counterbalanced by the decision of the supreme court of Massachusetts in the subsequent case of *Cory v. Boylston Fire & Marine Ins. Co.*, decided in 1871, and reported in 101 Mass., p. 146, also in 9 Am. Rep., p. 14. This was a case upon a policy of insurance similar to that issued to libelants. The loss sought to be recovered arose from damage to champagne wine packed in cases and valued by the case. The ruling was that under such a warranty "it is not enough to bring a case within this clause that perils of the seas should be the efficient and, within the rule laid down in the previous decisions, the proximate cause by which the sea water was shipped which more or less directly operates upon and injures the goods; or that sea water should come in contact with part of the cargo; but it must come into actual contact with the articles for the damage to which the underwriters are sought to be charged."

The result of this ruling was that the underwriter was absolved from liability upon a state of facts curiously resembling, as the court remarks, those in the former case of *Baker v. The Manufacturers' Ins. Co.*, where the same tribunal had held the underwriters liable. The difference in result arose simply from the insertion of the warranty under consideration here. The case is directly in point and it is adverse to the claim of these libelants.

I have not overlooked the suggestion made in behalf of the libelants, that a distinction between that case and this arises from the fact that there the wine was valued by the case in the policy, while here the policy is open. But this

is a distinction without a difference. Inserting in the policy a valuation of the articles by the case does not change the nature of the contract. It is still a policy in gross upon a shipment consisting of different articles (*Hernandez v. The Sun Mutual Ins. Co.*, 6 Blatch., 317; §§ 1003-5, *infra*); and so far as the question under consideration is involved the two policies are alike.

The conclusion reached by the supreme court of Massachusetts commends itself to my judgment. It is certainly in harmony with the letter of the warranty, and as I think with the spirit and intention of the parties; and no arguments have been here presented sufficient to lead me to a different conclusion.

It has been said that the vapor arising from sea water is sea water within the meaning of the warranty. But the difference between a case where damage arises from sea water carried by absorption or capillary attraction, and one where the damage is caused by the vapor evolved from sea water, is palpable. The risk is different in the two cases, not only in degree but in character, because the vapor of water is communicated under different circumstances and in obedience to different laws from those that control the movements of water.

Nor can the position be maintained that the barley shipped by the libelants is to be deemed for the purpose of the insurance to be a single article, and, as in *Woodruff v. The Commercial Ins. Co.*, the insurer be held liable upon the ground that all the damage arose from sea water having been communicated by absorption or having made its way upon some other principle of natural philosophy from one part of the article to another part of the same article. For, however the fact may have appeared in *Woodruff v. The Commercial Ins. Co.*, in this case the evidence forbids the conclusion that sea water was ever communicated to any sacks except the five thousand three hundred and sixty sacks that displayed marks of the contact of sea water. It is, therefore, impossible upon the evidence in this case to hold that the disputed damage was occasioned by the actual contact of sea water with a part of the article insured. Nor can a shipment of grain in bags be deemed to consist of a single article.

In a case of insurance upon hides before the supreme court of the United States (*Bias v. The Chesapeake Ins. Co.*, 7 Cranch, 416) the insurance was described as an "insurance in gross on a cargo consisting of a distinct number of articles." If such be the character of an insurance upon hides, certainly an insurance upon grain in sacks cannot be said to consist of a single article.

But it is said, if this be an insurance of many different articles in gross, the different kernels of grain constitute the articles of which it is composed, and inasmuch as it would be absurd to suppose an intention by the warranty to compel the insurer to show actual contact of sea water with each kernel of grain, it must have been the intention to treat the barley as consisting of a single article when applying the provision of the warranty. If this were the intention no advantage would result to the libelants, for, as before stated, the damage in dispute did not result from the contact of sea water, but from the contact of vapor. Besides, policies of insurance are commercial contracts, to be construed and applied in view of the methods pursued by the merchants in their dealings with each other, and among merchants no notice is taken of the possibility that some of the kernels in a sack of grain that is wet may escape contact with the water; but in the absence of evidence to the contrary they act upon the assumption — sufficiently accurate for all practical purposes — that when sea water comes in contact with a sack of grain it will by

absorption be brought in contact with all the grain in the sack. And in such case they would, when ascertaining the part damaged, treat each sack as constituting a single article. The more reasonable supposition, therefore, is, that it was the intention of the parties to this contract that in applying the warranty each sack of grain should be deemed a distinct article. So understood, the warranty will read: "This grain is warranted free from damage or injury from dampness, unless such dampness be caused by actual contact of sea water with the damp sack." If the policy had contained a warranty so worded it would scarcely have been claimed that the insurer was liable for any damage outside of the five thousand three hundred and sixty bags which showed marks of the actual contact of sea water.

My conclusion, therefore, is that the libelants have failed to show that a loss equal to twenty per cent. of the value insured was occasioned by any peril insured against, and their libel must, therefore, be dismissed, with costs.

[On appeal this judgment was affirmed by the circuit court, where the following opinion was delivered. *Neidlinger v. Ins. Co. of North America*, 18 Blatchford, 297-302. 1880.]

§ 703. *The barley not to be treated as shipped in bulk.*

Opinion by BLATCHFORD, J.

The libelants rest their case on a single point. They contend that, for the purpose of construing the policy, the barley is to be treated as if it had been shipped in bulk and not in sacks, the insurance being of so many bushels, not divided, and not specified as being in sacks, and there being no evidence that the respondent knew that the barley was shipped in sacks. The answer to this view is, that the policy contains a provision that, in case of partial loss by sea damage to any merchandise insured under it, the loss shall, as far as practicable, be ascertained by a separation and sale of only the damaged portion of the contents of the packages, and not otherwise. This clause is to be applied so as, in good faith, to give the respondent the benefit of the contract exempting it from liability for damage by dampness unless through actual contact of sea water with the articles damaged, occasioned by sea perils. There must be a separation of, at least, sacks with which sea water has come in contact. If there is to be a separation of the damaged parts of packages, there must be a separation of sacks some part of the contents of which has been damaged by actual contact with salt water. If the barley was in fact shipped in packages or sacks, the respondent is entitled to the benefit of that actual fact in ascertaining the loss. According to the certificates, the loss is to be adjusted in conformity with the conditions of the policy. Although the certificates specify only so many bushels of barley, yet the policy substantially provides that, if any merchandise insured under it is in packages, those with which sea water has come in actual contact shall be separated. On this principle, and assuming that all the grain in any sack which has come in actual contact with sea water is to be regarded as having come in actual contact with sea water, the damage is not twenty *per cent.* in respect of all such grain. The case is one not different in principle from what it would be if the certificates had specified so many sacks of barley and had valued the contents of each sack.

§ 704. *Contact of vapor not contact of sea water, under the circumstances.*

There is no liability for damage from vapor arising from the sea water which has come in contact with one sack, so far as such vapor or the dampness thereof affects the barley in another sack, with which other sack sea water has

not otherwise come in contact. *Cory v. Boylston Ins. Co.*, 107 Mass., 140. To hold that the contact of such vapor is the actual contact of sea water is to fritter away the good sense of the provision, which was introduced after decisions in such cases as *Baker v. Manuf'rs Ins. Co.*, 12 Gray, 603. The view of the libelants would require the same decision under the actual contact clause as without it. I do not understand the case of *Woodruff v. The Commercial Ins. Co.*, 2 Hilton, 130, as being an authority for the libelants. The observations of the district judge, in his decision in this case, as to that case, seem to be well founded.

If all the damage in this case had been from vapor arising from sea water which had found its way into the ship, without any other actual contact of such sea water with any barley, it might as well then as now have been contended that the contact of such vapor was the actual contact of sea water. But this would take away all force from the actual contact clause.

The libel must be dismissed, with costs to the respondent in the district court and in this court.

§ 705. *Partial loss.*—It was stipulated in a policy of insurance that the underwriters should not be liable "for any partial loss of other goods, or on the vessel and freight, unless it amount to five per cent. exclusive in each case of all charges and expenses incurred for the purpose of ascertaining and proving the loss." *Held*, that the words "in each case" do not mean at each time of loss, but refer to the several subjects insured, and require a damage of five per cent. to justify a claim in each case. *Held*, also, that successive losses on the cargo, each less than five per cent., but in the aggregate amounting to more than five per cent., did not fall within the exemption, and were to be borne by the underwriter. *Donnell v. Columbian Ins. Co.*,* 2 Sumn., 366.

§ 706. *It seems* that the same rule would apply to losses on the ship. *Ibid.*

§ 707. *Quære*, whether a distinction exists between successive losses by the same peril in the same voyage, and successive losses by different perils in the same voyage. *Ibid.*

§ 708. *Blockaded ports excepted.*—Insurance against "all risks, blockaded ports and Hispaniola excepted." *Held*, that the words of exception did not constitute a warranty, being the words of the insurer. *Held*, also, that sailing for a blockaded port, not knowing it to be such, was not within the exception. *Yeaton v. Fry*,* 5 Cr., 335.

§ 709. *Seizure.*—As to the excepting clause, relative to seizure or detention for or on account of illicit or prohibited trade, etc. *Bradstreet v. Neptune Ins. Co.*, 8 Sumn., 615; *supra*, V, Risk Insured.

§ 710. *Capture by Confederate vessel.*—A taking by a vessel of the late Southern Confederacy was a capture within the meaning of a policy exempting the underwriter from loss by capture. *Mauran v. Insurance Co.*,* 6 Wall., 1.

§ 711. The taking of a ship by the Confederate privateer *Sumter* was not a taking by pirates; the word "capture," in a warranty against "capture, seizure, or detention," includes a taking by pirates. *Dole v. New England Ins. Co.*,* 2 Cliff., 394.

§ 712. Where different causes concur, to one of which it is necessary to attribute the loss, the loss is to be attributed to the efficient predominant peril, whether it is or is not in activity at the consummation of the disaster. A loss occasioned by the capture of a vessel by a Confederate privateer, followed by burning the same, is a loss caused by capture, within the rule. *Ibid.*

§ 713. *Prior insurance.*—By the usual clause in policies as to prior insurance, the underwriter is exonerated if prior insurance to the full value of the vessel and cargo has been made by the assured on the same voyage, and is in full force at the time, though by a subsequent agreement between the assured and the prior underwriter, before the risk begins, the prior insurance is canceled. *Seamans v. Loring*, 1 Mason, 127 (§§ 664-69).

VIII. DEVIATION.

SUMMARY—*Stopping for repairs*, § 714.—*Cruising for prize and avoiding capture*, §§ 715, 716.—*Delays*, §§ 717-721.—*Touching at various ports*, §§ 722-724.

§ 714. Insurance on the Jefferson at and from St. Lucia to New York, with liberty to touch and trade at St. Kitt's. The vessel having lost some of her men, went into St. Bartholomew's to supply the loss, and sustained an injury on her return voyage by collision, with damages exceeding half her value. Upon a defense of deviation, *held*, that if an accident happen while the property is at the risk of the underwriters and cannot be repaired at the port of departure, the vessel may go to the nearest port for the purpose. But the assured must show that it was necessary to proceed to another port, and that the vessel went to the nearest port at which her wants could be supplied. *Cruder v. Philadelphia Ins. Co.*, §§ 725, 726.

§ 715. A vessel armed with a letter of marque, and insured as such, has no right to cruise at large for prizes, but she may chase and capture hostile vessels coming in sight in the course of her voyage without the act being a deviation; and this whether the policy describe her as having a letter of marque or not, if the underwriters knew the fact. *Haven v. Holland*, §§ 727-729.

§ 716. If a vessel capture a hostile vessel in self-defense, she has a right to take possession and man the prize, and this will not constitute a deviation if her own crew is not thereby injuriously weakened. *Ibid*.

§ 717. Insurance was effected on goods on a voyage at and from Gaudaloupe to a port in France on the Atlantic. The vessel, instead of going directly to France, stopped at Santos two or three days, which was proved to be the safest and most usual route in time of war. *Held*, that if the vessel went to Santos with the honest intention to avoid British cruisers, and remained there no longer than necessary, the deviation was excusable. *Goyon v. Pleasants*, § 730.

§ 718. Insurance on a vessel and freight "at and from T. to Havana, and at and from thence to New York, with liberty to stop at Matanzas," with a representation that the vessel was to stop at Matanzas to know if there were any men of war off Havana. The vessel sailed on the voyage insured, and put into Matanzas to avoid British cruisers then off Havana and in the practice of capturing neutral vessels trading in Spanish ports. While at Matanzas she unloaded her cargo under an order from the Spanish authorities, and afterwards proceeded to Havana, whence she sailed for New York, and was lost by perils of the sea. No delay was caused by discharging the cargo; the risk was actually decreased. *Held*, that the stopping and delay at Matanzas were proper, and that the unloading was not a deviation. *Hughes v. Union Ins. Co.*, § 731. See *Hughes v. Union Ins. Co.*,* 8 Wheat., 294.

§ 719. Delay to take on board a cargo not authorized by the policy is a deviation though there may have been no increase of risk. *Maryland Ins. Co. v. Le Roy*, § 732.

§ 720. The length of time a vessel may wait to take in her cargo, without discharging the underwriter, does not depend upon the usage of trade. *Oliver v. Maryland Ins. Co.*, §§ 733-34.

§ 721. The danger which will justify a vessel in remaining in port a long time, without discharging the underwriters, must be obvious, immediate and directly applied to the interruption of the voyage. *Ibid*.

§ 722. If by usage a vessel be permitted to go from one port to another to collect her cargo, and she unnecessarily exhaust at one port the whole time allowed to complete the cargo, she cannot go to the other port without deviation. *Ibid*.

§ 723. Where a policy described a voyage from Orococo to St. Bartholomew's or St. Thomas, and at and thence to Tobacco, *held*, that in the absence of evidence of usage, the assured was not authorized to go to both ports, and that having touched at the one and thence proceeded to the other, there was a deviation. *Bulkley v. Protection Ins. Co.*, §§ 735-38.

§ 724. If a vessel insured "at and from Kingston in Jamaica to Alexandria" take in a cargo at Kingston for Baltimore and Alexandria, and before she arrives at the dividing point is captured, it is a case of intended deviation only, and not of non-inception of the voyage insured. *Marine Ins. Co. v. Tucker*, §§ 739-47.

[NOTES.—See §§ 748-772.]

CRUDER v. PHILADELPHIA INSURANCE COMPANY.

(Circuit Court for Pennsylvania: 2 Washington, 262-265. 1808.)

STATEMENT OF FACTS.—Insurance was effected on goods on board the Jefferson, at and from St. Lucia to New York, with liberty to touch and trade at

St. Kitt's. The vessel having lost her mate and two mariners at St. Lucia, sailed to St. Bartholomew's, in order to procure a supply of men, on the 12th of October. She arrived there on the 18th, and, the next day, sailed on her voyage for New York. The captain, in his deposition, states that he went to St. Bartholomew's as the most likely place to get seamen, and because the port charges were lower there than at any of the English islands; that she could not, without such supply, have proceeded on her voyage to New York, although, with the assistance of a passenger going to St. Bartholomew's, who worked his passage thither, she was sufficiently manned to go there. Being asked if the same end could not have been answered by going to St. Kitt's, he answered that he could not determine as to that, as the wind would not have permitted him to fetch St. Kitt's, if he had been so disposed.

On the voyage from St. Bartholomew's she was run foul of by another vessel and so much injured that the crew abandoned her, and got on board a vessel then near. Part of the crew went on board the disabled vessel for water, and were by a storm prevented from returning. They however brought her safely to New York, with considerable injury to the cargo, which, with salvage, exceeded fifty per cent. A regular abandonment was made and refused.

The objections to the recovery were: First, that the calling at St. Bartholomew's was a deviation. Second, if not so, then sailing without being sufficiently manned discharged the underwriters, on the ground of want of seaworthiness. Third, if it should be contended that the voyage began at St. Bartholomew's, then it was a different voyage from the one insured.

§ 725. *If accident happen when vessel is at risk of underwriters, she may go to nearest port for relief.*

Charge by WASHINGTON, J.

The question is, whether the calling at St. Bartholomew's amounted to a deviation. It is admitted, that if an accident had befallen the vessel on her voyage, the deviation, with a view to repair the loss, would have justified the act; but it is contended by the counsel for the defendants, that if the accident happen before the inception of the voyage, it exposes the vessel to the objection of want of seaworthiness if she break ground in that situation. The rule seems to be that if the accident happen whilst the property is at the risk of the underwriters and cannot be repaired at the port of her departure, she may, without prejudice to the insurance, go to the nearest port where the damage may be repaired; and that in doing so, she stands in the same situation as if she had repaired at the place of departure. This principle is laid down in the case of *Motteaux v. The London Assurance Company*, and seems to be perfectly reasonable. If the vessel is injured in port (being insured *at and from* that port, as in this case), and she cannot be repaired there, to say that she should not be at liberty to go to the nearest port where she can be repaired is to say that the voyage never shall commence; or, if it do, that the underwriters shall be discharged, although the accident happened whilst she was protected by the policy. It is for the benefit of all concerned that the step should be taken.

§ 726. — *but the measure must be necessary.*

But in all these cases it should appear fully to the satisfaction of the jury that the measure was necessary, and this it is incumbent on the plaintiff to show if he would excuse the deviation. The only witness as to this part of the subject is the captain, who states that he went to St. Bartholomew's

because he thought it more likely that he should complete his crew there, and that the port charges were lower. But he does not state that he could not have got his crew at another port, and as to the port charges this was no concern of the defendants, and therefore no excuse. Being asked if he could not as well have got them at St. Kitt's, he answers that it was not in his power to determine the question, because, as the wind was, he could not have gone to St. Kitt's if he had been so disposed. If he refers to the state of the wind when he left St. Lucia, he might have waited till it was more favorable; if he means when he was off St. Kitt's, the observation would not apply. But one thing is obvious, that whether he could or could not have got to St. Kitt's, he never, from the moment he broke ground, intended to go there. It is unfortunate that the map offered in evidence by the defendants' counsel in his summing up (and which, to preserve regularity in trials, we thought it improper to introduce at that stage of the cause), had not been sooner offered. However, it is not incumbent on the defendants to show that the vessel did not go to the nearest place to get a crew; the plaintiff should satisfy you that St. Bartholomew's was the nearest port at which his wants could be supplied; and unless you can be thus satisfied, you ought to find for the defendants.

HAVEN v. HOLLAND.

(Circuit Court for Massachusetts: 2 Mason, 230-235. 1820.)

STATEMENT OF FACTS.—*Assumpsit* on a policy of insurance, in the usual form, on merchandise on board the *Volant*, from her port of lading in France to her port of discharge in the United States. The vessel was captured on her homeward voyage by the British. Before sailing from Bayonne the master applied to the American minister and obtained a commission and letter of marque, and increased his armament and crew. On the homeward voyage a vessel was discovered which appeared to be standing for the *Volant*, and attempts were made to avoid her. The two vessels having approached near to each other, the master of the *Volant* demanded a surrender, which was made, and the prize was manned and ordered to France. The captured vessel proved to be the *Criterion*, an American brig, which had been recently captured by the British. The defendant contended that the stopping to capture the *Criterion* was a deviation.

Opinion by STOEY, J.

It does not appear to me that there is any serious difficulty in the law applicable to this case.

§ 727. *Vessel insured under letter of marque may chase and capture hostile vessels in sight, but may not cruise for prizes.*

It is clear from the authorities that a vessel insured as a letter of marque has no right to cruise at large for prizes; but she has, in my opinion, a right to chase and capture hostile vessels which are met with and are in sight in the course of the voyage. See *Jolly v. Walker*, Marth. Ins., 195; *Parr v. Anderson*, 6 East, 202; *Park, Ins.*, 399 (6th ed.); *Hooe v. Mason*, 1 Wash., 207, 211. Here, however, the vessel was not insured as a letter of marque, although it was well known to the underwriters at the time of the insurance that she possessed such a commission. And the argument is, that knowledge of the fact does not aid this defect of description in the policy. I do not profess to feel any doubt on this point. It appears to me that it is wholly immaterial whether the vessel be described in the policy as a letter of marque or

not, provided the fact of her sailing under such a commission be known to the underwriters. The description of the fact does not make the construction of the policy more broad, but it repels any defense founded upon the concealment of a fact material to the risk. There are many cases in which this doctrine is applied. Although this is my opinion, yet as the principal question in this case turns upon another point, I am disposed to reserve this point, and to direct the jury to find a verdict for the defendant, unless the capture was made in necessary self-defense.

§ 728. *Master may defend his vessel by such means as he deems best.*

Whether a vessel be commissioned or not, she has a right to repel any attack of an enemy, and to protect and defend herself by all reasonable precautions against a meditated hostile attack. If a vessel supposed to be an enemy cruiser be in sight, and apparently intend an attack upon a merchant vessel, the master of the latter is bound to exercise his best skill and judgment as to the time and mode of his defense, and if he act honestly and fairly, he will be justified, whatever may be the event. He is not bound to endeavor to make his escape in the first instance, and on failure of this, to meet the enemy; nor is he bound to lay by or fly until an attack is commenced upon him, and he has received injury, and then, and not before, to exert his right of self-defense. The law vests him with a large discretion for the benefit of all concerned. He is to consult the safety of the persons and property on board in the best manner he can. He may lay to or chase the enemy ship if he deem that the most effectual means of securing his object. It may be his best course to begin the attack, and to attempt to cripple the enemy, or to encourage his own crew by commencing a chase, or to intimidate the enemy by laying to and showing a determination to resist any attack. See *Parr v. Anderson*, 6 East, 202, Lord Ellenborough's remarks at the trial at *nisi prius*. These are considerations which are confided to his discretion, and he is to judge under all circumstances what is the most promising mode of defense. To deprive him of this right of choice would be to subvert the great object of his appointment, and to sacrifice to ignorance and mistake, all the advantages of skill and management. The only question in cases of this nature is, whether what is done is fairly attributable to a mere intention of self-defense, or to motives of another nature, such as the desire of profit. If the former, then the act is justifiable; if the latter, then it is a deviation. Apply these principles to the present case. If, when the *Volant* wore round to attack the *Criterion* it was for the purpose of self-defense, to intimidate the enemy, and to repel a meditated attack before the *Volant* should herself be disabled, then it is clear that the act was not a deviation. But if this was wholly unnecessary, and was done by the master without any view to self-defense, and for the mere purpose of making a prize, then it was a deviation.

§ 729. *Master may take possession of and man his prize.*

But it is contended that if the capture was made solely in self-defense, still the master had no right to take possession of and man out the prize, but was bound to proceed on his voyage without this delay. I am of a different opinion. If the capture was made in self-defense, the master had a right to take possession of his prize, and if, without injuriously weakening his own crew, he could man the prize, he had a right so to do, and the delay for these purposes was not a deviation. He had a right to make the capture effectual, to prevent the enemy from recommencing the attack or giving information to other cruisers. The right of capture drew after it all the other incidents. It

would be most mischievous to the interests of trade to discourage a crew from making a gallant defense by the knowledge that in no event could they reap a reward from the victory. I know of no authority in the law that compels me to such a doctrine, and I cannot perceive that it stands on any solid principle of justice or reason or public convenience. (Verdict for plaintiffs.)

GOYON v. PLEASANTS.

(Circuit Court for Pennsylvania: 3 Washington, 241, 242. 1814.)

STATEMENT OF FACTS.—The policy, subscribed by the defendant, was on goods on board the *Elizabeth*, on a voyage to and from Guadeloupe to a port in France on the Atlantic; premium fifty per cent.; to return twenty if the risk should end without loss.

The vessel sailed from Point Petre, on the 10th of March, 1809, and proceeded to the Saints, where she stopped for three or four days to make observations if there were any enemies cruising in the offing, and then proceeded on her voyage by a route not in the direct course of her voyage, but such as was proved to have been the most safe, and such as three-fourths of all vessels going from Point Petre to France usually pursued during war. It was proved that after the capture of Marigalante, an island in the direct route to France, by the British, in 1806, the ocean surrounding that island was much infested with British cruisers, and that an attempt to proceed that way would have been attended with great danger; that the safest plan was to sail from Point Petre at night, to the Saints (islands distant about fifteen miles from that port), and from the high grounds on the island to ascertain whether it would be safe to proceed.

The vessel was captured some days after she left the Saints, by a British cruiser, and was regularly condemned.

§ 730. *Deviation excusable if real object to secure greater safety.*

Charge by WASHINGTON, J.

We do not understand the ground taken by the plaintiffs' counsel, to excuse a deviation from the direct route from Point Petre to France, to be confined to the proof offered by him to establish a usage to touch at the Saints, and to proceed on from thence. But the real and substantial justification of the deviation is, that it was more safe to pursue the course which this vessel took than the direct route by Marigalante. And, if you are of opinion that this vessel went out of her way, and touched at the Saints, with the honest intention of avoiding British cruisers, remaining there no longer than was necessary, then the deviation is excusable, and the plaintiffs are entitled to a verdict. (Verdict for plaintiffs.)

HUGHES v. UNION INSURANCE COMPANY.

(3 Wheaton, 159-167. 1818.)

ERROR to U. S. Circuit Court, District of Maryland.

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This was an action of *assumpsit*, brought on a policy insuring the ship *Henry*, and her freight, "at and from Teneriffe to the Havanna, and at and from thence to New York, with liberty to stop at Matanzas." At the trial the plaintiff gave in evidence the representation on which the policy was made, which contained this expression: "We are to stop at Matan-

zas, to know if there are any men-of-war off the Havanna." The vessel sailed from Teneriffe on the 7th of April, 1807, and on the 7th of June following put into Matanzas, in the island of Cuba, to avoid British cruisers, who were then cruising on her way to and off the port of Havanna, and who were then in the practice of capturing American vessels sailing from one Spanish fort to another. On the 6th of July, as soon as the passage was clear, she proceeded to the Havanna, whence, on the 14th of July, she sailed on her voyage to New York. On the 28th of that month she foundered at sea and was totally lost. The action was for the insurance on the vessel and freight from the Havanna. The underwriters gave in evidence, that while at Matanzas she unladed her cargo, and insisted that this was a deviation, by which they were discharged. To repel this evidence, the plaintiffs showed that the stopping and delay at Matanzas were necessary to avoid capture, and therefore allowed by the policy; that no delay was occasioned by discharging the cargo; that the risk was not increased, but diminished by it; and that an order from the Spanish government had made this act necessary.

The court instructed the jury that unlading the cargo at Matanzas was a deviation which discharged the underwriters, unless it was rendered necessary by the order of the Spanish government at the Havanna. That in this case the order did not justify such unlading, and that the underwriters were, consequently, discharged. Under these directions the jury found a verdict for the defendants. The plaintiff having excepted to the opinion of the court, the judgment, which was rendered in favor of the defendants, was brought before this court on writ of error.

§ 731. *Unlading cargo which did not increase risk was no deviation.*

At the trial the cause seems to have turned principally on the necessity to unlade the cargo at Matanzas, produced by the order of the Spanish government at Havanna. As this court concurs with the circuit judge in the opinion that this order was obtained under circumstances which take from it the character of a force imposed on the master, and compelling him to discharge his cargo, and is, therefore, no excuse for such discharge, it will be unnecessary further to notice that part of the case. The question to be considered is that part of the opinion which declares that unlading the cargo at Matanzas, although it occasioned no delay, and did not increase but did diminish the risk, was a deviation which discharged the underwriters. In considering this question, it is to be observed that the *termini* of the voyage were not changed. The Henry did sail from Teneriffe to the Havanna, and was lost on the voyage from Havanna to Baltimore. The policy permitted her to stop at Matanzas, and the purpose of stopping was to know if there were any men-of-war off the Havanna. It would be idle to stop for the purpose of making this inquiry, if it were not intended that the Henry might continue at Matanzas so long as the danger continued. The stopping and delay at Matanzas is then expressly allowed by the policy.

But admitting this, it is contended that unlading the cargo is a deviation. And why is it a deviation? It produced no delay, no increase of risk, and did alter the voyage. The vessel pursued precisely the course marked out for her in the policy. In reason nothing can be found in this transaction which ought to discharge the underwriters. If, however, the case has been otherwise decided, especially in this court, those decisions must be respected.

In *Stitt v. Wardel*, 1 Esp. N. P., 610, it was determined that liberty to touch and stay at any port did not give liberty to trade at that port; and in *Sheriff*

v. Potts, 5 Esp. N. P. 96, it was decided that liberty to touch and discharge goods did not authorize the taking in of other goods. These cases certainly bear with considerable force on that under consideration; but they were decided at *nisi prius*, and seem to have been in a great degree overruled by the court, in the case of *Raine v. Bell*, reported in 9 East, 195. In that case, under a policy to touch and stay at any place, goods were taken on board during a necessary stay at Gibraltar. The court was of opinion that as this occasioned no delay nor any increase or alteration of the risk, the plaintiff was entitled to recover. Between the case of *Raine v. Bell*, and this case, the court can perceive no essential difference.

In the supreme court of Pennsylvania (*Kingston v. Gerard*, 4 Dal., 274), a similar question occurred, and it was there held that unlading and selling part of her cargo by a captured vessel during her detention would not avoid the policy.

But it is contended that this point has been settled in this court in the case of *Maryland Ins. Co. v. Le Roy*, 7 Cranch, 26 (§ 732, *infra*). In that case a liberty was reserved in the policy "to touch at the Cape de Verd Islands, for the purchase of stock, such as hogs, goats and poultry, and taking in water." The vessel stopped at Fago, one of the Cape de Verd Islands, and took in four bullocks and four jackasses, besides water and other provisions, unstowed the dry goods, and broke open two bales, and took forty pieces out of each for trade. The vessel remained in the island from the 7th to the 24th of May, although the usual delay at those islands for taking in stock and water, when the weather is good, is from two to three days. The weather was good during this delay; and the bullocks and jackasses incumbered the deck of the vessel more than small stock would have done. The court left it to the jury to determine whether the risk was increased by taking the jackasses on board, and directed them to find for plaintiffs, unless the risk was thereby increased. The jury found for the plaintiffs; and this court reversed the judgment rendered on that verdict, because the taking in the jackasses was not within the permission of the policy.

It is perfectly clear that the case of *Maryland Ins. Co. v. Le Roy* differs materially from this. In that case articles were taken on board which incumbered the deck of the vessel, and which were not within the liberty reserved in the policy. In that case, too, the insured traded, and the delay was considerable and unnecessary; the risk, if not increased, might be, and certainly was, varied. The judge, therefore, ought not to have left it to the jury on the single point of increase of risk by taking in the jackasses. Although the risk might not thereby be increased, the authorized delay and unauthorized trading during that delay, connected with taking on board unauthorized articles, discharged the underwriters, according to the settled principles of law; and the court does not say in that case that these circumstances were immaterial or without influence. The court does not feel itself constrained, by the decision in *Maryland Ins. Co. v. Le Roy*, to determine that, in this case also, which differs from that in several important circumstances, the underwriters are discharged. The judgment is reversed and the cause remanded with directions to issue a *venire facias de novo*.

Judgment reversed. (a)

(a) See *Hughes v. Union Ins. Co.*,* 8 Wheat., 294.

MARYLAND INSURANCE COMPANY v. LE ROY.

(7 Cranch, 26-31. 1812.)

ERROR to U. S. Circuit Court, District of Maryland.

STATEMENT OF FACTS.— Action of covenant brought by Le Roy and others, against the Maryland Insurance Company, upon a policy of insurance upon the ship John, from New York to five ports on the coast of "Africa, between Castle D'Elmina and Cape Lopez, including those ports, and at and from them, or either of them, back to New York, with liberties as per order for insurance."

The order of insurance was as follows, namely: "At what rate will you insure \$3,500 upon freight of the ship John, of New York, valued at that sum, at and from New York to Castle D'Elmina, on the gold coast of Africa, with liberty for the vessel to touch at the Cape de Verd Islands for the purchase of stock, such as hogs, goats and poultry, and taking in water?

"Also, \$9,000 on the American ship John, valued at this sum; and \$11,800 on cargo by said ship, consisting of wine, rum, beef, geneva, dry goods, tobacco, molasses, etc., at and from New York, to five ports on the coast of Africa, between Castle D'Elmina and Cape Lopez, including those ports, with liberty of touching and trading at all or any of said ports, backwards and forwards, and at and from her last port on the coast, to New York, with liberty of touching at the Cape de Verds on her return passage, for stock and to take in water. It is understood that the captain returning to one or more ports that he had touched and traded at before, shall not be considered a deviation. The John was ready and expected to sail the 13th inst. There are no contraband goods on board, and the ship is armed with eight carriage guns, with ammunition in proportion, and is an excellent vessel, and Captain Lawrence, who commands her, is a native of New York, well acquainted on the coast of Africa, and has been at most of the places it is intended the vessel is to stop at, and is a careful, experienced seaman."

The declaration was for a total loss by the perils of the sea. The cause was tried upon the issue of *non infregit conventionem*, and the verdict and judgment were for the plaintiffs, with \$5,476 damages. Upon the trial of this issue the defendants (the plaintiffs in error) took twelve bills of exceptions, but as the opinion of this court was given upon the seventh only, it is deemed unnecessary to state the others.

The first bill of exceptions stated not only the facts which the plaintiffs and defendants offered to prove, but detailed at great length the testimony and circumstances tending to prove those facts, or from which they might be inferred. Among other facts, it stated that the ship, in the prosecution of her voyage, arrived at the Island of Fogo, one of the Cape de Verd Islands, on the 7th of May, 1805, where the captain received on board four bullocks, and four jackasses, besides water and other provisions, and unstowed the dry goods and broke open two bales, and took out forty pieces of each for trade. That the ship remained there until the 24th of May. That the time generally employed by a vessel in taking in stock and water at the Cape de Verd Islands is from two to three days, unless the weather should be very unfavorable; that the weather was good, and that the bullocks and jackasses incumbered the deck much more than small stock would have done.

The seventh bill of exceptions stated that the defendants gave in evidence all the facts detailed in the preceding bills of exceptions, and thereupon prayed the court to direct the jury that, if they believe the same, then the

taking the said jackasses on board the said ship John, while she lay at the Island of Fogo, was not within the privilege allowed to the plaintiffs in this cause to touch at the Cape de Verd Islands, in the performance of the voyage insured, for the purchase of stock and to take in water, and therefore vitiates the policy, which direction the court refused to give; but the court was of opinion, and accordingly directed the jury, that the taking in the four jackasses at the Isle of Fogo, as aforesaid, did not avoid the policy, unless the risk was thereby increased; whereupon the counsel for the defendants excepted.

Opinion by MR. JUSTICE JOHNSON.

In deciding on this cause the court will confine itself to the case made out on the seventh exception. Its decision on the point presented by that exception disposes of the case finally.

The opinion prayed for was, that by taking in, at Fogo, an additional cargo, not sanctioned by the contract of insurance, the insurers were discharged from their liability under the policy. The charge delivered by the court was that the subsequent liability of the underwriters must depend upon the question whether any increase of risk resulted from the shipping of that additional cargo.

§ 732. *Taking cargo not authorized by policy avoids same.*

In this charge this court are of opinion that the court below erred. The discharge of the underwriters from their liability in such cases depends, not upon any supposed increase of risk, but wholly on the departure of the insured from the contract of insurance. The consequences of such violation of the contract are immaterial to its legal effect, as it is *per se* a discharge of the underwriters, and the law attaches no importance to the degree in cases of voluntary deviation; necessity alone can sanction a deviation in any case; and that deviation must be strictly commensurate with the *vis major* producing it. The case of *Raine v. Bell*, 9 East, 195, has been cited as supporting a contrary doctrine.

Without being understood to acquiesce in the correctness of that decision, it may be remarked that the question was not, in that case, whether the lading, taken in at Gibraltar, was within the terms of the policy, as in the present; but what acts were lawful to be done during the delay, occasioned by a justifiable cause of deviation. On the contrary, the case of *Sheriff v. Potts*, 5 Esp. N. P. C., 96, was a case of voluntary departure from the stipulations of the policy, and the decision supports the opinion we now give. It may also be remarked that, in the case of *Raine v. Bell*, the notice which Lord Ellenborough takes of the case of *Sheriff v. Potts* virtually admits the doctrine upon which this court founds its decision.

The terms of this policy, so far as connected with this decision, are, "with liberty of touching at the Cape de Verd Islands on her outward passage, for stock, and to take in water." Touching, in its nautical sense, is known to be the most restrictive word that can be adopted in such a case. Construing the license according to the subject-matter, and in its necessary connection with the offer on the freight, it could mean no more than permission to provision the vessel with live stock, such as is usual on a voyage, and may be procured at the Cape de Verds.

It might, indeed, admit of a doubt whether any of the larger animals used for food were included within the policy. The words of the first offer certainly were intended to confine the permission to the smaller animals. Stock is a term of the most general import; in its present extended application, it

would include a great variety of subjects that never could have entered into contemplation of the parties. In what sense was the term used? is the question to be decided; not what uses it might have been applied to in other contracts, or between other parties. The general want of precision in the language of maritime contracts is an endless cause of litigation among mercantile men. Courts of justice are therefore obliged to resort to such reasons as the nature, object and terms of the contract present, to determine the precise extent of the obligation of the parties.

We feel no inclination to add to the number of causes which vitiate a policy; but the amount of the premium depends upon such a variety of considerations (as often suggested by caprice as by judgment), that the contract, whatever it is, must be substantially adhered to.

Judgment reversed.

OLIVER v. MARYLAND INSURANCE COMPANY.

(7 Cranch, 487-496. 1813.)

ERROR to U. S. Circuit Court, District of Maryland.

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This was an action brought on a policy insuring the *Snow Comet*, at and from Baltimore to Barcelona, and at and from thence back to Baltimore. The *Comet* arrived at Barcelona on the 25th day of July, in the year 1807, where she was compelled to perform quarantine. On the 28th of November the *Comet* cleared out from Barcelona for Salou, a port of Catalonia, about sixty miles south of Barcelona, where her return cargo was ready to be taken on board. On the 1st of December, when in the act of sailing, the officers of the vessel were informed that the Algerine cruisers were out capturing American vessels. They were advised to remain until they received further information. On the 8th day of January, 1808, they sailed for Salou and arrived on the 10th. They were detained by high winds till the 28th of January, when they sailed for Baltimore. On the 5th of February the vessel was captured by a British cruiser while on her return voyage, and carried into Gibraltar, where she was condemned under the orders of council of the 8th of November, 1807. Evidence was given that it was usual for vessels trading to Barcelona to touch at Salou or some other port on the same coast, to take in the whole or part of their return cargo, and that in some instances vessels had remained in the port of Barcelona four, six, and even eight months, waiting for a return cargo.

§ 733. *Usage cannot regulate the time to be consumed in taking on a cargo.*

On this evidence the counsel for the defendants moved the court to instruct the jury that the plaintiff could not recover in this cause by reason of the length of time the vessel remained at Barcelona. The court refused to give the direction as prayed, but did instruct the jury that, if they believed the facts stated, the plaintiff was not entitled to recover unless from the whole testimony in the cause they should be of opinion that the vessel did not remain longer at Barcelona than the usage and custom of trade at that place rendered necessary to complete her cargo. To this direction of the court the plaintiff, by his counsel, excepted.

This exception was not much pressed at the bar, nor does it appear to this court to contain any principle to which he could rightly object. Unquestionably an idle waste of time, after a vessel has completed the purposes for which

she entered a port, is a deviation which discharges the underwriters. If the Comet remained without excuse, at Barcelona, an unnecessary length of time while her cargo was ready for her, and she might have sailed, she would remain at the risk of the owners — not of the underwriters.

There is, however, some doubt spread over the opinion in this case in consequence of the terms in which it is expressed. The vessel might certainly remain as long as was necessary to complete her cargo, but it is scarcely to be supposed that this was regulated by usage and custom. The usages and customs of a port or of a trade are peculiar to the port or trade. But the necessity of waiting where a cargo is to be taken on board until it can be obtained is common to all ports and to all trades. The length of time frequently employed in selling one cargo and procuring another may assist in proving that a particular vessel has or has not practiced unnecessary delays in port, but can establish no usage by which the time of remaining in port is fixed. The substantial part of the opinion, however, appears to have been, and seems to have been understood, that the plaintiff could not recover unless the jury should be of opinion that the vessel did not remain longer at Barcelona than was necessary to complete her cargo, of which necessity the time usually employed for that purpose might be considered as evidence.

§ 734. *If a vessel entitled by usage to go to two ports for cargo consume at one all the time allowed, she cannot then go to the other.*

The defendants then moved the court to instruct the jury that if the said vessel continued at Barcelona as long as was justifiable by the usage of trade at that place for completing and taking in her cargo, and did not complete and take in her cargo there, but afterwards went to Salou and remained there the length of time as stated in the said protest, in such case the plaintiff is not entitled to recover.

The court instructed the jury that if the vessel remained at Barcelona as long as the usage of trade justified for the purpose of taking in a cargo there, that she could not afterwards go to another port and take it in without vacating the policy. To this opinion also the counsel for the plaintiff excepted. Upon this exception there was some difference of opinion in this court. For myself, I considered the direction as attaching the departure, which would avoid the contract, to the act of sailing to and continuing in Salou for the purpose of completing her return voyage, and am of opinion that although the Comet might have remained at Barcelona long enough to have taken in a return cargo there, for which she might or might not be blamable, yet that no additional fault was committed by touching at Salou for the purpose of completing her cargo, if to touch at Salou for that purpose was the usage of the trade.

A majority of the court, however, is of a different opinion. The usage to stay at Barcelona for a return cargo, and to touch at Salou for a return cargo, as disclosed in the plaintiff's evidence, are considered by them not as independent but as auxiliary usages which are to be taken in connection in ascertaining whether there was or was not unreasonable delay in the conduct of the voyage. The assured had a right under these usages, as they are called, to take in part of the cargo at Barcelona and part at Salou, or the whole at either port. The delay necessary for these purposes would be justifiable at either port; but if the assured exhausted the whole time at one port, which, according to the usage, was allowable only for the purpose of taking in the whole cargo, the subsequent delay at another port for the purpose of taking

in the cargo must be considered as unreasonable. The delay at Barcelona, under such circumstances, could not be necessary for the purposes of the voyage, and therefore would determine the policy. But the deviation would rest merely in intention until the time of sailing for Salou, for until that time the assured would have a right to lade his cargo at Barcelona, and thus retroactively justify his stay there under the usage. The delay could not be a consummated deviation until the whole time allowed by the usage was exhausted, and the party had definitively abandoned the lading of a cargo which would justify that delay. The opinion of the court below appears to the majority of this court to have proceeded on this ground and to be correct.

The plaintiff then, in addition to the former testimony, gave evidence that it was usual for vessels to remain at Barcelona until their return cargoes, or so much thereof as might be necessary for their completion, was provided and collected at Salou or some other southern port in Catalonia, and then to sail to such port for the purpose of taking in the cargoes so collected.

The defendants then moved the court to instruct the jury that since it appeared from the protest of the master and others on board the Comet and from the sentence of condemnation produced by the plaintiff that all the return cargo, which the said vessel took in at Barcelona, was taken in on or before the 28th of November; that the said vessel was then ready for sea, and was actually cleared out on the 1st of December; and that being there and about to sail immediately for Salou the said Snow Comet, in consequence of a report that the Algerine cruisers were out cruising in the Mediterranean against American vessels, remained at Barcelona until the 8th of January, 1808, before she sailed from Barcelona,—if the jury believed these facts the plaintiff could not recover. This opinion was given by the court and the plaintiff excepted to it.

Had not the testimony on which this application was founded been spread upon the record, the court would have found some difficulty in deciding on the propriety of the opinion which was given from the terms employed in stating the application to the circuit court. It appears, however, from a comparison of the application to the court with the testimony on which it was founded, to have been intended to obtain from the court the opinion that the testimony respecting the report that the Algerines were out capturing American vessels was not a sufficient justification for remaining at Barcelona from the 1st of December, 1807, till the 8th of January, 1808.

No doubt is entertained that the danger of capture from the Algerines, if proved to be real and immediate, would justify the continuance in the port of Barcelona. And the apprehension of such danger, if founded on reasonable evidence, would produce a like effect. But in each case the danger must not be a mere general danger, indefinite in its application and locality. If it were so in time of war, any delay, however long, in a port, would become excusable, for there would always be danger of capture from the enemy's cruisers. Nor is it sufficient that the danger should be extraordinary, for then any considerable increase of the general risk would authorize a similar delay. The danger, therefore, must be obvious and immediate in reference to the situation of the ship at the particular time. It must be such as is then directly applied to the interruption of the voyage, and imminent; not such as is merely distant, contingent and indefinite. In the present case it is not shown that there was any danger in proceeding from Barcelona to Salou. No Algerine force is shown to be interposed between those ports. Whatever might be

the danger elsewhere, if there was none in proceeding to and remaining in Salou, it was the duty of the captain to have proceeded to that place, taken in his cargo, and remained there for further information. The captain was bound to have gone as far on his voyage as he could consistent with the general safety.

The judgment affirmed, with costs.

BULKLEY v. PROTECTION INSURANCE COMPANY.

(Circuit Court for Connecticut: 2 Paine, 82-92. 1835.)

Opinion by THOMPSON, J.

STATEMENT OF FACTS.—Two grounds have been taken in support of the application for a new trial in this case. 1. That the verdict is against the evidence given at the trial; and 2. For misconduct or irregularity on the part of the jury for disclosing the verdict before it was delivered in court.

The action is upon a policy of insurance, bearing date the 11th of January, 1830, \$1,500 on the schooner Director, and \$1,000 on the freight, on a voyage at and from Ocrocoke in North Carolina, to Saint Bartholomew's or Saint Thomas in the West Indies, and at and from thence to Tobasco, and at and from thence to New York. The schooner arrived safe at Tobasco and took in her return cargo, and sailed on the 13th of September, 1829, on her return voyage, and was lost on the bar at the mouth of the harbor of Tobasco.

The jury at the trial in September last found a verdict for the plaintiff for the whole amount claimed. It is contended that the verdict is against the evidence, upon two points submitted to the jury. 1. With respect to the representation as to the age of the vessel; and 2. With respect to the deviation.

§ 735. *False information may avoid the insurance though volunteered.*

The representation on procuring the policy to be underwritten was, that the vessel was six years old, and stood in New York on the books of the insurance companies A 2 good, whereas, in a point of fact, it appears from the evidence that she was seven years and eight months old, and did not stand on any of the books of the insurance companies in New York as A 2 good; but in four of the companies as A 3, and in one, in 1829, as A 2, but ought to have stood A 3 good, in the opinion of the inspector who kept the books. It is contended on the part of the assured that this is matter relating to the seaworthiness of the vessel, and becomes immaterial by reason of the implied warranty of seaworthiness.

It is a general rule that all facts material to the risk, and known to the one party and not to the other, and which may affect the mind of the underwriter, either as to the point whether he will underwrite at all, or at what rate of premium, must be fully and in good faith disclosed when the policy is effected. But as an exception to this general rule, it seems to be pretty well settled, that when the matter which it would be otherwise necessary to disclose is covered by a warranty, either express or implied, no representation need be made. But when there is a misrepresentation in answer to inquiries made by the underwriter, it will avoid the policy, although the matter misrepresented may be covered by a warranty. And this distinction grows out of the principle that the contract of insurance is peculiarly one of good faith. So that in the present case, if inquiry had been made by the underwriters as to the age of the schooner, and how she stood on the books of the insurance

companies in New York, the information given might have been a misrepresentation that would avoid the policy, if the jury had found it material, and that it would have influenced the underwriters. 1 Kent, Com., 233; 1 Phil. Ins., 89; Haywood v. Rogers, 4 East, 590. It may be admitted that it was not necessary in the first instance for the assured to state the age of the vessel or how she was rated by the New York insurance companies. He might have remained silent without its affecting the policy. But it is no way clear that where such information is voluntarily given, although not drawn out by inquiries made by the underwriters, it will not equally affect the policy. The very reason for not making the inquiry might have been that the information had already been given, and the inquiry would have been useless if not impertinent. To say that information volunteered, although false and material, shall not affect the policy where the facts misrepresented relate to matter covered by a warranty is opening a door to fraud inconsistent with sound policy and that good faith called for in the contract of insurance. I do not deem it necessary, however, to express any decided opinion upon that point. The materiality of the misrepresentation was matter for the jury, and if the motion for a new trial turned upon this point, I am not prepared to say that the verdict is so much against the weight of evidence as to justify setting it aside.

§ 736. *Permission to go to St. B. or St. T. is not permission to go to both, in the absence of usage.*

Whether or not there was a deviation which will defeat the right of recovery depends upon the question of usage. The voyage as described in the policy is from Ocrocoke to St. Bartholomew's or St. Thomas, and at and from thence to Tobasco, and at and from thence to New York. That the policy only covers a voyage to one or the other of the West India Islands mentioned cannot admit of a doubt, unless justified by usage. It was at the election of the assured to go either to the one or the other; but the language of the policy is too plain and explicit to admit of a construction that it authorizes a voyage to both. The shortness of the time, or of the distance of a deviation, is immaterial, if voluntary and without necessity and not justified by usage, although neither the risk nor the premium would have been increased, if the assured had wished the policy so made as to authorize going to both ports. The outward cargo was discharged at St. Thomas, and the deviation complained of is the going previously to St. Bartholomew's. Some criticism has been made at the bar upon the evidence as to the vessel's actually so touching at any port in St. Bartholomew's as could be considered a deviation. But no reasonable doubt can be entertained upon that point. The captain, in his deposition describing the voyage, says: The vessel went from Elizabeth City to St. Bartholomew's, and from thence to St. Thomas, where they delivered all the cargo. And again, he says: The vessel went first to St. Bartholomew's and thence to St. Thomas, and after that to Tobasco. The same language is here adopted in describing the voyage to St. Bartholomew's as to St. Thomas, and will not admit of a construction that the vessel only sailed by St. Bartholomew's or lay off and on the harbor. But the plain and obvious construction of the deposition is, that the vessel went to St. Bartholomew's, but, a market for the cargo not being found there, she proceeded to St. Thomas, and there disposed of her cargo; and this was clearly a deviation unless justified by usage. If the policy gives no liberty of touching at any specified port or ports, it is a deviation to stop unnecessarily at any port where vessels bound on the same voyage do not usually touch.

§ 737. *Underwriters presumed to know particular usages of trade.*

Underwriters are presumed to know the particular usages of the trade and the local situation and circumstances of the ports comprehended within the voyage insured. All matters of general notoriety, and equally open to the knowledge of both parties, are presumed to be known to both. Where, therefore, a policy is made upon a particular voyage, the usages relating to such voyage are impliedly made a part of the contract, although the policy contains no express provision on the subject; but such usage ought to be so certain and uniform as to warrant the presumption that it is generally known as the law of that trade. 3 Wash. C. C., 150; 1 Gal., 444. Where the usage set up relates to the right of touching at any particular ports in the course of the voyage, it ought to be so uniformly pursued that it may be presumed to be known to the parties. And two instances of touching at a particular port were held not sufficient to establish a usage in the case of *Martin v. Del. Ins. Co.*, cited 1 Phil. Ins., 184.

§ 738. *No usage shown.*

It is deemed unnecessary to go into a particular examination of the testimony on the subject of usage. The weight of evidence is clearly against any known and established usage, as set up on the part of the plaintiff. And indeed it may well admit of doubt, whether, if the case stood alone upon the evidence of the three witnesses on the part of the plaintiff, the usage would be sufficiently established to justify going into St. Bartholomew's, and afterwards unloading at St. Thomas. These witnesses do not state any facts showing any usage or actual practice on this subject, but rather seem to express an opinion as to the law of the case upon a policy like the present; for they say, unless there was liberty to touch at St. Bartholomew's, there would be no use in naming the two ports; and admit that on a voyage direct to St. Thomas, no other port being mentioned, it would be a deviation to stop at St. Bartholomew's. This policy must be considered in this light. It is not a policy covering a voyage to more than one port for any purpose whatever; it is to one or the other of two ports, at the election of the assured. This may be a very important advantage to the assured, and by no means implies a right of going to both ports. It would be confounding language to read the word *or* for *and*. One of the plaintiff's witnesses thinks the vessel might, under a policy like the present, lay off and on the harbor of St. Bartholomew's long enough to send in her boat to make inquiry respecting the market, but that the vessel could not go into the harbor without vitiating the policy. So that according to this witness, the plaintiff cannot recover in this case; but when the testimony of fifteen witnesses on the part of the defendants is taken into consideration, the preponderance is too great to sustain the verdict, and the ends of justice require that it should be set aside and a new trial granted on payment of costs; and this view of the case renders it unnecessary to notice the other ground upon which the motion has been rested.

MARINE INSURANCE COMPANY v. TUCKER.

(3 Cranch, 357-396. 1806.)

ERROR to the Circuit Court for the District of Columbia.

For a statement of the facts in this case, see the opinion of **PATERSON, J.** Opinion by **MR. JUSTICE JOHNSON.**

Upon the trial of this cause in the court below, two grounds of defense

were assumed by the plaintiffs in error. 1. That the policy had been avoided by a deviation from the voyage insured. 2. That if the insured were entitled to recover at all, it could only be for an average, not a total loss.

In the argument before this court the first ground was varied, and the plaintiffs in error contended "that the risk insured was never entered upon." Without considering the propriety of entering upon the discussion of a question so materially different from that made in the bill of exception, I will only remark that it was judicious in the counsel to abandon an opinion as inconsistent with natural reason as it is with the established doctrine of the law of insurance. An intent to do an act can never amount to the commission of the act itself. That an intended deviation will not vitiate a policy, and that the vessel remains covered by her insurance until she reaches the point of divergency, and actually turns off from the due course of the voyage insured, is a doctrine well understood among mercantile men, and has uniformly governed the decisions of the British courts from the case of *Foster v. Wilmer*, to the present time.

§ 739. *Intention to deviate is nothing.*

The doctrine now insisted on by the plaintiffs in error was probably suggested by some incorrect expressions attributed to Lord Mansfield in the case of *Wooldridge and Boydel*. It is said that the judge in that case expressed an opinion that "if a ship be insured from A to B, and before her departure the insured determine that she shall call at C, which is out of the usual course of the voyage from A to B, this is rather a different voyage than an intended deviation." This opinion was certainly in no wise material to the decision of that case, and is expressly contradicted by the case of *Kewley v. Ryan*, and a case, which I consider with much respect, decided in the state of New York, between *Henshaw* and the Marine Insurance Company of New York. We can only vindicate the accuracy of his lordship's opinion in the case which he states, by supposing that his mind was intent upon those cases of intended deviation, in which a *suppressio veri*, or necessary increase of risk, are the grounds of decision.

The ordinary rule for ascertaining the identity of a voyage insured is by adverting to the *termini*. A rule which is certainly correct as far as it extends, but in the rigid application of which, it is easy to conceive that cases may occur in which it would bear injuriously upon the insurer. If it has any defect, it is not extending far enough the claim to indemnity, as the *terminus ad quem* may in many instances be relinquished without any possible increase of risk, or even without varying the risk, except only as to lessening its duration. I will instance the case of an insurance from America to St. Petersburg, when the vessel, in fact, is to terminate her voyage at Copenhagen; or the case of an insurance to Alexandria, in Virginia, when the vessel is to terminate her voyage at Georgetown in Maryland.

Whether the risk insured against in this case ever was incurred, I would test by the question whether, if the *Eliza* had arrived in safety, or even had sailed for Europe, the insured might have legally demanded a return of the premium. I presume not. The insurance being at and from the port of Kingston, the risk commenced during her stay in port, and cannot be apportioned when thus blended, but was wholly and indefeasibly vested in the underwriters, although the vessel had forfeited her policy by shaping her course for Europe the moment she had left the port of Kingston. In the case before us, she adhered to her ultimate destination, and the forfeiture of her insurance could

not have been incurred until after entering the Chesapeake, and actually bearing away farther eastward than was consistent with her course to the Potomac.

§ 740. *Abandonment must be within reasonable time after loss.*

2. With regard to the question whether it be a case of total or average loss, a very few observations will suffice to satisfy the mind that the judgment below is correct.

If, under every combination of circumstances, the insured is bound to procure money at whatever interest, or to raise it at whatever sacrifice of property, to defray the disbursements for repairs, reshipping a crew, salvage, costs of suit, and every incidental expense, this will be shifting the loss from the insurer to the insured. Should it be admitted that, in the case before us, the insured were under any greater obligation to ransom and refit the vessel than the insurer, the circumstances in evidence are sufficient to excuse him. Unsuccessful attempts had been made to dispose of both vessel and cargo, and as to raising money on bottomry, who would have accepted the security of a vessel embarrassed, by the loss of her register, to a degree the extent of which could not possibly be foreseen; a bond for money to become due on the arrival of a vessel which perhaps might never be able to sail, or, if she did sail without her necessary documents, would be exposed to innumerable hazards, and among them the forfeiture of her insurance for that very cause.

It is true that a case of capture and recapture, where the two events are communicated before an election to abandon has been actually communicated to the underwriters, will not of itself sanction an abandonment. Yet it is equally true that, in a case of capture, a recapture alone will not deprive the party of his right to abandon. The consequences of the capture and recapture, the effect produced upon the fate of the voyage, must govern the right of the parties. This effect is always a matter of evidence, and must rest much upon the discretion of a jury. This doctrine is well illustrated in the cases of *Pringle v. Hartley*, 3 Atk., 195, and *Goss v. Withers*, 2 Burr., 683.

In the case before us, the information of the capture, recapture and sale was communicated in the same letter. The loss was then certainly total; and as the insurers cannot charge the insured with any premeditated design to involve the vessel in the difficulties which broke up the voyage, I think they ought to bear the loss.

Much has been said about the liability of the insured for the misconduct of his agents; but as all amounts to a charge that they did not make use of forced means to raise money for the release of the vessel (an obligation not incumbent upon them), it does not appear to me that the extent of the liability of the insured for the acts of the captain or supercargo, after the death-stroke is given to the voyage, need be considered.

Opinion by MR. JUSTICE WASHINGTON.

There are but two questions in this cause which I deem worthy of particular consideration; for the last exception is to the refusal of the court to give an opinion upon a matter of fact, and for which no foundation was laid by the evidence spread upon the record, even if it had been proper for the court, in such a case, to give an answer to the question propounded. I also lay out of the case the award mentioned in the declaration, not only because no breach is assigned which applies to it, but because no opinion was asked of, or given by, the court respecting it.

§ 741. *Intention to deviate is nothing.*

The first subject which claims attention is whether, upon the facts stated in the second bill of exceptions, the court below was right in the direction given to the jury that there was no deviation, at the time of capture, from the voyage insured, and that the voyage insured was actually commenced. The facts material to the decision of this point are that the *Eliza* cleared out at Kingston for Alexandria, and a bill of lading was signed by the master to deliver her cargo at Alexandria. That after her clearances were obtained, she took in a cargo for Baltimore, and bills of lading were signed for delivering the same at that port. That the captain sailed from Kingston with an intention, previously formed, of proceeding first to Baltimore and there landing part of her cargo, and then to go to Alexandria; but she was captured before her arrival at the dividing point between Baltimore and Alexandria.

It is admitted that this is not a case of deviation, because the intention formed at Kingston, before the voyage commenced, of going first to Baltimore, was never carried into execution. The only question then is whether the voyage described in the policy was changed or not. As to this there is no difference of opinion at the bar respecting the legal effect of an alteration of the voyage on the contract of indemnity; it is and must be conceded that the policy never attached. But the difficulty is in determining what circumstances do, in point of law, constitute such an alteration as will avoid the policy.

The criticisms of the counsel for the plaintiffs in error upon the rule contended for by the defendants ought not, in my opinion, to avail them, if that rule be firmly established by uniform decisions; for in questions which respect the rights of property, it is better to adhere to principles once fixed, though originally they might not have been perfectly free from all objection, than to unsettle the law in order to render it more consistent with the dictates of sound reason.

The first case we meet with upon this subject is that of *Carter v. The Royal Exchange Assurance Company*, which is cited in *Foster v. Wilmer*, decided in 19 Geo. II. (2 Stra., 1248). The former was an insurance on a ship from Honduras to London, and the latter on a ship from Carolina to Lisbon, and at and from thence to Bristol. In both a cargo was taken in to be delivered at an intermediate point; but the loss having happened before the ship had arrived at the dividing point, the insurers were held liable upon the ground that nothing more was intended than a deviation, which, not being carried into execution, did not avoid the policy.

The case of *Wooldridge v. Boydell*, Doug., 16, is next in point of time. This was an insurance on a ship at and from Maryland to Cadiz. She cleared for Falmouth, and a bond was given to land the whole cargo in Britain. No evidence was given that the vessel was bound to Cadiz; she was taken before she came to the dividing point. At the trial of this cause, Lord Mansfield told the jury that if they thought the voyage intended was to Cadiz, they were to find for the assured; but if there was no design to go to that port, then they were to find for the defendant, and the ground upon which the court decided the motion for a new trial was that there never was an intention to go to Cadiz. But it is plain that if Cadiz had been intended as the ultimate point of destination, the clearing out for an intermediate port with an intention to land the cargo there would not have been considered as anything more than an intended deviation.

Way and Modigliani, 2 T. R., 30, was decided in 1787, and was an insurance at and from the 20th October, 1786, from Newfoundland to Falmouth, with liberty to touch at Ireland. She sailed on the 1st of October from Newfoundland, went to the Banks and fished till the 7th, and then sailed for England and was lost on the 20th. The reasons assigned for the decision of this case give it the appearance of an authority unfavorable to the doctrine laid down in the above cases. But the weight of it is greatly diminished, if it be not destroyed, by the following considerations: 1st. That as there was a clear deviation it was unnecessary to decide the other point, that the policy did not attach; and 2d. That this latter opinion seems to have been entertained only by one of the court, and even this judge seems to have relied very much upon the fact that the vessel sailed to the Banks; 3d. From what is said in *Kewley v. Ryan*, it would appear that the ship when she left Newfoundland did not sail for England, and of course the voyage insured never was commenced.

Kewley v. Ryan, 2 H. Bl., 343, decided in 1794, was a policy on goods from Genoa to Liverpool. The ship sailed on that voyage, but it was intended, as plainly appeared by the clearances, to touch at Cork. She was lost, however, before she arrived at the dividing point; and the decision conformed to those given in the preceding cases, the *termini* of the intended voyage being really the same as those described in the policy.

The case of *Scott and Vaughan*, decided *at nisi prius* in 1794, before Lord Kenyon, seems opposed to the principles laid down in the preceding cases, and, if we have an accurate report of it, is inconsistent with the decisions of the same judge in *Kewley v. Ryan*, and other cases.

Murdock and Potts, 2 Park, Ins., 451, decided in 1795, was, in principle, as strong a case of a change of voyage as that of *Wooldridge and Boydell*, but equally contributes to explain the general doctrine laid down in all the cases. For in this the *terminus ad quem* was, most obviously, St. Domingo, where the freight insured was payable, or some port other than Norfolk, where the ship was to call for the sole purpose of receiving orders.

The last English case which I shall notice is that of *Middlewood and Blakes*, decided in 1797 (7 T. R., 162). It was an insurance on the *Arethusa*, at and from London to Jamaica, for which place she cleared out; but the captain was bound by orders to call at Cape St. Nichola Mole, in order to land stores there, pursuant to a charter-party. She was captured after she had passed the dividing point of three several courses to Jamaica, but before she had reached the subdividing point of the continuing course to Jamaica and that leading to the Mole. The whole court considered this as a case of deviation only, and Lawrence, J., was so strongly impressed with the weight of former decisions, that, not attending to this obvious objection to the plaintiff's recovery, but considering the *termini* of the voyage intended to be the same with those mentioned in the policy, his first opinion inclined to the side of the plaintiff.

The case of *Henshaw and the Marine Insurance Company*, decided in the supreme court of New York (2 Caines, 274), confirms the principles of the above cases, and would command my respect were it opposed to them.

The rule, then, which I consider to be firmly established by a long and uniform course of decisions is, that if the ship sail from the port mentioned in the policy, with an intention to go to the port, or ports, also described therein, a determination to call at an intermediate port, either with a view to land a

cargo, for orders, or the like, is not such a change of the voyage as to prevent the policy from attaching, but is merely a case of deviation, if the intention be carried into execution or be persisted in after the vessel has arrived at the dividing point.

§ 742. *Capture and recapture.*

The next question is, whether the court below erred in refusing to instruct the jury that if they believed the facts stated in the first bill of exceptions, they were to find an average and not a total loss? The defendants in error contend that, by the capture and recapture of the vessel, under the various circumstances of loss of crew, inability to pay the salvage and expenses, loss of register, etc., the voyage insured was completely defeated, and, therefore, the assured had a right to abandon and demand as for a total loss.

On the other side it is insisted that the captain might, in a variety of ways, have prevented the sale of the vessel, and that if he had done the best in his power for the interests of all concerned, he might have liberated the vessel from the *lien* of the captors, and have performed his voyage in safety to Alexandria, without any other inconvenience than this temporary interruption, and the payment of salvage and expenses. If so, that it was not competent to the assured, under these circumstances, to convert a loss partial in its nature into a total one.

Whether the assured had a right to abandon and recover as for a total loss or not was a question of law, dependent upon the point of fact, whether, upon the whole of the evidence, the voyage was broken up, and not worth pursuing; and, in consideration of this question, the jury would, of course, have inquired, amongst other matters, whether the captain had done what was best for the benefit of all concerned. The court might, with propriety, have stated the law arising upon this fact, whichever way the jury might find it, and, indeed, such would have been their duty if a request to that effect had been made. But the court very correctly refused to give the direction as prayed, because by doing so they would have decided the important matter of fact upon which the law was to arise, which was only proper for the determination of the jury. In the case of *Mills and Fletcher*, which turned upon the question whether the captain by his conduct had not made the loss a total one, Lord Mansfield would not decide whether the loss was total or not, but informed the jury that they were to find as for a total loss, if they were satisfied that the captain had done what was best for the benefit of all concerned.

Upon the whole, then, I am of opinion that the judgment ought to be affirmed.

Opinion by MR. JUSTICE PATERSON.

STATEMENT OF FACTS.—This action was brought on a policy of insurance, which John and James H. Tucker, being British subjects, residents at Alexandria, had effected on the body of the sloop *Eliza*, her tackle, apparel and furniture, to the value of \$3,800, at and from Kingston in the island of Jamaica to Alexandria, in the state of Virginia. The policy bears date the 1st of September, 1801.

The first question to be considered is, whether the voyage on which the sloop *Eliza* set out was the same or a different voyage from the one insured. By the terms of the policy it is stipulated that the *Eliza* was to sail from Kingston to Alexandria; and it is stated in the bill of exceptions that she did sail from Kingston, but with an intention to go first to Baltimore, and there deliver

twenty hogsheads and ten tierces of sugar, and then to proceed to Alexandria, which was the port of destination described in the policy. She cleared out at the custom-house in Kingston, on the 10th of August, 1801, for Alexandria, and the master signed a bill of lading to deliver her cargo at that place; after which he took in the sugar, to be delivered at Baltimore. It is contended on the part of the insurers that the taking in the sugar to be landed at Baltimore constituted a different voyage from the one agreed upon, and vitiates the policy; or in other words, that the voyage which was the subject of the contract was never commenced.

§ 743. *Intention to touch at intermediate port not a deviation.*

From a review of the cases which have been cited, the principle is established, that, where the *termini* of a voyage are the same, an intention to touch at an intermediate port, though out of the direct course, and not mentioned in the policy, does not constitute a different voyage. In the present case the *termini*, or beginning and ending points, of the intended voyage were precisely the same as those specified in the policy, to wit, from Kingston to Alexandria, and in legal estimation form one and the same voyage, notwithstanding the meditated deviation. The first reported case on this subject is *Foster v. Wilmer*, in 2 Stra., 1249, in which Lee, C. J., held that taking in salt to be delivered at Falmouth, a port not mentioned in the policy, before the vessel went to Bristol, to which place she was insured, was only an intention to deviate, and not a different voyage. And the chief justice in delivering his opinion mentioned the case of *Carter v. Royal Exchange Assurance Company*, where the insurance was from Honduras to London, and a consignment to Amsterdam; a loss happened before she came to the dividing point between the two voyages, for which the insurer was held liable. The adjudication in *Strange* was in the 19 Geo. II., and from that time down to the year 1794 we find no variation in the doctrine. A remarkable uniformity runs through the current of authorities on this subject. In *Kewley v. Ryan*, 2 H. Bl., 343, Trinity term, 1794, the principle is recognized; and in 2 New York Term Rep., 274, *Henshaw v. The Marine Insurance Company*, February, 1805, it is fortified and considered as settled by the supreme court of that state. In a lapse of sixty years we find no alteration in the doctrine, which is sanctioned, and has become too deeply rooted and venerable by time, usage and repeated adjudications, to be shaken and overturned at the present day. It has grown up into a clear, known and certain rule for the regulation of commercial negotiations, and is incorporated into the law merchant of the land. Where is the inconvenience, injustice or danger of the rule? It operates in favor of the insurers by a diminution of the risk, and not of the insured, who have the departure in contemplation; for if the vessel, after she has arrived at the point of separation, should deviate from the usual and direct road to her port of destination, the insurers would be entitled to the premium, and exonerated from responsibility. An intention to deviate, if it be not carried into effect, will not avoid the policy. There must be an actual deviation. The policy being "at and from," the risk commenced; there was also an actual inception of the voyage described; for the *Eliza* sailed from Kingston for Alexandria, was captured in a direct course to the latter, before she reached the dividing point, and, therefore, the underwriters became liable for the loss.

§ 744. *Abandonment to be within reasonable time.*

The second point in the cause is whether the insurers were liable for a total or a partial loss. And here a preliminary question presents itself. Was the

abandonment made in proper time? When the Tuckers received information of the loss it became incumbent on them to elect whether they would abandon or not; and if they intended to abandon it was incumbent on them to give notice of such intention to the underwriters. Our law has fixed no precise period within which the abandonment shall be made, and notice of it shall be given to the insurers; but declares that it shall be done within a reasonable time. In the case before us it appears that John and James H. Tucker received information of the capture and recapture of the *Eliza* at the same time, in a letter from W. & B. Bryan & Co., dated on the 26th of September, 1801; but it does not appear when the letter came to hand. On the 26th of November, 1801, the Tuckers offered to abandon the *Eliza* to the insurers, which offer was rejected. Can it, under these circumstances, be pretended that the Tuckers were guilty of neglect, or that the abandonment was not made according to the settled rule? It was made within a reasonable time, and no neglect can justly be imputed to them. We must have some facts whereon to build the charge of negligence, for it is not to be presumed; and the intervening period between the date of the letter and the time of abandonment, after making due allowance for the passage of the letter, does not afford sufficient ground on which to raise the imputation of neglect. This brings us to the great question in the cause, whether the insurers were liable for a total or an average loss. On the 22d August, 1801, the *Eliza* was captured by a Spanish armed schooner, in the usual course from Kingston to Baltimore and Alexandria, and a day or two afterwards was recaptured by a British sloop of war and carried into Kingston on the 26th of the same month. The mere acts of capturing and recapturing are not of themselves sufficient to ascertain the nature and amount of the loss sustained. The loss may be total, though there is a recapture. *Hamilton v. Mendez*, 2 Burr., 1198; *Aguilar and others v. Rodgers*, 7 D. & E., 421. Whether the loss be partial or total will depend upon the particular circumstances of the case, which it becomes necessary to take into view. The *Eliza* was consigned to Bryan & Co. at Kingston, who were authorized to dispose of her; they endeavored to sell her, but without effect; and it is stated that they could get no offer for her before she sailed from Kingston, nor since that time. Bryan & Co. put on board ten tierces of coffee of the value of \$1,000, belonging to the Tuckers, to be delivered at Alexandria; and when she was captured all the seamen, except Bell, the ostensible master, and one man, were taken on board the Spanish schooner. The *Eliza* was navigated under a British register during the voyage, which register was lost by reason of the capture and recapture, and has never been found.

After the recapture the *Eliza* and her cargo were libeled in the vice-admiralty court for salvage; a claim was put in by Bryan & Co., as agents for Eli Richards Patton, the real and navigating master and supercargo; and the sloop and cargo were adjudged to be lawful recaption on the high seas, and ordered to be restored on paying to the recaptors one full eighth part of the value of the sloop and cargo for salvage, with full costs; and to ascertain the value it was further ordered that the sloop and cargo should be forthwith sold by the claimants, unless the value should be otherwise agreed upon. The sloop was insured for \$3,800 and sold for \$915; the coffee sold for \$1,000, and the costs, charges and commissions amounted to \$909, which almost absorbed the sum for which the sloop was sold. It is not found that the sloop had sustained no damage by the capture and recapture; and considering the difference between \$3,800, the value insured, and \$909, the price for which she sold,

the jury might, without other evidence, have presumed that she had received considerable injury. From these facts, taken together, the inference is rational and just, that the voyage was broken up and destroyed, and that the underwriters were liable for a total and not for an average loss. To repel this inference, and remove responsibility from the insurers, it has been urged in argument that the agents for the Tuckers were guilty of gross neglect and misconduct. If Bryan & Co. ceased to be agents after the sailing of the sloop, then the captain became clothed with an implied authority to do what was fit and right, and most conducive for the interest and benefit of all the concerned; and therefore, whether the agency of Bryan & Co. continued, or, being at an end, devolved by operation of law on the captain, is perfectly immaterial; for the question still recurs, whether the actual or implied agent had been guilty of fraud, negligence or other improper conduct, which will exonerate the insurers. I am not able to discern any misconduct on the part of the agent that would exculpate the underwriters and prevent their being responsible for a total loss. And indeed, this was a point proper for the decision of the jury, agreeably to the case of *Mills v. Fletcher*, in Doug., 230, and therefore the exception taken to the opinion of the court was not well founded. The sloop could not be sold at private sale, and by reason of the capture and recapture she might have sustained considerable damage. To sell the coffee, which constituted the cargo for Alexandria, to satisfy the salvage and costs, would have been an imprudent measure; for the redemption would have absorbed the whole proceeds, and then she would have returned to Alexandria without a cargo, as the captain had no funds to purchase one; and besides, she must have sailed without a register, which would have exposed her to great and unnecessary danger. Prudence dictated the sale as a safe step, and most for the benefit of the concerned.

§ 745. *Capture and recapture.*

The error set forth in the third bill of exception is, that the court below refused to instruct the jury that the loss of the register, by means of the capture and recapture, was not sufficient, in law, to defeat the voyage from Kingston to Alexandria, and might have been supplied by special documents. Though the register did not impart any physical ability to the sloop, in regard to her sailing, yet it was a document which tended to communicate safety, as it designated her character, individually and nationally. It is a necessary paper, and operates as a national passport; for without it, she might be seized as an unauthorized rover on the ocean, and, in certain cases, would have been liable to confiscation. The register is a document of such a special and important nature that its loss cannot be fully made up by other official papers. It would have been a very imprudent step for the captain to have proceeded on his voyage without a register; if he had, he would have been justly charged with improvidence, negligence and culpable misconduct.

§ 746. *A case of intention to deviate merely.*

Opinion by MR. JUSTICE CRISHING.

I consider this as clearly a case of intentional, not actual, deviation; but not as a case of non-inception of the voyage insured.

This is proved by a number of cases cited; and contradicted by none. What a case of non-inception is, is shown by the case of *Wooldridge v. Boydell*, Doug., 16, where the ship was insured from Maryland to Cadiz, having

no intention at all of going there; but that is totally different from the present case, where the vessel was cleared out at Jamaica for Alexandria, with a cargo taken in for Alexandria, and intended to go there.

It is true sugars were taken in for Baltimore, and the captain intended going there first. That amounts only to an intent to deviate; but no deviation unless executed. This is proved by divers authorities. *Middlewood v. Blakes*, 7 T. R., 162. B. R., a ship insured at and from London to Jamaica, and the captain had orders (exactly like the case at the bar) to touch at Cape St. Nichola Mole, to land stores, pursuant to charter-party. Upon which one of the judges (Lawrence) gave an opinion that if the vessel had been captured before she came to the dividing point between the northern and southern courses of Jamaica, the insurers would have been liable.

And the other judges agreeing with Judge Lawrence, to lay the whole stress of the cause in favor of the insurer, upon the captain's not exercising his judgment at the time, upon which was the best and safest of the three courses (whose judgment the insurers had a right to have the benefit of), but taking the northern course, merely in pursuance of orders, to land stores at Cape St. Nichola Mole. All this shows that, had the captain exercised his judgment in going the northern course, as being the best and safest, the whole court would have held the insurer liable, as the vessel was captured before she came to the dividing point between the course to the Cape and to Jamaica.

Another case, more direct and decisive, is *Foster v. Wilmer*, 2 Str., 1248, 1249, where the ship was insured from Carolina to Lisbon and to Bristol, and the captain took in salt to deliver at Falmouth, before going to Bristol, repugnant to the specification of the policy, yet, being captured before arriving at the dividing point between Falmouth and Bristol, the insurer was held liable, which seems exactly the present case.

The mere taking in goods for another port does not of itself make a deviation. It may, however, if it materially vary the risk, and be a circumstance designedly concealed and suppressed, excuse the underwriters. In the present case it does not appear materially to vary the risk, any more than in taking in stores to land at Cape St. Nichola Mole, in the case of *Middlewood v. Blakes*, varied the risk, which was not suggested by court or counsel that it did; or the taking in salt to land at Falmouth, in the case of *Foster v. Wilmer*. It did not delay the voyage in the present case; the vessel sailed with convoy as soon as it was ready, and was afterwards captured in the proper course, before deviating.

The award may be laid out of the case for more reasons than one. I think it void for uncertainty.

§ 747. *Loss of register and hands by capture may make a total loss.*

As to the loss, whether total or average, the jury who had the whole evidence before them have, in effect, found a total loss, and the voyage broken up. It is not certified by the court that the bill of exceptions contains the whole evidence; and as strong circumstances, I think conclusive ones, are stated that show the voyage could not be safely pursued, or could not be pursued at all, in consequence of the loss of register and loss of hands by the capture, either of which, it does not appear, could be supplied, I think we are not warranted to overrule the verdict or reverse the judgment.

Judgment affirmed.

MARSHALL, C. J., did not sit in this case.

§ 748. The general definition of deviation is, a voluntary departure from the course of the voyage insured, without necessity or reasonable cause. *Bond v. The Brig Cora*, 2 Wash., 80.

§ 749. Saving life—Saving property.—For a vessel to go out of her course to save the life of a man will not be considered a deviation. *Ibid.*; *The Boston*, 1 Sumn., 329; *The Ewbank*, id., 424.

§ 750. The saving of life is an ingredient in salvage service; and a deviation by a vessel to save a vessel on which the crew are sick will not discharge the underwriters; but it would be otherwise in case of delay to save property. *Bark Nicholaus*, Newb., 449.

§ 751. Delay to save life is not a deviation; but delay merely to save property is. *The Boston*, *supra*.

§ 752. Running down to a vessel in distress, to ascertain whether the persons on board need relief, and the taking of necessary measures to afford it, constitute no deviation. The double motive of relieving distress and saving property does not render the delay a deviation. If, however, the taking of the other vessel in tow be the proper mode of relief, and the towing be continued after it had ceased to be necessary in order to relieve the distress of the crew, and merely to save property, then it was a deviation. If the circumstances are not decisive of the motives of the master, in such a case the court will give him the benefit of a favorable construction. *Crocker v. Jackson*, 1 Spr., 141.

§ 753. The bearing away, for a distance of two or three miles, to speak a signaling vessel, and a delay of two or three hours to take from a foreign vessel, bound for a foreign port, the crew of a deserted American ship for conveyance to a home port, does not constitute a deviation. *Box of Bullion*, 1 Spr., 57.

§ 754. A deviation, if against the will of the master, or even if voluntary, to save the property, is justified. But in the latter case it must appear that the master acted in good faith, according to his best judgment, for the benefit of all concerned. *Winthrop v. Union Ins. Co.*, 2 Wash., 7 (§§ 493-97).

§ 755. A necessity or a justifiable cause must exist, and must be satisfactorily shown. The real motive of the master ought to correspond with the one assigned, or there will be strong ground to suspect that he was not acting in good faith. *Ibid.*

§ 756. Unseaworthiness.—Although the unseaworthiness of the vessel, occasioned by want of men, at the time the risk commences, may not vacate the policy, provided she is seaworthy when the voyage commences, yet she cannot go out of her course after the commencement of the voyage to supply such want. It is not an excuse for a deviation that there was a sufficient number of hands to navigate the vessel to a port where the necessary addition to the crew could be obtained for the whole voyage, such port not being in the course of the voyage, and the want of hands existing before the commencement of the voyage insured. The vessel should be fitted for the voyage insured at the time of her departure. *Cruder v. Pennsylvania Ins. Co.*, 2 Wash., 339.

§ 757. What a sufficient deviation to release underwriters, and justify a claim for salvage. *Warder v. Goods Saved from La Belle Creole*, 1 Pet. Adm., 31.

§ 758. Any departure from the usual course of a voyage, or stopping at any place even in the course of the voyage not permitted by the policy, is a deviation, and if not justified will avoid the policy. *Coles v. Marine Ins. Co.*,* 3 Wash., 159.

§ 759. Necessity.—The smallest unnecessary deviation avoids the insurance, though no loss was caused thereby. *Martin v. Delaware Ins. Co.*,* 2 Wash., 254.

§ 760. It is no deviation for a vessel to go to the nearest place out of her course for refreshments, if necessary. *Coles v. Marine Ins. Co.*,* 3 Wash., 159.

§ 761. If a real necessity for taking in water arise, a stopping at the nearest port for the purpose is justifiable. *Wood v. Pleasants*,* 3 Wash., 201.

§ 762. Same—Special case.—All the officers on an American vessel insured died in the course of a voyage, in the East Indies. While the captain was sick he gave orders to a seaman, ignorant of navigation, to take the ship to the Isle of France, out of the course of the voyage, and deliver her to the consul there. The vessel was taken there, and thence dispatched to New York, but was lost on the way. *Held*, that taking the ship to the Isle of France was not a deviation. *Winthrop v. Union Ins. Co.*, 2 Wash., 7 (§§ 493-97).

§ 763. Vessels in company.—Where it is understood by the underwriter that two vessels shall accompany each other on a voyage insured, and it is known that one is faster than the other, it is implied that the faster vessel may stop at places in the voyage not named in the policy, and wait a reasonable time, but no longer, for the other; and the reasonableness of the time of delay at a particular place is for the jury. *Coles v. Marine Ins. Co.*,* 3 Wash., 159.

§ 764. If the terminus of a voyage be fixed in a policy, the vessel cannot go out of the usual course of the voyage, even though permitted to stop and trade at any ports or places. *Winthrop v. Union Ins. Co.*, 2 Wash., 7 (§§ 493-97); *Coles v. Marine Ins. Co.*,* 3 Wash., 159.

§ 765. *Intent to deviate.*—Though a vessel sail to a port within the permission of the policy, with intent to go to a port not permitted if the first prove to be blockaded, there is no deviation. *Maryland Ins. Co. v. Woods*,* 6 Cr., 29.

§ 766. *Usage.*—It is no deviation to touch and stay at a port out of the voyage if that is within the usage of trade; but whether the act is within the usage is a question of fact. *Bentloe v. Pratt*,* Wall. C. C., 58.

§ 767. *Liberty to touch.*—Liberty, in a policy of marine insurance, to *touch* at a place, does not justify *trading*; and trading would be a deviation and avoid the policy. *United States v. The Paul Shearman*, Pet. C. C., 98.

§ 768. *Honduras.*—During the existence of war between England and Spain goods on a vessel chartered by a British subject were insured from her port or ports of lading in Honduras to Liverpool. *Held*, that it was not a deviation for the vessel to load anywhere in Honduras, though out of that portion possessed by the British and in that possessed by the Spanish. *Graham v. Pennsylvania Ins. Co.*,* 2 Wash., 118.

§ 769. *Delay.*—Whether delay at a port constitutes a deviation depends upon the usage of trade with regard to the object of selling the cargo. Where different ports are to be visited for this purpose, the owner has a right to limit the price at which the master may sell, to a reasonable extent; and a delay, if *bona fide* made for the purpose, does not constitute a deviation. *Columbian Ins. Co. v. Catlett*, 12 Wheat., 383 (§§ 657-63).

§ 770. *Same — Special case stated.*—Policy on a ship and freight to be earned on a round voyage from Teneriffe to Havana, touching at Matanzas, and thence to New York. The ship was at the time under a charter-party, not stated to the underwriter, to the same effect. She put in at Matanzas to avoid cruisers, and while waiting discharged her cargo there. Proceeding to Havana, she there took in another cargo, where the charter-party was terminated by compromise and release. *Held*, that the right of the assured was not limited to the voyage of the charter-party, so as to be determined by the termination of that. *Held*, also, that the unlading at Matanzas during the delay to avoid cruisers was not such a deviation as avoided the policy. *Hughes v. Union Ins. Co.*,* 8 Wheat., 294.

§ 771. *Anchoring off port.*—In a voyage to Pernambuco the vessel, when she arrived off Pernambuco, came to anchor off the port when she might have gone directly in. *Held*, a deviation. *West v. Columbian Ins. Co.*,* 5 Cr. C. C. 309.

§ 772. *Release of deviation.*—A vessel was insured from A. to B., and her port of discharge in the United States. She went to C. and took in a cargo for D. and stopped at S. on the return voyage. The underwriters signed a memorandum that the deviation to S. should not prejudice the insurance, the vessel having sailed thence to E. There was a total loss by shipwreck. *Held*, that the memorandum did not help the deviation of going to C. instead of B., and that the misstatement of the return voyage being to E., annulled the memorandum. *Glidden v. Manuf. Ins. Co.*,* 1 Sumn., 232.

IX. ABANDONMENT AND TOTAL LOSS.

1. *Of Ship.*

SUMMARY—*Reason of abandonment*, §§ 778-775.—*Words of abandonment*, §§ 776, 777.—*State of facts as distinguished from information*, § 779.—*Total loss from capture ceases, when*, § 780.—*Fear of peril*, §§ 781, 782.—*Delay*, § 783.—*Embargo*, § 784.—*Capture and recapture*, §§ 785-789.—*Repairs equal to half value*, §§ 790, 795.—*Loss of voyage as to cargo*, § 796.—*Condition of ship*, § 797.—*Repair and return of ship*, § 798.—*Master's authority*, § 799.—*Revocation of abandonment*, §§ 800, 801.

§ 778. The assured must always state to the underwriter a sufficient reason for his offer to abandon, and if he does so it is no objection that he does not state other reasons. *King v. Delaware Ins. Co.*, §§ 802-11.

§ 774. If the assured states an insufficient reason for abandoning, he cannot at the trial rely upon one not stated in the notice. *Ibid*.

§ 775. Insurance was made on the freight of the *Venus*, from Philadelphia to the Isle of France. On the voyage insured the ship was stopped by a British ship on the 16th of January, 1808, detained for a short time, and discharged, her register being indorsed "warned not to proceed to any port in the possession of his majesty's enemies." The *Venus* returned to Philadelphia 23d February, 1808, and the assured claimed for a total loss. The Isle of France was not blockaded by an actual force until 1st February, 1808; but the captain of the British ship informed the master and owner of the *Venus* that the Isle was blockaded, and that she would

be prize if she did not obey the warning, and this caused the return. *Held*, no ground for abandonment. *Ibid*.

§ 776. To constitute a valid abandonment, no particular form of words and no writing are required; but the abandonment should be explicit and not left to inference from doubtful facts. The evidence of an offer to abandon considered and held insufficient. *Copeland (or Copelin) v. Phoenix Ins. Co.*, §§ 812-19.

§ 777. Where, however, the underwriter elected to raise and repair a sunken vessel, and this, though done, was very insufficiently done, and not done and tender to the owner made within reasonable time, *held*, that the assured was entitled to recover for a total loss, and that he was not bound to point out the particulars in which the repairs were insufficient, the fact being manifest. *Ibid*.

§ 778. A vessel cannot be abandoned in time of danger so long as it is practicable for human exertion, skill or prudence to save her. *Ibid*.

§ 779. The right of the assured to abandon and recover for a total loss depends upon the state of facts at the time of the act, and not upon the state of information. *Marshall v. Delaware Ins. Co.*, §§ 820-21; *Bradlie v. Maryland Ins. Co.*, §§ 822-29.

§ 780. The technically total loss from capture ceases with a decree of restitution, though that decree may not have been executed at the time of an offer to abandon. (Affirming *S. C.*,* 2 Wash., 54.) *Marshall v. Delaware Ins. Co.*, §§ 820-21.

§ 781. Where a total loss is asserted as ground of recovery, the loss must be caused by the immediate operation of some peril; it is not sufficient that the voyage has been abandoned for fear of the operation of the peril. *Smith v. Universal Ins. Co.*, § 830.

§ 782. The underwriters do not undertake that the voyage shall be performed without delay, or that the perils insured against shall not occur. They undertake only for losses sustained by those perils; and though a peril begins to act upon the subject, still if it be removed before loss and the voyage is not broken up, but is or may be resumed, the assured cannot abandon. *Ibid*.

§ 783. Mere delay of the voyage by perils insured against, not producing total incapacity to perform the voyage, cannot constitute a technically total loss. A delay for the purpose of repairing damage insured against, the damage not exceeding half the value of the vessel, falls within this rule. It matters not that the policy is on time. *Bradlie v. Maryland Ins. Co.*, §§ 822-29.

§ 784. An embargo imposed by the government to which the insurer and assured belong, after the beginning of the risk, furnishes legal ground for abandonment. *Odlin v. Insurance Co.*, §§ 831-34.

§ 785. Insurance was effected on the ship *Experiment*, at and from New York to any ports on the north side of Jamaica, and at and from the same to New York. The vessel was captured by a Spanish privateer while proceeding from Falmouth, in Jamaica, to Montego Bay, recaptured by the British, carried back to Falmouth, and afterwards to Montego Bay, where the vessel and cargo were subjected to salvage of one-eighth, sold for the payment thereof, and purchased by the captain for the benefit of whom it might concern. And the vessel having completed her lading, returned to New York subject to a bottomry bond for advances made by the consignee, her outward freight having exceeded the salvage and expenses resulting from the recapture. The assured abandoned on being informed of the recapture. *Held*, that there was no ground for abandonment. *Queen v. Union Ins. Co.*, §§ 835, 836.

§ 786. A capture as prize will authorize an abandonment as soon as notice is received, provided the loss continue to the time when the abandonment is made. *Ibid*.

§ 787. If a recapture is made with a view to salvage, and this does not exceed with the expenses half the value of the property, and the recapture produces only a temporary interruption of the voyage, the insured cannot abandon. *Ibid*.

§ 788. If the recapture be as prize, or the voyage be lost, or not worth pursuing, if the salvage be very high, or if further expenses be necessary and the underwriters will not pay them, the assured may abandon. *Ibid*.

§ 789. A ship on a sealing voyage visited the Falkland Islands, where the master, second mate, and four of the best men were captured by the governor of the island. The ship was also seized, and after being in the hands of the captors two or three days was recaptured by the mate and part of the crew, brought home, and libeled for salvage. *Held*, a constructively total loss. *Williams v. Suffolk Ins. Co.*, §§ 837-38.

§ 790. There may be an abandonment in case of injury to a vessel though the cost of repair or recovery prove to be less than half her value; if it was probable that the cost would equal half her value, there may be an abandonment. And the true basis of valuation is the value of the ship at the time and place of the disaster, and not that of the policy, or the home port, or the general market. *Bradlie v. Maryland Ins. Co.*, §§ 822-29.

§ 791. A policy of insurance provided that the assured might abandon in case of loss.

amounting to half the value of the vessel as stated in the policy. The policy declared the vessel worth \$45,000; the testimony was that she was worth \$25,000. *Held*, that to justify an abandonment the loss must have been at least \$22,500. *Copeland (or Copelin) v. Phoenix Ins. Co.*, §§ 812-19.

§ 792. A vessel was seized in a foreign port by the custom officers for alleged violation of revenue laws; upon trial it was found that there was no good ground for the seizure, and the vessel was restored to the owners. But from long exposure in consequence of the legal proceedings she could not perform her voyage home without repairs beyond half her value. She was accordingly abandoned to the underwriters. *Held*, that the abandonment was good. *Magoun v. New England Ins. Co.*, §§ 839-40.

§ 793. Insurance on the freight of the *Hannah* at and from New York to Wilmington, thence to Barbadoes and back to Philadelphia. At Wilmington a cargo was prepared for shipment, had the *Hannah* arrived there. The vessel was forced by stress of weather to put into Norfolk, and arrived there in a state of wreck. The agent of the assured gave notice to the agent of the underwriters at Norfolk, and requested the making of all necessary repairs; which he declined. The repairs would have cost upwards of \$3,000, for which the vessel was insured. The plaintiffs offered to abandon, and the vessel was sold for \$325. *Held*, that if the injury exceeded half the value of the vessel, the assured had a right to abandon unless the underwriters would agree, at all events, to pay for the repairs, though they should exceed what they were liable for if only a partial loss had taken place. *Hart v. Delaware Ins. Co.*, §§ 841-44.

§ 794. A vessel was insured from Messina to Boston. She met with disasters in the course of her voyage, put into Lisbon for repairs, and they were made, exceeding half her value. A bottomry bond was given for the amount. She proceeded on her voyage and safely arrived. Four days after her arrival the owner abandoned, not having previous information. Subsequently the vessel was sold under the bottomry bond. *Held*, that the loss was not total at the time of the abandonment. *Held*, also, that the underwriter was entitled to have the usual deduction on the repairs of a third new for old, as the sale of the vessel was by default of the owner. *Humphreys v. Union Ins. Co.*, §§ 845-50.

§ 795. The actual cost of repairs at the true value, and not the cost estimated at so much in a depreciated local currency, is the rule by which underwriters are to pay for the repairs. *Ibid*.

§ 796. Loss of voyage as to cargo is not loss of voyage as to ship. *Alexander v. Baltimore Ins. Co.*, §§ 851-52.

§ 797. If at the time of an offer to abandon the ship be in possession of the master, in good condition, and at liberty to proceed, loss of the cargo will not authorize a recovery for total loss of the ship. *Ibid*.

§ 798. If underwriters take possession of a vessel alleged to have been abandoned by the owner, and repair and offer to return her to the owner upon his paying part of the expense of the repairs, this is an acceptance of the abandonment, in case there has been one. *Gloucester Ins. Co. v. Younger*, §§ 853-63.

§ 799. The master of a vessel has no authority to abandon; and a ratification of the act by the owner must be made within reasonable time. The evidence considered and held to show a valid abandonment. *Ibid*.

§ 800. Whether an abandonment has been revoked or not is a question of fact (ordinarily). *Columbian Ins. Co. v. Ashby*, §§ 864-67.

§ 801. After abandoning to the underwriters a ship insured, the master proceeded to sell her. *Held*, not necessarily a revocation of the abandonment. *Held*, also, in such a case, that a refusal by the master to accept an offer by an agent of the underwriters to furnish money for the relief of the ship, which was stranded, was not a revocation. *Ibid*.

[NOTES.— See §§ 914-971.]

KING v. DELAWARE INSURANCE COMPANY.

(Circuit Court for Pennsylvania: 2 Washington, 300-309. 1808.)

STATEMENT OF FACTS.— Action on a policy of insurance on the freight of the *Venus* from Philadelphia to the Isle of France. There was a special verdict to the effect that the *Venus* was met 16th January, 1808, by the British ship of war *Wanderer*, and informed that the Isle of France was blockaded, and warned not to proceed to any port in the possession of "His Majesty's enemies," that warning being indorsed on the ship's certificate of ownership and clearance. The verdict further stated that the captain of the *Venus*

thereupon abandoned the voyage, returned to Philadelphia and restored the cargo to the shippers. The insured abandoned as for a total loss, which the insurers would not accept. The Isle of France was not blockaded until the 1st of February following.

Opinion by WASHINGTON, J.

The only question in this cause is, whether the ground of abandonment, stated in the notice, be sufficient in law to entitle the plaintiff to recover as for a total loss?

§ 802. *When master may abandon for danger.*

This question must depend upon the fair construction of the contract which these parties have entered into. The nature of the obligation which the underwriter assumes is that the vessel or cargo, as either may be insured, shall go in safety to the port of destination; or that the freight shall be earned, if the insurance be upon freight, notwithstanding any of the perils enumerated in the policy; and that if, in consequence of those perils, or either of them, a loss should happen, he, the underwriter, will indemnify the insured against such loss. If the property insured be actually lost, or the voyage be put an end to by any of the enumerated perils, in which case a technical total loss takes place at the option of the insured, he is at liberty to abandon all his interest to the underwriter, and to demand the stipulated indemnification. The question then will be, whether the blockade, declared by the British orders in council of the 11th and 25th of November, 1807, and the warning given to the *Venus*, in this case, amounted to a peril within the words "arrests, restraints and detainments of princes," etc.; for it is not pretended that any other peril mentioned in the policy applies to the case. Was she arrested, restrained, or detained, except for the period employed in examining her papers, and from which she was soon relieved? It may be admitted without difficulty that a vessel may be restrained, as well by the operation of law, or by an *irresistible prevention* from performing the voyage, as by the application of actual physical force. The *vis major* may be substantially the same in its effects in either case, provided that in the former there exists in fact a right or a power to make the restraint effectual, and a reasonable degree of certainty that it will be and can be so used. An embargo is as much a restraint and detention, although it amounts to nothing more than a legal prohibition against the sailing of the vessel, as if she were taken into the custody of the officers of the government, and were deprived of all the means of removing from the wharf. A blockade, formed by the actual investment of the port of destination, is a restraint imposed by the government to which the blockading squadron belongs, although the vessel is never for a moment arrested and is left free to go wherever she pleases, except to the invested port. But in this case, the attempt to enter the interdicted port would be a violation of the law of nations, and would be followed with almost absolute certainty by the penalty of seizure and confiscation; and there exists, *in fact*, a power to make the seizure and to enforce the penalty. In some cases the apprehension of restraint has been considered as equivalent to a real restraint, although the danger was not immediate and certain; which, it must be admitted, is going a great way. But it is conceived that, in such cases, the actual existence of a power to restrain must be shown, and no reasonable doubt should be felt but that it would and could have been effectually exercised in case an attempt had been made to enter the port of destination. If the underwriter is to answer for a technical total loss, where none has really been sustained, it is the duty of the insured to do

all he may to prevent such loss; and he should proceed upon his voyage until the danger of an actual loss is rendered manifest.

§ 803. *Probability of capture no ground for abandonment.*

At the time the *Venus* was notified, by the commander of the *Wanderer*, of the blockade of the Isle of France, she had performed but a very small part of her long voyage. The Isle of France not being in fact blockaded, there was neither a legal nor an actual force to prevent this ship from entering the port of her destination, except the casual danger arising from capture by privateers, to which neutral vessels were exposed, by the injustice and rapacity of the belligerent powers. Of course the situation of the *Venus*, in relation to the perils of arrest or detainment, was in no respect changed from what it was when she left her port of departure. It is in vain to say that she might, after the indorsement of her papers, have met with British cruisers, in which case this evidence of her having been warned would have subjected her to capture and condemnation; for this is merely stating an apprehended instead of a real danger. If the captain of the *Venus* had, on his voyage, received information, and if such had been the fact, that innumerable privateers covered the seas over which she was yet to pass, this would have very much increased the *probability* of capture, but it would not have justified the insured in breaking up the voyage, and throwing the whole loss upon the underwriters.

§ 804. *Increase of risk will not excuse insured for breaking up the voyage.*

An increase of the risk, occurring after the voyage has begun, will not excuse the insured, beyond a prudent and necessary deviation, in order to avoid it; most unquestionably, it will not warrant the putting an end to the voyage altogether, as was done in the present case. *Neilson v. Columbian Ins. Co.*, 1 John., 301, is a stronger case to justify a deviation than the present, because, though apprehension of danger was the cause of it in both, yet in that the cause was present; in this it was contingent and remote. It is not necessary for the court to say what course the *Venus* might or ought to have adopted after she was discharged by the *Wanderer*, or to attempt to lay down a general rule for the government of the assured in similar situations. The ground of our opinion is, that the reason assigned for the abandonment in this case is not within any of the perils enumerated in the policy.

§ 805. *Warning and indorsement of papers do not amount to arrest or detainment.*

The notification, warning and indorsement of the papers do not, under the circumstances of this case, amount to an arrest, restraint or detainment. We totally disregard the conclusions of law which the jury have drawn from the facts found, because they are not competent to draw such conclusions; and in the present instance we conceive they have mistaken the law. It is true that the voyage may have been broken up in consequence of the circumstances stated by the jury; but in point of law this was not a sufficient reason for the step which was taken. Nor can we agree with the jury in opinion that the verbal communication made to Captain King by one of the officers of the British ship, or all the circumstances of the case taken together, justified the captain in returning to Philadelphia. It is believed that this opinion is in collision with none of the cases which were cited in the argument, and is fully supported by the principles laid down in most of them. An examination of these cases is all which now remains.

§ 806. *Authorities reviewed.*

The case of *Schmidt v. United Ins. Co.*, 1 Johns., 249, is certainly the strong-

est which was referred to on the side of the insured. Without giving any decided opinion upon that case, it will be sufficient to point out the circumstances which distinguish it from the present. In that the voyage was from New York to Hamburg. The vessel had progressed as far as the English channel, when she was regularly notified that the Elbe was blockaded, *and the fact was that the Elbe was actually invested*. The vessel, however, proceeded to the nearest port to that of her destination. She was warned, comparatively speaking, in the very neighborhood of the place where her voyage was to end, by a British ship of war; and it was highly improbable that she would find the blockade raised had she persisted in prosecuting her voyage to Hamburg. The interdiction of trade with that port was legal; a force was on the spot to prevent and to punish the attempt to violate it, and the event was considered as certain if the vessel had persisted in going thither. Upon the main question the court was divided, but it seems to have been agreed by all the judges that there must be evidence of a blockade *in fact*, and that a mere notification amounts to nothing. In this case the *Venus* had probably not proceeded a tenth part on her voyage, *no actual investment of the Isle of France existed*, and the vessel returned home, leaving it as uncertain then as at the time of her departure whether she might suffer from any of the perils against which she was insured.

Scott v. Libby, 2 Johns., 336, was the case of a vessel turned away from the port of her destination by an *investing squadron*, so that the owner was prevented, by actual *vis major*, from complying with his contract to carry the goods to that port; notwithstanding which it was decided that he was not entitled to his freight.

The cases of *Hurtin v. Phoenix Ins. Co.* and *Simonds v. United States Ins. Co.*, in this court, turned upon the breaking up of a voyage, in each case, by an actual force operating immediately on the subjects insured, and preventing its completion. In *Morgan v. The Insurance Company of North America*, 4 Dall., 455, the goods were carried to the port of delivery, and offered to the consignee, who could not receive them in consequence of an order of the government. The court decided that the freight was earned. *Neillson v. Columbian Ins. Co.* has been before noticed. It is an authority against the plaintiff, in whose behalf it was cited, for the reasons before mentioned.

These are all the cases which were cited in support of this action, so far as is recollected. It must be admitted that the case of *Hadkinson v. Robinson*, referred to on the other side, was decided upon the special memorandum in the policy, although it did not necessarily turn upon that circumstance; and therefore it is not to be relied upon as an authority in a case unaffected by the memorandum. *Dyson v. Rowcroft*, which followed soon afterwards (3 Bos. & Pull., 474), furnishes a satisfactory commentary upon the expressions made use of by Lord Alvanley in the former case. This, also, was an insurance on articles excepted by a memorandum from losses not total in their nature. The articles were rendered so rotten by *sea water* that it became necessary to throw them overboard. Here the peril which produced the total loss of the thing insured acted directly upon it, and produced its destruction; whereas, in *Hadkinson v. Robinson*, the occlusion of the ports of Naples against British vessels acted circuitously upon the subject insured, since it could not be positively said that this was the cause of its destruction. Nevertheless, there are a number of very strong expressions used by Lord Alvanley in this case, which would lead to a conclusion that his judgment would have

been the same if the policy had been upon goods not included within the memorandum; for if the embargo, under the circumstances of the case, was not such a peril as would justify breaking up the voyage, it would have been shorter to say so at once, and the ground of decision would have been more direct and intelligible than that which was taken. But the case of *Lubbock v. Rowcroft*, 5 Esp., 50, is conceived to be directly in point, though infinitely stronger than the present in favor of the insured. That was a policy on twenty bags of pepper, on a voyage at and from London to Naples, Leghorn, or Messina, with liberty to touch at any port in the Mediterranean. When the ship arrived at Minorca, it was found that Messina was in the hands of, or blockaded by the French, in consequence of which the insured abandoned and went for a total loss. Lord Ellenborough considered that the abandonment was made from an apprehension of capture, and not from a loss within the terms of the policy, and that if such was allowed, every ship about to sail from the port of London, to a port which had fallen into the hands of the enemy, might abandon. Erskine, for the insured, admitted that though one hundred French privateers had covered the seas, so that the probability of capture was great, this would not have justified a breaking up of the voyage, because, notwithstanding the danger was so imminent, the vessel might have escaped; but he insisted that in that case the capture was certain. This case appears to have been overlooked by the bar and bench, in the case of *Schmidt v. The United Insurance Company*, or it might properly have shaken the opinion of some of the judges, if its authority was allowed. Without admitting that it is to be considered as such, it may safely be said that if that decision be nearly right, the opinion of this court cannot be very wrong. The principle laid down by Lord Ellenborough, that an apprehension of capture does not afford a cause of abandonment, we entirely approve, whatever we might have thought as to its application to the circumstances of that case.

§ 807. *Quære, whether delivery of cargo to freighter after return of vessel to home port would defeat offer to abandon. (a)*

Without determining whether the delivery of the cargo to the freighter, after the return of the *Venus* to the port of Philadelphia, did or did not defeat the offer of abandonment, and without giving an opinion in this case upon the effect of the embargo, we think that upon the point which has been discussed the law is in favor of the defendants.

§ 808. *Ground of abandonment should be stated.*

Our reason for avoiding the last point is, that the embargo is not stated in the notice given to the defendants as a ground of abandonment, and, consequently, it cannot be relied upon at the trial. It is incumbent on the insured to state to the underwriter a sufficient reason for the offer to abandon, and it is no objection, if he does so, that he does not state other reasons. But if he state an insufficient one, he cannot at the trial rely upon one not stated in the notice. This is clear from the nature and use of an abandonment. The underwriter should have an opportunity of judging whether he is bound to accept the offer or not. If bound, that he may do so at once, and by becoming the owner may take proper measures for the preservation of the property. To conceal the true ground is to deceive him into possible error, and materially to affect his interest.

Judgment for defendants.

(a) An offer to abandon is in time if made as soon as the proofs of loss are received. *Gardner v. Ins. Co.*, * 2 Cranch, C. C., 550.

[The case now went to the supreme court, where the decision *supra* was affirmed. The following is the material part of the opinion. *King v. Delaware Ins. Co.*, 6 Cranch, 71–82. 1810.]

Opinion by MARSHALL, C. J.

The principal question arising on this case is, was the captain of the *Venus* justified in returning to Philadelphia, after having proceeded about one thousand miles on his voyage, either by the indorsement on his papers, or the verbal information given by an officer of the *Wanderer*?

§ 809. *Whether a voyage was broken up, not for the jury.*

A point preliminary to the examination of this question on its merits has been made by the plaintiff in error. The jury have found that “by the interruption, detainment and warning off of the British force, the voyage of said ship *Venus* was broken up.” After stating the verbal information given by the British officer respecting the blockade of the Isle of France is this further finding: “We find, in consequence thereof, that the said *Elisha King* was fully justified in returning to the port of Philadelphia.” These findings, it is urged, conclude the court, and render this special verdict equivalent to a general one.

But this court is not of that opinion. It has been truly said that finding the breaking up of the voyage finds nothing. The question recurs, was the voyage broken up by one of the perils insured against, or by the fault of the captain? The answer to this question determines the liability of the underwriters. It has been also truly said that the question of justification is a question of law, not of fact. If, as in this case, the jury find the fact specially, and draw the legal conclusion that the fact amounts to a justification, the court is not bound by that conclusion. The case then is open to examination on its real merits, unaffected by the particular findings which have been noticed.

§ 810. *British orders of council.*

In proceeding to inquire whether the circumstances which actually occurred justified the captain of the *Venus* in returning to Philadelphia, it becomes important to ascertain the real hazard of prosecuting his voyage. This essentially depends on the construction of the British orders of council issued in November, 1807. By the plaintiff in error it is insisted that these orders extend to the direct trade between a neutral port and the colony of an enemy. In support of this construction, a very acute and elaborate criticism has been bestowed on those orders, which appears to the court merely to furnish additional proof of the imperfection of all human language. The intent of the orders to exclude from their operation this direct trade, an intent alike manifested by the context, and by the particular words forming the exception, the universal understanding of both countries, which has been, on more than one occasion, publicly and officially expressed, are too conclusive on this point to render it necessary that the court should proceed to review that analysis of this document which has been so well made at the bar.

According to the construction contended for by the plaintiffs in error, an exception professedly made to mitigate the rigor of the general rule, “and still to allow to neutrals the opportunity of furnishing themselves with colonial produce for their own consumption and supply,” would be more rigorous than the rule itself, and would interdict that trade by which they were to be supplied with this produce for their own use, with as jealous circumspection as the trade professedly prohibited by the general rule.

It is, then, the clear and unanimous opinion of the court, that the words "shall have," which are used in the exception, relate as well to the time of capture as to the time of issuing the orders, and that a direct voyage from the United States to a colony of France was not prohibited. It being found that the Isle of France was not actually blockaded, and the orders not prohibiting the voyage, it remains to inquire whether the apprehension excited by the warning, or by the verbal communication of a British officer, justified the return of the *Venus* to Philadelphia.

It has been very truly observed that, in this case, the *Venus* was not physically incapacitated from prosecuting her voyage. With equal truth has it been observed that there was no legal impediment to her proceeding, because the voyage was not prohibited by the orders of November, 1807; and consequently the indorsement on her papers would not have increased the danger.

§ 811. *Fear of restraint or capture, no ground for breaking up voyage in this case.*

There did not, then, at the time the voyage was abandoned, exist, either in fact or in law, the restraint or detention against which the underwriters insured. From fear, founded on misrepresentation, the voyage was broken up, and the vessel returned to her port of departure. Whether this might be justified under any circumstances it is unnecessary to determine. But the court is of opinion that the circumstances of this case did not justify it. The *Venus* might have proceeded, and ought to have proceeded, until she could obtain further information. It would be dangerous in the extreme if any false intelligence received on a voyage might justify a captain in acting as if that intelligence were true.

The case of *Blackenhagen v. London Assurance Co.*, 1 Camp., 454, has a strong bearing on this case, and though that was a decision at *nisi prius*, it is entitled to all the respect which is due to the court of common pleas. After the same opinion had been successively given by Lord Ellenborough and by Sir James Mansfield, it was affirmed by the whole court, and the jury having found against the opinion of the judge, a new trial was granted.

The court gives no opinion on the question how far the underwriters would have been liable had the orders of council prohibited the trade to the Isle of France. This decision is not intended in any manner to affect that question.

Judgment affirmed, with costs.

COPELAND v. PHENIX INSURANCE COMPANY — SAME v. SECURITY INSURANCE COMPANY.

(Circuit Court for Missouri: 1 Woolworth, 278-292. 1868.)

Opinion by MILLER, J.

STATEMENT OF FACTS.— These cases were tried to the court without a jury, and we now proceed to render our judgment.

The "Benton," the boat insured by these companies, was sunk in the Missouri river, November 3, 1865, about sixty miles above Omaha, in consequence of being struck by a snag, which made a large opening in the side of her hull. It is not controverted that the injury is one covered by the policies of the defendants.

The plaintiff claims that he notified the defendants that he abandoned the vessel there, that he had a right to do so under the policies, and that they ac-

cepted the abandonment. The defendants deny each of these positions. They say that they took possession of the boat as she lay sunk, under the provision of the policies which authorized them to do so, for the purpose of raising and repairing her, and returning her to the plaintiff after she had been repaired. They did raise, repair, and tender her to the plaintiff, who refused to receive her.

The grounds alleged by the plaintiff for his refusal are: 1. That he having rightfully abandoned the vessel, nothing remained but for the defendant to pay the amount of the insurance. 2. That there was an unreasonable delay in repairing and returning the vessel. 3. That the repairs were insufficient.

§ 812. *Abandonment for loss less than half the value of vessel.*

In regard to the first of these grounds, we are of opinion that plaintiff has established no right to abandon the vessel. The most conclusive reason for this opinion is found in the provision of the policies that the assured shall have no right of abandonment unless the damage or injury shall amount to one-half the value of the vessel as stated in the policies. The value therein stated was \$45,000. In order, therefore, to authorize the plaintiff to abandon, the amount of injury sustained must be at least \$22,500. The testimony is uncontradicted that the boat, when she received the injury, was worth \$25,000, and no more. To justify an abandonment, the damage must have been such that no more than \$2,500 of value was left in her. We cannot doubt that the furniture in the cabin, the boiler, engines, and other machinery capable of removal, together with the dismantled hull, were worth three times that sum.

§ 813. *Due care, diligence and energy to be exercised before abandoning.*

But we should fail to do our duty as a court if we did not say that, independently of that provision of the policy, we have come to the conclusion that there was no right of abandonment in this case. We are satisfied that Captain Yore, who had charge of the vessel, in his hurry to escape from her before navigation became impeded by ice, did not exercise that energy, diligence and skill in his efforts to raise her, which the principle of law governing such cases requires. The testimony on the part of the plaintiff shows that he gave all proper directions to Captain Yore, and that he exercised such faithfulness and frankness as became his position towards the defendants. But the law justly regards the principal as responsible for the acts of the agent. Every principle and every analogy constitutes the master the agent of the owner under such circumstances. It is well settled that in cases of necessity happening during the voyage, the master is by law created the agent for the benefit of all concerned, and his acts done under such circumstances, in the exercise of good faith and a sound discretion, are binding upon all parties in interest. The "Sarah Ann," 2 Sumn., 206; The New England Ins. Co. v. The "Sarah Ann," 13 Pet., 387. And when the injury is so great as to justify a sale, he from necessity becomes the agent of the underwriters, as well as of the owner, to effect the sale for their benefit. The Patapsco Insurance Co. v. Southgate, 5 Pet., 604. If his agency extends to a disposition of the vessel when she is injured but not destroyed, it must extend to all acts which he may do to save her from destruction. And this is the more certain when it is considered that such is his duty. He cannot abandon his vessel in time of danger so long as it is practicable for human exertion, skill and prudence to save her from the impending peril. Even after she is stranded there is an obligation upon him to take all possible care of the cargo. The "Niagara" v. Cordes, 21 How., 7

(CARRIERS, §§ 438-50). Even in case of capture, the master of a neutral vessel is bound to remain with the ship until she is condemned or a recovery is hopeless. *Williard v. Dorr*, 3 Mason, 161. And in a proper case, after the loss or sale of the ship, he is agent to tranship the freight for the merchant. *Shipton v. Thornton*, 9 Ald. & Ell., 314; *Jordan v. Warren Ins. Co.*, 1 Story, 342 (§§ 480-87, *supra*); *Hunter v. Prinsep*, 10 East, 378.

The owner of this vessel dispatched her on this long and, as the event proved, hazardous voyage in charge of a master of his own selection, who was vested with this large authority over her and her cargo, and who was subject to these obligations. The bare statement is enough to show an agency here which subjected the owner to a responsibility for all of the acts and negligences of the master. For the purpose of doing all that the owner ought to do to save the vessel from total loss, the master was his agent.

In an agreement of this kind the plaintiff contracts for indemnity for, and security against, loss by any of the perils insured against. The defendant contracts to give that security upon the condition that all practicable means be employed on the part of the insured to make such loss as light as possible. It is a contract which, by its nature, requires a faithful observance of all the obligations imposed by it upon either party.

We are satisfied that the bulkhead which was designed to cover the injured place in the hull and to exclude the water was not constructed with the skill which Captain Yore is known to have possessed. If more time had been taken, and more care exercised in its construction, a bulkhead could have been made which, when once the water was all pumped out of the hold, would have kept it out. It is clearly shown that the one made here was not fitted to the bottom and side of the boat with the skill which prudent officers would, in such an emergency, have exercised. All this is conclusively established by the fact that, without difficulty or material change in her situation, the vessel was, in a short time, raised by Captain Mann, the agent of the defendants, and that he exercised only such energy and skill, and employed only such means, as had been within Captain Yore's control. We are therefore of opinion that, for want of due care, diligence and skill in the effort to raise the vessel, the plaintiff had not entitled himself to abandon her.

§ 814. *What constitutes an acceptance of abandonment.*

We are also of the opinion that the defendants did not accept the abandonment. The evidence upon this point consists of certain conversations between the plaintiff and the agents of the defendants residing at St. Louis. When the former heard of the accident he immediately communicated with these agents, and in one of several conversations about that time he said to them: "I have telegraphed to Captain Yore, if he cannot raise the boat, to wreck her." To this they responded, "All right." The plaintiff claims that this was a proposition of abandonment on his part, and an acceptance on theirs.

We are not able to accede to this view. In order to constitute a valid abandonment, no particular form of words, and no writing, is necessary. But in whatever manner it is made, it ought to be explicit, and not left open as matter of inference from some equivocal acts. The abandonment, when properly made, operates as a transfer of the property to the underwriter and gives him a title to it, or what remains of it, as far as it was covered by the policy. No deed is necessary to pass the title. *Columbian Insurance Co. v. Ashby*, 4 Pet., 139 (§§ 864-67, *infra*); *Patapsco Ins. Co. v. Southgate*, 5 Pet., 604; *Chesapeake Ins. Co. v. Stark*, 6 Cranch, 268. The law gives to this act

in pais all the effects which the most accurately drawn assignment would accomplish. *Comegys v. Vasse*, 1 Pet., 193. And if the abandonment, when once made, is good, the rights of the parties are definitely fixed by it, and it is irrevocable by either party without the consent of the other. *Peele v. Merchants' Co.*, 3 Mason, 27. These considerations make manifest the necessity that the act operating as an abandonment should be decisive.

In this case, so far from offering to abandon even, the plaintiff asserted his right to control the vessel; and he went on to state the manner in which he proposed to do so. The defendants might well have supposed that, even if Captain Yore should wreck the vessel, the plaintiff would still claim to own the wreck, and call for indemnity for a total loss less the value of the wreck. The course proposed by him was the only proper one for him to pursue if he did not intend to abandon the vessel. The defendants' assent to his proposal cannot be construed into an acceptance of the abandonment, which he might or might not afterwards make.

The mere fact of submersion of the vessel does not amount to a total loss. On the high seas it affords strong *prima facie* evidence, but in the shallow waters of the Missouri it does not afford even a presumption. *Emerigon*, ch. 12, §§ 12, 13; *Goss v. Withers*, 2 Burr., 697; *Anderson v. Royal Exch. Ass. Co.*, 7 East, 38; *Sewall v. United States Ins. Co.*, 11 Pick., 90.

§ 815. *Raising and repairing a wreck and tendering her to insured no defense to an action on the policy, unless done within a reasonable time.*

The abandonment, then, by the act of the insured must therefore appear. If, when Captain Yore left the vessel and refused to make any further effort to save her, the defendants had not interfered, but had stood upon their rights as the case then was, we should now have to ascertain the amount of injury for which the defendants, under all the circumstances, are liable. But such is not the present position of the parties. On the 20th day of the then month of November, which was about seventeen days after the accident occurred, the defendants notified the plaintiff that they should exercise the option authorized by one of the provisions of the policies, and undertake to raise and repair the boat. Accordingly, without any instructions or interference on the part of the plaintiff, they did raise, repair and tender her to him.

We are of opinion that this is no sufficient defense to the present action, because, first, there was unjustifiable delay in repairing and tendering the vessel; secondly, the repairs were insufficient. From the time the defendants had notice of the sinking of the boat until they notified the plaintiff of their intention to raise her, fifteen days elapsed. During this time, as they well knew, the machinery, boilers and engines were being removed from the vessel as a wreck, all of which, if she were to be raised, would have to be replaced at considerable expense and loss of time. Their determination should have been taken sooner.

This is, however, a minor consideration. A very few days after they had determined to raise the vessel, Captain Mann was on the spot and had her afloat. If the energy and diligence which characterized his proceedings in raising had been exhibited also in repairing her there would have been no cause of complaint. But he seems to have supposed that when she was once afloat his employers were safe. The most unaccountable delays occurred in replacing the machinery; no workmen were put upon her until some time in December. But two were employed upon her before she was brought to St. Louis. It was not until May 9, 1866, that she was tendered to the plaintiff at St. Louis.

The actual repairs cost only \$1,764.70, a sum so small as to show clearly that there was no reason for the length of time consumed in making them.

It is to be considered here that the vessel was employed by the plaintiff in the trade of the extreme Upper Missouri. Unless a vessel in that trade leaves St. Louis very early in the spring she will encounter low water. The 9th of May is too late in the season to set out upon such an enterprise. One witness says she would have been worth \$5,000 more if she had been tendered so as to make a trip that year.

The general rule is, that the repairs must be made as expeditiously as possible, in order that the voyage, if it be not completed, may not be broken up. *Peele v. Suffolk Ins. Co.*, 7 Pick., 254; *Reynolds v. Ocean Ins. Co.*, 22 Pick., 191; 1 Met., 160. And even when, by the terms of the policy, this rule is waived by the assured, still such dispatch in the prosecution of the repairs is demanded of the insurer as would restore the vessel ready for another adventure in season profitably to engage in the same. And if the insurer is guilty of unreasonable delay he must bear the consequences.

§ 816. *Insufficient repairs by underwriter no defense to suit upon the policy.*

But we attach more importance to the fact that the repairs were insufficient. The overwhelming preponderance of testimony is that the vessel lacked \$5,000 in value of the repairs necessary to indemnify the plaintiff for the injury sustained by the accident. The deficiencies in repairs, as made, are set forth in the finding of facts at the end of this opinion.

The actual repairs made upon the vessel cost, as I have already stated, \$1,764.70. The expenses of repairing and of raising her were \$12,132.82. When tendered to plaintiff she was worth \$12,000. When the injury was sustained she was worth \$25,000. Under these circumstances there can be no doubt that the repairs were insufficient to meet the obligations which the defendants had assumed under the policies. Without going into an examination of the authorities, I may state that the conditions of these policies, supported by the law, require that the vessel, when tendered, should have been in such a condition that the plaintiff, when receiving her, should have full indemnity for all the injury which was covered by the policy.

It is claimed for the defendants, however, that, conceding the insufficiency of the repairs, inasmuch as the plaintiff did not point out to them the defects, he was bound to receive the boat, make the necessary repairs, and look to a future action at law to reimburse him the expenses; at all events, that he could not recover the full value of the vessel by refusing to receive her, until he did point out the deficiencies of which he complains, and give the defendants an opportunity to supply them.

There are decisions which go so far as to say that where the defects are not great, where they are of little importance in comparison with the whole injury to the vessel, where they might have escaped the attention of the insurers while attempting in good faith to comply with the requirements of the contract, they shall not be compelled to pay as for a total loss, unless the particulars to which objection is made are pointed out to them. We have serious doubt whether the principle by the supreme court of Massachusetts (*Reynolds v. Ocean Ins. Co.*, 22 Pick., 191, 1 Met., 160; *Norton v. Lexington Ins. Co.*, 16 Ill., 235), asserted to this extent in the cases cited to us, can be sustained as the law. But it is not necessary to overrule these decisions, for there are manifest distinctions between them and the present case. In the first place the

deficiencies here were so obvious, so necessarily within the sight and knowledge of the defendants, that they did not need to be pointed out. Secondly, the deficiencies were so very great in proportion to the repairs actually made, the former being estimated at \$5,000 and the latter only a little exceeding \$1,700, that it is absurd to say that there was any fair and honest effort to indemnify the plaintiff for his loss.

I have already stated the views of the court upon the fidelity required of both parties in these contracts of insurance, and have commented, as I thought it deserved upon Captain Yore's failure to do all that he could to raise the vessel. And I think that, after getting her afloat, there was a like determination on the part of the defendants to do just as little as was possible, and escape the liability imposed upon them under their contract by the law. In this effort they have failed to escape that liability. We find that the plaintiff was justified in refusing to receive the vessel, and as the policies are valued policies, he is entitled to the full amount insured by each, to wit, \$5,000, with interest from the time the loss was fixed.

§ 817. *Special finding of facts.*

To enable the parties to have a review of this judgment in the supreme court, we make the following special finding of facts:

1. There was a due execution and delivery of the policy offered in evidence by the plaintiff.
2. The boat was struck by a snag, and sunk in the Missouri river, about sixty miles above Omaha, November 3, 1865; which injury was one of the perils against which defendants insured plaintiff in said policy.
3. Under the circumstances the plaintiff had no right to abandon the vessel as a total loss, even though he gave notice that he did so.
4. There was no acceptance by defendants of such abandonment.
5. The defendants, under the provisions of the policy, took possession of the vessel for the purpose of raising, repairing, and tendering her to the plaintiff.
6. They did raise her, proceeded to repair, and tendered her to the plaintiff at her home port, May 9, 1866.
7. The vessel was used mainly for the trade of the Upper Missouri river, making trips from St. Louis to Fort Benton. She would have been worth \$5,000 more to her owner if tendered to him so that she could have put out on her voyage earlier in the spring. The actual tender was not made in reasonable time.
8. The repairs made were insufficient to constitute indemnity for the injury. To this, additional repairs to the value of \$5,000 were requisite. There was not proper canvas or covering for the hurricane deck, nor rigging, nor ropes. The injury to and destruction of furniture were not made good. There were left in the sides of the hull, above light-water mark, cracks through which, when the vessel was loaded and sunk down to them, the hold would have filled with water. Smaller cracks were left in the deck floor. She was not painted. A cargo would have suffered injury from these defects. The repairs in all these respects, except the paint, and even a part of that, were made necessary by the accident, and were covered by the policy.
9. The plaintiff did not point out these defects to the defendants, and refused generally to receive the boat.

On these facts as found, the court renders judgment for the plaintiff for the amount insured in the policy.

[The case was now taken to the supreme court, and the decision *supra* affirmed. The following opinion was delivered. *Copelin v. Insurance Company*, 9 Wallace, 461-467. 1869.]

Opinion by MR. JUSTICE STRONG.

Nothing in this record requires us to look beyond the special finding of the facts made by the court, or to do more than determine whether, upon the facts found, the plaintiff below was entitled to the judgment given.

§ 818. *An offered abandonment may be accepted, though there is no right to abandon.*

As the sum insured by the policy was not greater than the sum required to make the additional repairs necessary to indemnify the plaintiff, it is difficult to perceive why, in any aspect of the case, he was not entitled to the judgment given. The defendants complain, however, that they have been held liable as for a constructive loss, when there was no right to abandon, and when the abandonment of which the plaintiff gave notice was not accepted. Doubtless had the defendants taken possession of the boat, as they were authorized to do, by the provisions of the policy, and had they raised, completely repaired and returned her to the plaintiff in a reasonable time, they could not have been held liable for a total loss. It is an established fact that there was no right to abandon when they did take possession of the vessel. And it was expressly stipulated in the policy, that the acts of assured, or insurers, or of their joint or respective agents, in preserving, securing or saving the property insured, in case of danger or disaster, should not be considered, or held to be, a waiver or acceptance of an abandonment. It is well settled, however, that an offered abandonment may be accepted, even when the assured has no right to abandon, and if accepted, it must be with its consequences. And an acceptance need not be expressly made. It may even be refused, and yet the insurers, by their conduct, may make themselves liable as for a total loss.

§ 819. *Delay to repair and return may amount to acceptance of abandonment.*

Though, by the terms of the policy, these defendants had a right to take possession of the boat, and repair her for account of the plaintiff, yet this was a privilege accorded to them only, that they might thus make indemnity for the loss. Taking possession to make partial repairs, not amounting to indemnity, was not contemplated by the contract. It was not authorized. Nor did the contract warrant taking possession of the boat, and holding her for an unreasonable time. The insurers were bound to repair and return without unnecessary delay. In holding longer than was necessary for making repairs, they must be regarded as acting, not as insurers, but as owners, for they had no other authority than that of owners for their failure to return within a reasonable time. Their action was, therefore, a substantial recognition and acceptance of the abandonment of which they had been notified, for in no other way had they become owners. On no other theory can this delay be considered lawful. It is true the policy stipulated that the acts of the insurers in preserving, securing or saving the property insured in case of danger or disaster, should not be considered or held an acceptance of abandonment, but this manifestly refers only to authorized acts. Retaining possession of the boat an unreasonable time, and then offering to return her unrepaired, were not authorized acts, and consequently they are unaffected by the stipulation. They must therefore be regarded as constructive acceptance of an abandon-

ment. This is a principle asserted and well sustained by the authorities. In *Peele v. Suffolk Ins. Co.*, 7 Pick., 254, where the jury had found that the underwriters, who had taken possession of the stranded vessel, had not offered to restore her in a reasonable time, the court said: "The underwriter has his duties as well as his rights. If he take the vessel into his possession to repair her, he must do it as expeditiously as possible, in order that the voyage, if not completed, may not be destroyed. If he delay the repairs beyond a reasonable time, he forfeits his right to return the ship, and must be considered as taking her to himself under the offer to abandon." The principle, said the court, rests upon the very nature of the law of insurance, which is a fair and honest indemnity for loss. The same doctrine was asserted in *Reynolds v. Ocean Ins. Co.*, 1 Met., 160, and it was also held that the underwriter's duty and liability in such a case are not varied by a clause in the policy of insurance, stipulating "that the acts of the assurers in recovering, saving and preserving the property insured in case of disaster, shall not be considered an acceptance of an abandonment." Such also was the ruling in a case between the same parties, 22 Pick., 191, and in *Norton v. Lexington Fire, Life & Marine Ins. Co.*, 16 Ill., 235. It is in our judgment sustained by sound reason.

The plaintiffs in error, however, insist that the doctrine cannot be applied to the present case, because the court below found there was no right, under the facts shown on the part of the plaintiff, to abandon for a total loss, although he gave notice that he did so abandon, and that there was no acceptance by the insurers of such an abandonment. But this must be considered in connection with the other facts found. It is equally a fact in the case, that the defendants took possession of the boat, repaired her very insufficiently, and, after having held her an unreasonable time, offered to return her. The legal effect of this we have seen. Taking these facts together, the finding that the defendants did not accept the abandonment which the plaintiff offered at a time when he had no right to abandon means no more than that there was no express or avowed acceptance. This is quite consistent with the judgment, that, by their failure to return the boat within a reasonable time, they made themselves liable to pay the full amount of the policy.

We cannot follow the plaintiffs in error into an examination of the evidence, in order to inquire whether it was not the fault of the assured that the boat was not repaired and tendered to him in a reasonable time. Our judgment is necessarily founded exclusively upon the finding of facts by the court. That is equivalent to a special verdict, and upon that we think the plaintiff below was entitled to the judgment which he obtained.

Judgment affirmed.

MARSHALL v. DELAWARE INSURANCE COMPANY.

(4 Cranch, 202-208. 1806.)

ERROR to U. S. Circuit Court, District of Pennsylvania.

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—Action for a total loss on a policy of insurance on the brig *Rolla*, her cargo and freight. The material facts stated were, that the brig *Rolla*, a neutral vessel, while prosecuting the voyage insured, was captured by a belligerent cruiser, and libeled as prize of war. On the 9th of July, 1806, a final sentence in favor of the vessel and cargo was passed, and on the 19th of the same month, about 1 o'clock, P. M., restitution was made.

On the 17th of July the assured in New York received information of the capture, and immediately gave orders to his agent in Philadelphia to abandon to the underwriters. In pursuance of these orders, the offer to abandon was made on the morning of the 19th.

The judgment of the court below was for the defendants.

The question submitted to the consideration of the court is this: Is the assured entitled to recover for a partial or for a total loss?

In support of the claim for a total loss two points have been made: 1st. That the state of information at the time of the abandonment, not the state of the fact, must decide the right of the assured to abandon. If this be otherwise, then it is contended, 2d. That the right to abandon is co-extensive with the detention, which continued until restitution was made in fact, and that restitution in fact, though made on the same day, was posterior in point of time to the abandonment.

§ 820. *Right to abandon depends upon facts, not information.*

1. Does the right to abandon depend on the fact or on the information of the parties? The right to abandon is founded on an actual or legal total loss. It appears to the court to consist with the nature of the contract, which is truly stated to be a contract of indemnity, that the real state of loss at the time the abandonment is made is the proper and safe criterion of the rights of the parties. Might they depend absolutely on the state of information, a seizure which scarcely interrupted the voyage might be, and frequently would be, converted into a total loss, and the contests respecting the real state of information might be endless. Intelligence of capture and of restitution might be received at the same time, and the insured might suppress the one and act upon the other.

This point came under the consideration of the court in the case of *Rhine-lander v. The Insurance Company of Pennsylvania* [4 Cr., 29], in which case it was said that "where a belligerent has taken full possession of a vessel as prize, and continues that possession to the time of the abandonment, there exists, in point of law, a total loss." The court, in delivering this opinion, understood itself to require that the continuance of the possession up to the time of the abandonment, or a technical total loss incurred notwithstanding the restoration, was necessary to justify a recovery as for a total loss.

§ 821. *Right to abandon terminates with decree of restitution after capture.*

In considering the second point the court proceeded to inquire whether the technical total loss on which the right to abandon depended was terminated by the decree of restitution or continued until that decree was carried into execution and restitution was made in fact. The real object of the policy is not to effect a change in property, but to indemnify the insured. Whenever, therefore, only a partial loss is sustained by one of the perils insured against, the original owner of the property retains it, prosecutes his voyage and recovers for his partial loss.

But the voyage may be really broken up without the destruction of the vessel and cargo. A detention by a foreign prince, either by embargo or capture, may be of such long duration as to defeat the voyage. This is a peril insured against, and of its continuance no certain estimate can be made. In the case of capture, it is, for the time, a total loss, and no person can confidently say that the loss will not finally be total. So of an embargo. Its duration cannot be measured, and it may destroy the object of the voyage. These detentions, therefore, are, for the time, total losses, and they furnish

reasonable ground for the apprehension that their continuance may be of such duration as to break up the voyage or ruin the assured by keeping his property out of his possession. Such a case, therefore, upon the true principles of the contract, has been considered as justifying an abandonment and a recovery for a total loss.

But when a final decree of restitution, from which it is admitted that no appeal lies, has been awarded, the peril is over. On no reasonable calculation can it be supposed that such a delay of restitution will ensue as from that time to break up the voyage. There is no reason to presume a subsequent detention on the part of the foreign prince. There is no motive for such detention. The master of the captured vessel may perhaps not be ready to receive possession, and the delay may proceed from him. At any rate, without some evidence that the peril was not actually determined, the court cannot consider it as continuing after the sentence was pronounced. A technical total loss originates in the danger of a real total loss. The court cannot suppose such a danger to have existed after a final sentence of acquittal, unless some order of court relative to a reconsideration could be shown, or it should appear that some other delays were interposed by the court which had pronounced the sentence or by the sovereign of the captor.

Had the facts on which this question depends been known at New York and Philadelphia as they occurred, could it have been said that there existed a technical total loss? After a decree of restitution, could it be said that while means were taking to carry that decree into execution, while the mandate for restitution was passing from the court to the vessel, the assured had a right to elect to consider his vessel as lost and to abandon to the underwriters? To this court it seems that the right to make such an election, at such a time, would be inconsistent with the spirit of the contract, and that the technical total loss was terminated by the decree of restitution, unless something subsequent to that decree could be shown to prove the continuance of the danger or of an adversary detention.

Nothing in this opinion is intended to extend to the case where a cargo may be lost without the loss of the vessel.

There is no error in the judgment of the circuit court of Pennsylvania, and it is to be affirmed, with costs.

Judgment affirmed.

BRADLIE v. MARYLAND INSURANCE COMPANY.

(12 Peters, 378-409. 1838.

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This cause comes before the court upon a writ of error to the circuit court of Maryland district. The original action was upon a policy of insurance dated the 22d of November, 1832, whereby the defendants, the Maryland Insurance Company, caused the plaintiffs, by their agents (William Howell & Son), to be insured, lost or not lost, \$10,000, at a premium of four per cent., on the brig Gracchus, Snow, master (valued at that sum), at and from Baltimore, for six calendar months, commencing that day at noon; and if she be on a passage at the expiration of the time, the risk to continue at the same rate of premium until her arrival at the port of destination. The declaration alleged a total loss by the casting ashore and stranding of the brig on the 23d of March, 1833, in the river Mississippi. Upon the

trial of the cause it appeared in evidence that the brig sailed from Baltimore on a voyage to New Orleans and safely arrived there, and took on board part of her cargo (pork and sugar) at that port, on a voyage for Baltimore; and about the middle of the 23d day of March, 1833, sailed from New Orleans intending to proceed to Sheppard's plantation, on the river Mississippi, about thirty-three miles below New Orleans, to take in the residue of her cargo for the same voyage. At the English Turn, about twenty-two miles from New Orleans, the brig attempted to come to anchor, and in so doing lost the small bower anchor, and then dropped the best bower anchor, which brought her up. The next morning while the brig was proceeding on her voyage she struck on a log, broke the rudder pintles, when she fell off and went on shore. A signal was then made for a steamboat in sight, which came to the assistance of the brig, and in attempting to haul her off the hawser parted. It was then found that the brig was making water very fast. Help was obtained from a neighboring plantation. They commenced pumping and discharging the cargo on board of the steamboat; and after discharging all the pork and a part of the sugar, they succeeded in freeing the ship on the afternoon of the same day. She was then got off and proceeded to New Orleans, where she arrived the same night, she continuing to leak and both pumps being kept going all the time. The next day the master understood that the steamboat claimed a salvage of fifty per cent. and intended to libel for it. On the 27th of the same month the brig was taken across the river for repairs. On the same day the brig was libeled for the salvage in the district court of Louisiana.

On the 25th of March, Snow, the master, wrote a letter to one of the owners, containing an account of the loss and state of the brig, and also of the claim by the salvors of fifty per cent., which the underwriters on the cargo and himself had objected to; adding that they should hold the steamboat liable for any damage that might be incurred on account of the detention.

On the 22d of April, Messrs. Howell & Sons addressed a letter to the company, submitting the letter of the 25th of March to the company, and say therein: "In consequence of the damage, together with the detention that must grow out of a law-suit (in which it appears that the vessel is involved), the voyage being broken up, we do hereby abandon to you the brig Gracchus, as insured in your office per policy No. 13,703, and claim for a total loss." On the same day the company returned an answer, saying: "We cannot accept the abandonment tendered in your letter of this date, but expect you to do what is necessary in the case for the safety and relief of the vessel."

On the 9th of the ensuing May, the district court decreed one quarter of the value of the vessel and cargo (estimated at \$7,000) as salvage; the brig being valued at \$2,500. On the 14th of the same month the master got possession again of the brig, the salvage having been paid. On the 3d of June, 1833, the brig was repaired and ready for a freight; and early in July she sailed for Baltimore with a partial cargo on board on freight, and duly arrived there in the latter part of the same month. The repairs at New Orleans amounted to the sum of \$1,690.15, and the share of the brig, at the general average or salvage, to the sum of \$1,245.07; in the whole amounting to \$2,935.22. To meet this sum and some other expenses the master obtained an advance from Messrs. Harrison, Brown & Co., of New Orleans, of \$3,715.41; and gave them as security therefor a bottomry bond on the Gracchus for the principal sum and five per cent. maritime premium, payable on the safe arrival of the brig at Baltimore.

On this bottomry bond the brig was libeled in Baltimore, and no claim be-

ing interposed by any person, she was, by a decree of the district court of Maryland, on the 5th of September, 1833, ordered to be sold to satisfy the bottomry bond; and she was accordingly sold by the marshal about the 20th of the same month to John B. Howell for \$4,750, and on the 24th of the same month there was paid to the attorney of the libelant the full amount due under the decree of the court. On the same day the president of the company addressed a letter to Messrs. Howell & Son, in which they say: "We have examined the statements of general and particular average and the accounts relating thereto, which you handed us some days ago, respecting the expenses incurred on the brig *Gracchus* at New Orleans. Although some of the charges are of a description for which the company is not liable by the terms of their policy, yet, wishing to act liberally in the case, we have agreed to admit every item in the accounts, and the different amounts will be as follows." Here follows a statement deducting from the repairs one-third new for old; and admitting the sum of \$2,409.11 to be due to the plaintiffs, and inclosing the premium note and a check for the amount. The letter then adds: "If you find any other charge, etc., has been paid at New Orleans, in order to raise the funds on bottomry, we will pay our full proportion of the same upon being made acquainted with the amount." On the same day Messrs. Howell & Son returned an answer, refusing to receive the premium note and check, adding: "We should do them (the owners) great injustice to make such a settlement. Our opinion is that in law and equity they have a claim for a total loss."

These are the principal facts material to be mentioned, though much other evidence was introduced into the cause upon collateral points by the parties.

The counsel for the defendants, after the evidence on each side was closed, moved the court to instruct the jury as follows:

Defendants' first prayer. The defendants, by their counsel, pray the court to instruct the jury that the notice of abandonment of the 22d of April, 1833, and the accompanying letter from Captain Snow of the 25th of March, as given in evidence by the plaintiffs, do not show or disclose facts which in law justify the offer to abandon then made; and therefore, that in the absence of all evidence that said abandonment was accepted by the defendants, the plaintiffs are entitled to recover only for a partial loss.

2. That if the said notice of abandonment was sufficient, still the jury ought to find a verdict for a partial loss only; unless they shall believe from the evidence that the *Gracchus* suffered damage from the accident that befell her on the 24th March, 1833, to more than one-half the sum at which she was valued in the policy, and that, in estimating said damage, the jury ought to take the cost of her repairs only, deducting one-third therefrom, as in the case of adjusting a partial loss.

3. That if the said abandonment was sufficient, as is assumed in the preceding prayer, still the jury ought to find a verdict for a partial loss only, unless they shall believe, upon the evidence, that the damage so sustained by said brig exceeded in amount one-half the sum at which she was valued in the policy; and that in estimating the cost of her repairs, for the purpose of ascertaining the amount of such damage, the jury are bound to deduct one-third therefrom as in the case of a partial loss.

4. That if said abandonment was sufficient, still, the jury ought to find a partial loss only, unless they shall believe that the damage as aforesaid was more than one-half the value of the said brig at the time the accident hap-

pened, according to the proof of such value as given in evidence; and that in estimating the amount of such damage the jury are to take the amounts of the general and particular averages as adjusted at New Orleans, deducting one-third from the actual cost of repairs.

But the court refused to give the instruction prayed for, and gave to the jury the following instruction: If the jury find from the evidence, that the *Gracchus* was so damaged by the disaster mentioned in the letter of Captain Snow, of March 25, 1833, that she could not be got off and repaired without an expenditure of money to an amount exceeding half her value, at the port of New Orleans, after such repairs were made, then the plaintiffs are entitled to recover for a total loss, under the abandonment made on the 22d day of April, 1833; and in ascertaining the amount of such expenditure, the jury must include the sum for which the brig was liable to the salvors, according to the decree of the district court of Louisiana stated in the evidence; but if the jury find that the vessel could have been got off and repaired, without an expenditure of money to the amount of more than half her value, then upon the evidence offered the plaintiffs are not entitled to recover for a total loss, on the ground that the voyage was retarded or lost, nor on account of the arrest and detention of the vessel by the admiralty process, issued at the instance of the salvors.

The defendants excepted to the refusal of the court to give the instructions prayed, and also to the opinion actually given by the court in their instructions to the jury. The plaintiffs also excepted to the same opinion given by the court.

The plaintiffs also prayed "the court to direct the jury that in this cause the insured, by their letter of the 22d April, authorized and required the proper expenditures to be made upon the vessel, for which said underwriters are liable under their policy; that no funds being supplied by them in New Orleans to meet this loss, and the salvage and repairs having been paid for by money raised upon *respondentia* upon the vessel, if the jury shall find that said vessel under the lien of this bond came to Baltimore, and the defendants were then apprised of the existence of such *respondentia*, and were also informed of the existence of the proceedings thereupon against said vessel, and they neglected to pay so much thereof as they ought to have paid to relieve said vessel, and omitted to place her in the hands of the owners, discharged of so much of such bottomry as the underwriters were liable for; and in consequence thereof said vessel was libeled and condemned and sold, and thereby wholly lost to the plaintiffs, then the plaintiffs are entitled to recover for the whole value of the vessel."

The court refused to give this instruction, and the plaintiffs excepted to the refusal, and the court signed a bill of exceptions upon both exceptions. The jury found a verdict for the plaintiffs for \$3,489.22, upon which judgment passed for the plaintiffs. And the present writ of error is brought by the plaintiffs for the purpose of reviewing the instructions above stated, so far as they excepted thereto.

Although the prayers for the instructions by the defendants are not before the court for the purpose of direct consideration, as the defendants have brought no writ of error, yet it is impossible completely to understand the nature and extent and proper construction of the opinion given by the court, without adverting to the propositions contained in them; for to them, and to them only, was the opinion of the court given as a response.

The second instruction asked by the defendants, in substance, insisted that to entitle the plaintiffs to recover for a total loss, the damage to the *Gracchus* from the accident should be more than one-half the sum to which she was valued in the policy; and that, in estimating that damage, the costs of the repairs only were to be taken, deducting one-third new for old. In effect, therefore, it excluded all consideration of the salvage in the ascertainment of the loss.

The third instruction was in substance similar to the second, except that it did not insist upon the exclusion of the salvage. In effect, therefore, it insisted upon the valuation in the policy as the standard by which to ascertain whether the damage was half the value of the *Gracchus* or not.

The fourth instruction insisted that to entitle the plaintiffs to recover for a total loss the damage must exceed one-half the value of the *Gracchus* at the time of the accident; and that in estimating the damage, the general and particular averages, as adjusted at New Orleans, were to be taken, deducting one-third new for old. In effect, therefore, it insisted that nothing but these adjustments were to be taken into consideration in ascertaining the totality of the loss at the time of the abandonment (admitting the abandonment to be sufficient), however imminent might be the dangers or great the losses then actually impending over the *Gracchus*. And all three of these prayers further insisted that the deduction of one-third new for old should be made from the amount of the repairs, as in the case of a partial loss, in ascertaining whether there was a right to abandon for a total loss, upon the ground that the damage exceeded a moiety of the value of the vessel.

§ 822. *Facts at time of abandonment determine the right.*

The instructions of the court actually given in these prayers involve the following propositions: 1. That if the expenditures in repairing the damage exceeded half the value of the brig at the port of New Orleans, after such repairs were made, including therein the salvage awarded to the salvors, the plaintiffs were entitled to recover for a total loss under the abandonment made on the 22d of April, 1833. 2. If the expenditures to get off and repair the brig were less than the half of such value, then the plaintiffs were not entitled to recover for a total loss upon the ground that the voyage was retarded or lost, nor on account of the arrest and detention of the brig under the admiralty process for the salvage.

The question is whether these instructions were correct. In considering the first, it is material to remark that, by the well-settled principles of our law, the state of the facts, and not the state of the information at the time of the abandonment, constitutes the true criterion by which we are to ascertain whether a total loss has occurred or not for which an abandonment can be made. If the abandonment, when made, is good, the rights of the parties are definitively fixed and do not become changed by any subsequent events. If, on the other hand, the abandonment, when made, is not good, subsequent circumstances will not affect it, so as retroactively to impart to it a validity which it had not at its origin. In some respects our law on this point differs from that of England, for, by the latter, the right to a total loss vested by an abandonment may be divested by subsequent events, which change that total loss into a partial loss. It is unnecessary to cite cases on this subject, as the diversity is well known; and the courts in neither country have shown any disposition of late years to recede from their own doctrine. The cases of *Rhineland v. The Insurance Company of Pennsylvania*, 4 Cranch, 29; and

Marshall v. Delaware Ins. Co., 4 Cranch, 202 (§§ 820–21, *supra*), are direct affirmations of our rule; and those of *Bainbridge v. Neilson*, 10 East, 329; *Patterson v. Ritchie*, 4 M. & Selw., 394, and *M'Iver v. Henderson*, 4 M. & Selw., 584, of the English rule.

§ 823. *Actual cost of repairs not the test of right to abandon.*

In cases where the abandonment is founded upon a supposed technical total loss by a damage or injury exceeding one-half the value of the vessel, although the fact of such damage or injury must exist at the time, yet it is necessarily open to proofs to be derived from subsequent events. Thus, for example, if the repairs, when subsequently made, clearly exceed the half value, it is plain that this affords one of the best proofs of the actual damage or injury. On the other hand, if the subsequent repairs are far below the half value, this, so far as it goes, affords an inference the other way. But it is not, and in many cases cannot be, decisive of the right to abandon. In many cases of stranding the state of the vessel at the time may be such, from the imminency of the peril and the apparent extent of expenditures required to deliver her from it, as to justify an abandonment, although by some fortunate occurrence she may be delivered from her peril without an actual expenditure of one-half of her value after she is in safety. Under such circumstances, if, in all human probability, the expenditures which must be incurred to deliver her from her peril are, at the time, so far as any reasonable calculations can be made, in the highest degree of probability, beyond half value, and if her distress and peril be such as would induce a considerate owner, uninsured, and upon the spot, to withhold any attempt to get the vessel off because of such apparently great expenditures, the abandonment would doubtless be good. It was to such a case that Lord Ellenborough alluded in *Anderson v. Wallis*, 2 M. & Selw., 248, when he said: "There is not any case nor principle which authorizes an abandonment unless where the loss has been actually a total loss, or in the highest probable at the time of the abandonment." Mr. Chancellor Kent, in his learned Commentaries, vol. 3, 321, has laid down the true results of the doctrine of law on this subject. "The right of abandonment," says he, "does not depend upon the certainty, but on the high probability, of a certain loss, either of the property or of the voyage, or both. The insured is to act, not upon certainties, but upon probabilities; and if the facts present a case of extreme hazard, and of probable expense exceeding half the value of the ship, the insured may abandon, though it should happen that she was afterwards recovered at a less expense." We have no difficulty, therefore, in acceding to the argument of the counsel for the plaintiffs in error on this point. But its application to the ruling of the court will be considered hereafter.

§ 824. *Value of ship at time and place of disaster to be considered.*

In respect to the mode of ascertaining the value of the ship, and, of course, whether she is injured to the amount of half her value, it has, upon the fullest consideration, been held by this court that the true basis of the valuation is the value of the ship at the time of the disaster; and that if, after the damage is or might be repaired, the ship is not or would not be worth, at the place of the repairs, double the cost of the repairs, it is to be treated as a technical total loss. This was the doctrine asserted in *The Patapsco Ins. Co. v. Southgate*, 5 Pet., 604, in which the court below had instructed the jury that if the vessel could not have been repaired without an expenditure exceeding half her value at the port of the repairs, after the repairs were made, it constituted a total loss. This court held that instruction to be entirely correct. It follows from

this doctrine that the valuation of the vessel in the policy, or the value at the home port, or in the general market of other ports, constitutes no ingredient in ascertaining whether the injury by the disaster is more than one-half the value of the vessel or not. For the like reason, the ordinary deduction, in cases of a partial loss, of one-third new for old from the repairs is equally inapplicable to cases of a technical total loss by an injury exceeding one-half of the value of the vessel. That rule supposes the vessel to be repaired and returned to the owner, who receives a correspondent benefit from the repairs beyond his loss to the amount of the one-third. But in the case of a total loss, the owner receives no such benefit; the vessel never returns to him, but is transferred to the underwriters. If the actual cost of the repairs exceeds one-half of her value after the repairs are made, then the case falls directly within the predicament of the doctrine asserted in the case in 5 Pet., 604. The same limitations of the rule, and the reasons of it, are very accurately laid down by Mr. Chancellor Kent in his Commentaries, vol. 3, 330, and in *Da Costa v. Newnham*, 2 Term R., 407.

§ 825. *Salvage must be included in the half value necessary to justify an abandonment.*

If, with these principles in view, we examine the first instruction given in this case in the circuit court, it will be found to be perfectly correct. Indeed, that part of the instruction which declares that if the brig "could not be got off and repaired without any expenditure of money to an amount exceeding half her value at the port of New Orleans after such repairs were made, then the plaintiffs are entitled to recover for a total loss under the abandonment," is precisely in the terms of the instruction given in *Patapsco Ins. Co. v. Southgate*, 5 Pet., 604. The error which has been insisted on at the argument by the plaintiffs is in the additional direction that, "in ascertaining the amount of such expenditure, the jury must include the sum for which the brig was liable to the salvors, according to the decree of the district court of Louisiana, stated in the evidence," which, it is contended, removed from the consideration of the jury the right to take into the account the high probability, at the time of the abandonment, of the allowance of a greater salvage, and even to the extent of the fifty per cent. then claimed by the salvors. And in support of the argument, it is insisted that the state of the facts and the high probabilities at the time of the abandonment constitute the governing rule, and not the ultimate result in the subsequent events. But it appears to us that the argument is founded upon a total misunderstanding of the true import of this part of the instruction. The court did not undertake to say, and did not say, that the jury might not properly take into consideration the high probability of a larger salvage at the time of the abandonment, but simply that the jury must include in the half value the amount of the actual salvage decreed, because that was, in truth, a part of the loss. The instruction was, therefore, not a limitation restrictive of the rights and claims of the plaintiffs, but, in fact, a direction in favor of their rights and claims, and in support of the abandonment. This is demonstrated by the then actual position of the cause. The defendants had asked an instruction that the costs of the repairs only, exclusive of the salvage, should be taken into consideration in estimating the half value; and also that the one-third new for old should be deducted from the amount of the cost, in estimating the half value. The court, in effect, negatived both instructions; and, in the particulars now objected to, there was a positive direction to the jury not to exclude but to include the salvage

in the estimate of the loss. In this view of the matter, the instruction was most favorable to the plaintiffs; and, so far from excluding evidence which might show the amount of the actual damage at the time of the abandonment, it resorted, and very properly resorted, to the subsequent ascertainment of salvage as positive evidence that, to that extent at least, the actual damage was enhanced beyond the cost of the repairs. We are entirely satisfied with this part of the instruction, in this view, which seems to us to be the true interpretation of it.

§ 826. *Retardation of voyage does not authorize an abandonment.*

In respect to the other part of the instruction there is no substantial difficulty. The mere retardation of the voyage by any of the perils insured against, not amounting to or producing a total incapacity of the ship eventually to perform the voyage, cannot, upon principles well established, be admitted to constitute a technical total loss which will authorize an abandonment. A retardation for the purpose of repairing damages from the perils insured against, that damage not exceeding one moiety of the value of the ship, falls directly within this doctrine. Under such circumstances, if the ship can be repaired and is repaired, and is thus capable of performing the voyage, there is no ground of abandonment founded upon the consideration that the voyage may not be worth pursuing for the interest of the ship-owner; or that the cargo has been injured, so that it is not worth transporting further on the voyage; for the loss of the cargo for the voyage has nothing to do with an insurance upon the ship for the voyage. This was expressly held by this court in the case of *Alexander v. Baltimore Ins. Co.*, 4 Cranch, 370 (§§ 851-52, *infra*), where it was decided that an insurance on a ship for a voyage was not to be treated as an insurance on the ship and the voyage, or as an undertaking that she shall actually perform the voyage; and only that, notwithstanding any of the perils insured against, she shall be of ability to perform the voyage, and that the underwriters will pay any damage sustained by her from those perils during the voyage. The court further held that, upon such an insurance, a total loss of the cargo for the voyage was not a total loss of the ship for the voyage. In respect to the point of retardation for repairs, the more recent authorities contain reasoning altogether satisfactory and consistent with the true nature and objects of policies of insurance. The subject was a good deal discussed in the case of *Anderson v. Wallis*, 2 Maule & Selw., 240, which was a policy on cargo; and again in *Everth v. Smith*, 2 M. & Selw., 278, which was a policy on freight; and again in *Falkner v. Ritchie*, 2 M. & Selw., 290, which was a policy on ship; and in each of the cases the court came to the conclusion that a mere retardation of the voyage by any peril insured against, did not entitle the insured to recover for a total loss if the thing insured was capable of performing the voyage. Lord Ellenborough, in the first case, said: "Disappointment of arrival is a new head of abandonment in insurance law." "If the retardation of the voyage be a cause of abandonment, the happening of any marine peril to the ship, by which a delay is caused in her arrival at the earliest market, would also be a cause of abandonment. I am well aware that an insurance upon a cargo for a particular voyage contemplates that the voyage shall be performed with that cargo, and any risk which renders the cargo permanently lost to the assured may be a cause of abandonment. In like manner, a total loss of cargo may be effected not merely by the destination of that cargo, but by a permanent incapacity of the ship to perform the voyage; that is, a destruction of the contemplated adventure.

But the case of an interruption of the voyage does not warrant the assured in totally disengaging himself from the adventure, and throwing this burden on the underwriters." In *Falkner v. Ritchie*, 2 M. & Selw., 290, his lordship added: "What has a loss of the voyage to do with a loss of the ship?" meaning, as the context shows, that the loss of the voyage is no ground of abandonment, where the ship is not damaged to an extent which permanently disables her to perform it. The same doctrine was affirmed in *Hunt v. Royal Exchange Assurance Company*, 5 M. & Selw., 47, and in *Naylor v. Taylor*, 9 Barn. & Cresw., 718. And it was long ago recognized by this court, by necessary implication, in the case of *Alexander v. Baltimore Ins. Co.*, 4 Cranch, 370 (§§ 851-52, *infra*), and *Smith v. Universal Ins. Co.*, 6 Wheat., 176 (§ 830, *infra*). In this latter case the court said: "The insurers do not undertake that the voyage shall be performed without delay, or that the perils insured against shall not occur. They undertake only for losses sustained by those perils; and if any peril does act upon the subject, yet if it be removed before any loss takes place, and the voyage be not thereby broken up, but is or may be resumed, the insured cannot abandon for a total loss." Language more explicit upon this point could scarcely have been used.

§ 827. *Detention by admiralty proceedings does not justify abandonment.*

Nor is there any, the slightest, difference in law, whether the retardation or temporary suspension of the voyage be for the purpose of repairs, or to meet any other exigency which interrupts, but does not finally defeat, the actual resumption of it. The detention of the ship, under the admiralty proceedings, does not, therefore, in any manner change the posture of the case. It is admitted on all sides, and indeed it admits of no legal controversy, that this detention cannot be construed to be a substantive peril within the clause of the policy respecting "restraints and detainments of all kings, princes or people;" for the restraints and detainments there alluded to are the operations of the sovereign power by an exercise of the *vis major*, in its sovereign capacity, controlling or divesting for the time the dominion or authority of the owner over the ship, and not proceedings of a mere civil nature to enforce private rights claimed under the owner for services actually rendered in the preservation of his property. This, indeed, if it admitted of any doubt, would be disposed of by the reasoning of the court in *Nesbitt v. Lushington*, 4 Term R., 783; and *Thornely v. Hebson*, 2 Barn. & Ald., 513. See, also, 3 Kent's Comm., 304, 326. In truth, the detention by the admiralty process was, in this case, as is apparent from the admitted facts, a mere retardation of the voyage. The brig was delivered from that proceeding; the salvage was paid, and she not only was capable, but did in fact resume and complete her voyage to Baltimore.

§ 828. *The loss of the cargo does not justify an abandonment.*

The considerations already suggested dispose of the other point raised under this instruction, as to the loss of the voyage. It is apparent that the loss of the voyage spoken of, and necessarily implied in this instruction upon the admitted state of the facts, was the loss of the cargo for the voyage, and not the loss of the vessel by incapacity to perform the voyage. If the vessel could, as the instruction supposes, be got off and repaired without an expenditure exceeding half her value, and be thereby enabled to resume the voyage, it is plain that the loss of the cargo for that voyage constituted no total loss of the vessel for the voyage. It is absolutely impossible for the court, upon the authorities already cited, to arrive at any other conclusion.

The state of things at the time of the abandonment did not demonstrate any incapacity of the ship to resume her voyage after the repairs; and in point of fact, as has been already suggested, she not only did resume it, but actually performed it. The insurance was upon time, and the policy actually expired, by its own limitation, upon the 22d of May, 1833, before she had actually resumed her voyage. But that can make no difference. An insurance on time differs as to this point in no essential manner whatsoever from an insurance upon a particular voyage, except in this, that in the latter case the insurance is upon and for a specific voyage described in the policy, whereas a policy on time insures no specific voyage, but it covers any voyage or voyages whatsoever undertaken within and not exceeding in point of duration the limited period for which the insurance is made. But an insurance on time by no means contains any undertaking on the part of the underwriters that any particular voyage undertaken by the insured within the prescribed period shall be performed before the expiration of the policy. It warrants nothing as to any retardation or prolongation of the voyage, but only that the ship shall be capable of performing the voyage undertaken, notwithstanding any loss or injury which may accrue to her during the time for which she is insured; and of resuming it, if interrupted. In other words, the undertaking is that the ship shall not, by the operation of any peril insured against during the time for which the policy continues, be totally and permanently lost or disabled from performing the voyage then in progress, or any other voyage within the scope of the policy. The case of *Pole v. Fitzgerald*, Willis, 641; S. C., Amb., 214, affords a striking illustration of this doctrine; and whatever doubts may be entertained as to some of the *dicta* in that case, Lord Ellenborough has well said that it may be of great use to resort to it in order to purify the mind from these generalities respecting the loss of the voyage of the ship, constituting *per se* a loss of the ship. *Falkner v. Ritchie*, 2 Maule & Selw., 293. There is no error, then, in the instructions actually given to the jury in the response of the court to those asked by the defendants.

§ 829. *In case of partial loss, and money raised on bottomry to pay repairs, underwriters liable only for extra expense of bottomry.*

In the next place, as to the instruction asked by the plaintiffs and refused by the court. In substance it insisted that if the underwriters had authorized the expenditures to be made for the repairs and had not supplied the appropriate funds for these repairs and for the salvage, and bottomry bond was given to secure them; and the underwriters were apprised of the admiralty proceedings at Baltimore and there neglected to pay so much thereof as they ought to have paid to discharge the same; and that the vessel, in consequence thereof, was sold under those proceedings, then the plaintiffs were entitled to recover for the whole value of the vessel. This instruction, it may be remarked, proceeds upon the supposition that there was not a technical total loss, entitling the plaintiffs to abandon; and that the abandonment of the 22d of April was not available for the plaintiffs. For, if it had been, then the underwriters would have become from that time the owners of the ship; and the subsequent losses, whatever they might be, would be on their sole account. The case put, then, supposes that in point of law, in the case of a merely partial loss to the ship, if money is taken up on bottomry for the necessary repairs and expenditures, it becomes the duty of the underwriters to deliver the ship from the bottomry bond to the extent of their liability for the expenditures; and that if they do not and the vessel is sold under the bottomry

bond, they are liable, not only for the partial loss, but for all other losses to the owner from their neglect. We know of no principle of law which justifies any such doctrine. The underwriters engage to pay the amount of the expenditures and losses directly flowing from the perils insured against, but not any remote or consequential losses to the owners, from their neglect to pay the same. It might be as well contended that if by the neglect to pay a partial loss the owners were prevented from undertaking a new and profitable voyage, the underwriters would be responsible to them for such consequential loss. The maxim here, as in many other cases in the law, is, *causa proxima non remota spectatur*. The underwriters are not bound to supply funds in a foreign port for the repairs of any damage to the ship occasioned by a peril insured against. They undertake only to pay the amount after due notice and proof of the loss; and, usually, this is to be done (as was in fact the present case) after a prescribed time from such notice and proof of the loss. If, to meet the expenditures for the repairs, the master is compelled to take up money on bottomry, and thereby an additional premium becomes payable, that constitutes a part of the loss, for which the underwriters are liable. But in cases of a partial loss, the money upon bottomry is not taken up on account of the underwriters, but of the owner; and they become liable to the payment of the loss, whether the bottomry bond ever becomes due and payable or not. In short, with the mode by which the owner obtains the necessary advances they have nothing to do, except that they must bear their share of the increased expenses to furnish the repairs, as a common sacrifice. Indeed, it seems difficult to understand upon what ground it is, that in case of a partial loss the owner is exonerated from the duty of delivering his own ship from the lien of the bottomry bond, and is at liberty to throw upon the underwriters the whole obligation of discharging it, under the penalty of being otherwise responsible in case of a sale; not for their share of the loss (assuming that they were at all bound to discharge any part of the bond), but for the whole loss. Upon what ground can it be said that the loss of the vessel by the sale in this case is attributable to the neglect of the underwriters, which does not equally apply to the owners? They had, at least upon their own argument, an equal duty to perform; for the underwriters were not liable for the whole amount of the bottomry bond, but for a part only; and the owners were bound to discharge the residue. How, then, can they call upon the underwriters to pay them a total loss on account of a sale which, upon their own argument, was as much attributable to their own neglect as to that of the underwriters? But we wish to be understood as putting this point upon its true ground in point of law; and that is, that in the case of a partial loss, where money is taken up on bottomry bond to defray the expenditures to repair it, the underwriters have nothing to do with the bottomry bond, but are simply bound to pay the partial loss, including their share of the extra expenses of obtaining the money in that mode, as a part of the loss. If it were otherwise, any partial loss, however small, might, if money were taken up on bottomry to meet it, be converted at the will of the owner into a total loss, if the underwriters should neglect to pay to the owner the amount of such partial loss. The case of *Thornely v. Hebson*, 2 Barn. & Ald., 513, inculcates a very different doctrine. It was there held that, even in the case of a libel for salvage, it is the duty of the owner, if he can, to raise the money to pay the salvage; and if he makes no such attempt, but suffers the ship to be sold under the admiralty process, he cannot thereby convert a loss which is partial into a total loss. And it was

there further said, by Mr. Justice Bayley (what is entirely applicable to the present case), that the sale, in order to constitute a total loss in such a case, must be from necessity and wholly without the fault of the owner.

The instruction asked in the present instance seems to have proceeded wholly upon the ground of the doctrine asserted in the case of *Da Costa v. Newnham*, 2 Term R., 407. But assuming that case to have been decided with entire correctness upon its own particular circumstances, it seems difficult, consistently with the principles of law, to apply the doctrine to cases which are not exactly in the same predicament, and it is not the first time that an attempt has been made to press that case into the service of other cases which are essentially different. The whole argument turns upon this: that the brig never came into the hands of the owner free from the lien of the bottomry bond; and therefore the total loss by the sale is properly attributable to the neglect of the underwriters. But the same argument would equally have applied if there had been, for the first time, admiralty proceedings in the home port against the brig (without any bottomry bond having been given), for the repairs thus made in a foreign port, as well as for the salvage. Yet no doubt could have been entertained that, under such circumstances, the underwriters would not have been bound to deliver the vessel from the liens thus incurred at the peril of otherwise becoming answerable for a total loss. In what essential particular is the case changed by the substitution of an express lien by bottomry, for an implied lien by the maritime law? In none, that we can perceive.

But what were the circumstances of the case of *Da Costa v. Newnham*? In that case, the insurance was for a voyage from Leghorn to London. The ship met with an accident in the course of the voyage, and put into Nice for repairs. Upon receiving notice thereof, the assured wished to abandon, and, indeed, was entitled to abandon, but the underwriters insisted upon the ship's being repaired, telling him to pay the tradesmen's bills. He consented, at last, that the repairs should be done, but refused to advance any money; in consequence of which it became necessary to take up a large sum of money on a bottomry bond to defray the expenses. The ship resumed and performed her voyage, and after her arrival the underwriters were applied to to take up the bottomry bond, but they refused. Admiralty proceedings were, as it should seem, accordingly instituted, and the ship was sold for six hundred guineas; the bottomry bond being for £600, which, with the interest, amounted to a larger sum, viz., £678.

The question under these circumstances was, whether the plaintiff was entitled to recover. Mr. Justice Buller, who tried the cause, was of opinion, under the circumstances, that for all the subsequent injury which had accrued to the owner, in consequence of the refusal of the underwriters to discharge the bottomry bond, and by which the owner was damnified to the full amount of the insurance, the underwriters were liable; because it was their own fault in not taking up the bond for the expenses of those repairs, which had been incurred by their own express directions; and the only remaining question was, how the average was to be calculated. The jury found a verdict for the owner for £62 19s., which together with £17 10s. paid into court by the underwriters, they calculated as the average loss per cent. which the owner was entitled to. A motion was afterwards made for a new trial, and refused by the court, substantially upon the grounds maintained by the learned judge at the trial.

From this statement of the facts, and the reasoning of the court applicable thereto, in the case of *Da Costa v. Newnham*, 2 Term R., 407, it is apparent that in that case the actual cost of the repairs (including of necessity the bottomry premium) exceeded the actual value of the ship; that the underwriters had fully authorized all these repairs, and had expressly promised to pay all the costs of the repairs and the necessary incidents. The owner of the ship, at the termination of the voyage, never came into the possession of the ship free from the lien of the bottomry bond; for the whole amount of which, as it included nothing but the costs and incidents of the repairs, the underwriters were liable, and which by necessary implication they had promised to pay. The sum claimed by the owner of the underwriters was in fact less than the amount of the cost of the repairs, that cost being £678, whereas the loss claimed was a total loss of the ship, which sold for six hundred guineas only; and it seems that the insurance was on an open policy.

The question in effect therefore was, whether the owner was not entitled to recover the full amount of the insurance, which was the amount of his actual loss, directly arising from the breach of the promise of indemnity made to him by the underwriters. Upon such a point there should not seem to be much reason for any real juridical doubt.

Now there are essential distinctions between that case and the present. In the first place, the repairs in this case were not made under any positive engagement of the underwriters beyond what the policy, by its own terms, necessarily included. The language of the underwriters in their answers, refusing the abandonment, in our judgment imports no more than this. It merely says, "we expect you to do what is necessary in the case for the safety and relief of the vessel." It was rather an admonition than a contract; a warning that the underwriters would hold the owners to the performance of all the duties imposed upon them by law; and not any promise as to their own obligations. In the next place, in the present case, the loss is to be taken upon the very form of the instruction, prayed to be a partial loss only; and as to the repairs, the underwriters were clearly, in such a case, entitled to the deduction of one-third new for old. In the case of *Da Costa v. Newnham*, 2 Term R., 407, the loss was treated by the court as a technical total loss, on account of the amount required for the necessary repairs. In the next place, in that case, the insured asked only to recover the amount of the costs of the repairs, which in fact exceeded the value of the ship; in the present case, the cost of the repairs, and the salvage, for which the underwriters were liable, fell short of the half value; and yet the plaintiffs insist to recover for a total loss. In the next place, in that case, the underwriters, by their refusal to make any advances, compelled, and indeed authorized, the owner to resort to a bottomry bond to supply the means of repairing the loss; and of course, as has been already intimated, the underwriters, by necessary implication, undertook to indemnify the owner against the lien and burden of the whole of that bond, in consideration of his undertaking to cause the repairs to be made.

The refusal to make good that promise was the direct and immediate cause of the loss and sale of the ship. In the present case, the bottomry bond included charges and amounts for which the underwriters were not liable. How then can it be inferred, from the facts stated in the instructions, that the underwriters, by implication, and without consideration, undertook to indemnify the plaintiffs against the whole bottomry bond, for the payment of a part of which, only, they were by law responsible?

So that, admitting the authority of *Da Costa v. Newnham* to the fullest extent which its own circumstances warrant, it stands upon grounds entirely distinguishable from those which ought to govern the present case. If the underwriters, in the present case, had authorized the whole expenditures on their sole account, and had promised to save the plaintiffs harmless from the whole amount of the bottomry bond, and the plaintiffs had made the expenditures and procured the advances for this purpose, upon the faith of such authority and promise, a very different case would have been presented for our consideration. At present, it is only necessary to say that the instruction before us states no such case, and calls for no such question; and therefore *Da Costa v. Newnham* cannot be admitted to govern the present case.

Upon the whole, our opinion is that there is no error in the instructions given or refused by the circuit court, and the judgment is therefore affirmed, with costs.

SMITH v. UNIVERSAL INSURANCE COMPANY.

(6 Wheaton, 176-187. 1821.)

ERROR to U. S. Circuit Court, District of Maryland.

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This was an action of covenant on a policy of insurance, underwritten by the defendants for the plaintiffs, on the 4th of February, 1817, on a voyage at and from New York to and at a port or ports, place or places, in the Gulf of Mexico, from the Balize to Campeachy, both inclusive, and from either back to New York, or a port of discharge in the United States, upon all kinds of lawful goods and merchandises laden, or to be laden, on board the schooner *Ellen Tooker*. In another part of the policy it is stated to be “on cargo consisting chiefly of munitions of war.” There is a memorandum also in the policy whereby the underwriters are warranted by the assured free from any charge, damage or loss which may arise in consequence of a seizure or detention of the property for or on account of any illicit or prohibited trade. The declaration alleges that the vessel, with the cargo, proceeded on the voyage, and asserts as a loss within the contract, that while on the voyage the schooner, with her cargo, was restrained and detained by certain persons acting under the authority of the king of Spain, whereby the goods and merchandises became wholly lost.

The material facts as they appeared on the trial are these: The *Ellen Tooker*, having on board property of the plaintiff of a greater value than the sum insured, sailed from New York, on the voyage insured, on the 31st of January, 1817. On the 25th of February she arrived at the Balize, where the master left the vessel and went to New Orleans, and having obtained information that Nantla and Talacuta were in possession of the Independents, to which places American vessels might proceed, on his return to the Balize, the schooner proceeded for Nantla, and arrived off that place on the 23d of March, and found it in possession of the Royalists. The schooner then proceeded to Talacuta, and having arrived off that place, a boat was sent ashore for information, the crew of which were made prisoners. Concluding from this occurrence that the place was in possession of the Royalists, the schooner put to sea, and on the 5th of April fell in with a fleet of six sail under the command of General Mina, with troops on board, bound for the bar of St. Ander. The master having had communication with General Mina, and received encouragement from him that he would purchase the cargo, the schooner kept company

with the fleet, and arrived off the bar of St. Ander on the 28th of April, where the schooner came to anchor in the open sea, the entrance being too shoal to permit her to cross the bar. On the 11th of May the master left the schooner and went up the river to Porto La Marina (where General Mina had his headquarters), for the purpose of selling the cargo, which he accordingly did, deliverable to General Mina as he should want it from time to time, at St. Ander, the whole delivery to be completed by the 1st of July. On the 18th of May, while the master was on shore, a Spanish frigate and two armed schooners of the Royalists hove in sight, and the schooner was immediately gotten under way for the purpose of escaping them, and after four hours' chase effected her escape. The schooner made several attempts to return, but was prevented by Spanish ships hovering about the place; on the 26th of May, finding the coast clear, she returned to St. Ander, which was still in possession of the Independents, and the master was taken on board. The foremast of the schooner being found to be loose in the step and injured, and the crew being short of water, the schooner proceeded to the mouth of the Rio Grande for water and to examine the foremast; and there the heel of the foremast being found to be gone, the schooner proceeded to the Balize for repairs, and arrived there on the 6th of June. The foremast was there repaired, and the schooner sailed again for St. Ander for the purpose of delivering the cargo to General Mina, according to contract, and on her arrival there on the 22d of June, the place was found to be in possession of the Royalists, who occupied it with a military force. In consequence of this, the schooner did not approach the shore, but proceeded along the coast northward to a place called Pass Cavellos, about two hundred and seventy miles from St. Ander, where information was received that St. Ander and the coast were completely in possession of the Royalists. The objects of the voyage being in this manner defeated, the schooner returned to New York with her original cargo on board, and arrived there on the 22d of July, 1817. The plaintiffs had no intelligence of the breaking up of the voyage until the return of the schooner to New York, and then abandoned to the underwriters in due time, assigning as a cause that the *Ellen Tooker* was "compelled by an armed force, to leave St. Ander, in the Gulf of Mexico, where she had arrived and was about to deliver her cargo, and was prevented thereafter by a like force from re-entering that place." This abandonment was not accepted. It was also in evidence that the cargo of the *Ellen Tooker* was shipped and intended to be sold to the Independent party of Mexico, which was waging war with the king of Spain, and that the same was prohibited from importation into Mexico by the laws of Spain, and would have been seized and confiscated if it had been carried into any of the ports in possession of the Royalists, but would have been freely admitted into any ports in possession of the Independent party.

Upon these facts a verdict was given, and judgment rendered for the defendants, and the cause was brought to this court by writ of error.

Upon these facts the circuit court directed the jury that the plaintiffs were not entitled to recover, and the propriety of this direction is the question before us upon this writ of error.

Two points have been argued at the bar: 1. That there was no actual restraint of persons acting under the authority of Spain, whereby the voyage was defeated. 2. That if a technical total loss took place, by the loss of the voyage, it was a loss occasioned by engaging in an illicit and prohibited trade, for which, by the memorandum in the policy, the underwriters are not liable.

The declaration and the abandonment both tie up the case to a total loss of the voyage by the restraint of Spanish authorities. If this case be not made out in proof, there is an end to the controversy.

§ 830. *Where total loss is asserted it must appear that it was caused by one of the perils insured against, and that peril must act directly, not circuitously.*

In cases of this sort, where a technical total loss is asserted as a ground of recovery, it is not sufficient that the voyage has been entirely frustrated and lost, but the loss must be occasioned by some peril actually insured against. The peril must act directly and not circuitously upon the subject of the insurance. It must be an immediate peril, and the loss the proper consequence of it, and it is not sufficient that the voyage be abandoned for fear of the operation of the peril.

The plaintiffs rely upon the fact of the *Ellen Tooker's* being chased away from St. Ander, and being prevented for several days from returning to that place by the presence of Spanish armed ships, as decisive proof of actual restraint. But the voyage was delayed only, and not broken up by this occurrence, for the vessel afterwards returned in safety to St. Ander. The insurers do not undertake that the voyage shall be performed without delay, or that the perils insured against shall not occur; they undertake only for losses sustained by those perils; and if any peril does act upon the subject, yet if it be removed before any loss takes place, and the voyage be not thereby broken up, but is or may be resumed, the insured cannot abandon for a total loss. If a vessel be captured during a voyage, and afterwards be recaptured, and performs, or may perform it, there can be no abandonment after the recapture for a technical total loss. In the present case the vessel actually did resume her voyage after the restraint ceased, and there is no evidence to show that any object of the voyage was defeated by this temporary restraint and delay to avoid capture. Then what was the real cause of the final destruction of the voyage? It was that St. Ander, which but for a short time was in the possession of the troops of General Mina, was, *in transitu*, again occupied by the Royalists, and the colonial government resumed its functions. A trade was inhibited with that place by the ordinary colonial laws of Spain, and the voyage itself, in which the *Ellen Tooker* was engaged, placed her and her cargo also in the character of an enemy. It was clear, therefore, that a proceeding into St. Ander would have subjected the *Ellen Tooker* to confiscation for a double cause — for breach of the ordinary laws of trade, and for a violation of neutral duties. The voyage then was broken up from fear of loss by reason of the seizure and confiscation of the property. It was abandoned by the master *quia timebat*, and not because there was any actual direct restraint which prevented the vessel from proceeding to the port of destination. The case, therefore, falls directly within the authority of the cases of *Hadkinson v. Robinson*, 3 Bos. & Pull., 388, and *Lubbock v. Rowcroft*, 5 Esp., 50, which have never been shaken. In the former case Lord Alvanley said, "any loss which necessarily arises from capture or detention of princes is a loss within the policy; but here the captain, learning that if he entered the port of destination, the vessel would be liable to confiscation, avoided that port, whereby the object of the voyage is defeated. This does not operate to the total destruction of the thing insured." There are precisely the same circumstances in the case now at bar. The underwriter does not warrant that the vessel shall have a right to trade at the port of destination, but only that, notwithstanding the perils insured against, the vessel shall proceed to such port. If the plaintiffs,

in the events which have occurred, were entitled to abandon and recover as for a technical total loss, they would have been entitled to abandon for the same cause at the time of the vessel's sailing from New York on the voyage; for St. Ander was at that time just as much shut against the vessel, and she was just as liable to confiscation for illegal traffic with that place, as she was at the time the voyage was broken up.

It is the unanimous opinion of the court that the judgment of the circuit court be affirmed with costs.

ODLIN v. INSURANCE COMPANY OF PENNSYLVANIA.

(Circuit Court for Pennsylvania: 2 Washington, 312-322. 1808.)

STATEMENT OF FACTS.—Agreed case. The schooner Hazard sailed from Philadelphia for Havana, insured by defendant at \$3,500. She was obliged to stop in the Delaware by head winds, and was there arrested and prevented from proceeding on her voyage under the operation of the embargo act of 1807. By consent and without prejudice she was sold. There was an abandonment for a total loss.

Opinion by WASHINGTON, J.

The question is, whether an embargo, imposed by the government to which the insurer and insured belong, subsequently to the commencement of the risk, furnishes a legal ground of abandonment? The question is thus generally stated, because it will be necessary to inquire, first, whether such an obstruction is within the perils of "arrest, restraint, and detainment of princes," etc.; and secondly, whether, if comprehended within those expressions, such a contract be repugnant to any principle of law? It is admitted that this precise case has never received a judicial decision in any of the courts of Great Britain or of the United States, although it has frequently been glanced at by the judges; from whom, however, nothing beyond hints of their opinions can be collected. We are sensible of the difficulty of the question, as well as of its importance to the parties, in this and other similar cases; we derive consolation, however, from reflecting that our opinion, if wrong, is subject to a revision elsewhere.

§ 831. *Domestic embargo after the insurance a restraint by government.*

The first question to be considered is whether a domestic embargo amounts to an arrest, restraint, or detainment of the government? That the expressions used in the policy are broad and strong enough in themselves to include the case of embargo generally can scarcely be denied, and is established by the decisions which have taken place in relation to foreign embargoes. Still, however, the question remains, whether an exception is to be implied in relation to an embargo imposed by our own government, upon the ground stated by Valin, that no person is presumed to guaranty the acts of his own prince, without an express stipulation. How it should happen that this question should never have occurred in England it is impossible for us, with any certainty, to determine. This circumstance has been laid hold of by each side in this cause, and each has endeavored to turn it to his own advantage. Arguments derived from this source, in general, cut both ways. Although neither can rely upon it as decisive in this case, we think the pretensions of the insured to the benefit of it are best founded, for the following reasons: It is believed that he is quite as apt to claim, in every case where there is a chance of success, as the insurer is to resist; perhaps more so. It is not probable that the former would easily surrender a right for which the general ex-

pression of the contract seems to afford at least a plausible ground, unless there were some evidence of a usage to qualify and restrain the literal construction. It is much more likely that the latter, acquiescing in the natural import of the expressions, would be induced to pay the loss without perceiving that, in principle, there could be a distinction between a foreign and a domestic embargo. Another reason, and one which has no inconsiderable weight with the court, is that this seems to have been the opinion of the French jurists; and although they may have been founded upon positive ordinances, yet it is probable they would in this, as we know they have been in other instances, be regarded by commercial men as evidence of the general law of merchants upon this subject; no judicial decision and no custom appearing to the contrary. The sea laws and state ordinances of many of the maritime countries of Europe have, with some exceptions, gradually become incorporated with the commercial law of England, by a kind of tacit adoption, and are, in these cases, considered as evidence of the custom of merchants. These regulations are read in the British and American courts, and have frequently furnished rules of decision where the positive law of the country or former decisions upon the point had not prescribed a different one. Without taking time to go through, in detail, the different passages from Roccus, Le Gierdon, Valin, Emerigon and Pothier, we think it may fairly be deduced from what they say, that if a vessel be detained by an embargo or other temporary restraint, laid by the authority of the French government, *after the risk has commenced*, the insured may abandon; and the passages where they appear to differ may be reconciled by considering them as sometimes speaking of a restraint imposed *before*, sometimes *after*, the risk has commenced; or differing upon the point whether the words "*commencement of the voyage*," in the ordinance of Louis XVI., mean what they express, or *commencement of the risk*. These opinions, taken in connection with the unqualified expressions of the contract itself, create a presumption which is almost irresistible, that the absence of a positive English authority upon this subject has arisen from a general understanding among merchants and underwriters that a domestic embargo, equally with a foreign one, is a peril within the words of the policy.

In a case where no express authority is to be found, the opinions of men learned in the law, and the *dicta* of judges, which in other instances should be relied upon with great caution, may not be improperly resorted to as corroborative evidence of the law. These will now be noticed.

Much greater reliance might be placed on the *dictum* of Lord Holt, in *Green v. Young*, 2 Lord Ray., 840; 2 Salk., 444, if it had been purely a case of embargo; yet it is quoted by Park and Marshall as if the other circumstances of the case had not influenced the opinion. In *Roche v. Ecbri*, 6 T. R., 413, it is obvious that Lord Kenyon, as well as the counsel on each side, were not impressed with any distinction between a foreign and a domestic embargo; for the judge, after stating that Roccus, Le Gierdon, and *Green v. Young* are, upon examination, all one way, and that in favor of the assured, concludes by saying that, as to a domestic embargo, there would perhaps be but little difficulty in deciding it. There can exist very little doubt on which side the inclination of his mind was. In *Goss v. Withers*, 2 Burr., 694, the expressions used by Lord Mansfield are certainly very general; and although both Park and Marshall have pressed them into the service to support their opinions, it is not clear that he had in his view a domestic embargo. In the case of *Hore v. Whitmore*, Cowp., 784, there is every reason to infer that the opinion enter-

tained by the bench and bar was that a domestic embargo affords a cause of abandonment; because, if the contract in that case was either suspended or put an end to, as a consequence of that circumstance, it was perfectly immaterial whether the warranty had been complied with or not. In neither case could the insured have recovered. In addition to all this, the opinions of Park and Marshall, in favor of the right of abandonment, are deserving of respect.

§ 832. *Distinction between law which makes performance unlawful and one which suspends performance.*

The cases relied upon by the defendants' counsel will be examined hereafter. At present it seems proper to inquire whether this construction of the contract is opposed to any principle of law, or to the sound policy of the nation. It is stated on the part of the underwriters, as a general rule, that where a contract is lawful at the time it is made, and a law afterwards renders a performance unlawful, neither party shall be prejudiced, but the contract shall be considered as at an end. This, as a general rule, will not be controverted. But there is an obvious distinction between a law which renders the performance *unlawful altogether*, and one which merely *suspends the performance* without condemning the subject of the contract. If the trade between this country and any other be wholly interdicted, or partially so in relation to particular articles; or if, after the contract to carry goods from this to that other country, war should break out between them, the *subject-matter* of the contract becomes unlawful: the prohibition acts directly upon it and forbids the performance. It is no answer that the prohibition may, upon a change of circumstances, be removed; the prohibition defeats the contract and releases the parties from all its obligations. But, in the case of a temporary restraint upon the performance of the contract, the subject-matter of it is not declared to be unlawful—the trade itself is not condemned—the legality of it is rather admitted; but it is not permitted to be performed for the present. Here the rule applies that if a law forbids performance of a contract in part only, he who is bound by it must still perform what he lawfully may. In the case of an embargo, for example, the ship-owner is disabled from commencing his voyage at the specified time; but he is bound to go when the prohibition is removed. A strict performance is prevented by law, and the law excuses it. What is an embargo? In its nature and design it imposes a temporary restraint; it is a measure of precaution and state policy, intended by the government either to distress some foreign nation or to protect the property of its own citizens. It is true that the embargo imposed by our government, in December, 1807, was unlimited as to time by the terms of it; and the concurrence of the legislative and executive branches of the government was necessary to remove it. But it was still an embargo. It suspended our intercourse with foreign nations, but did not declare, or mean to declare, that intercourse in itself unlawful. The British embargo, imposed on the 27th of July, 1796, in relation to Tuscany, was to continue *until the further order of the council*; and the Russian embargo was made to depend, for its continuance, upon the compliance of Great Britain with the convention, on her part, in respect to Malta. Both were dependent upon events which the governments imposing them could not control, and the former did, in fact, continue between two and three years. Yet the nature and essence of the measure were not changed. They were considered as temporary restraints which did not avoid, but merely suspended, the performance of contracts upon

charter-parties, and for seamen's wages, the only cases which were brought judicially into discussion.

§ 833. *One may agree to indemnify another against loss in consequence of embargo.*

Let us now see whether a contract by one person to indemnify another against loss arising from an embargo which the government to which the parties belong may, at any future time impose, is inconsistent with the sound policy of the nation. If it be, it is admitted to be void. If such a contract be made pending the existence of the embargo, it is clearly void; because, unless it is meant that the vessel should sail in defiance of the embargo, the contract itself would be nugatory. We do not mean to speak of contracts to be performed after the restraint is removed. We can see no good reason why one man may not, for valuable consideration, and in relation to a *real transaction* concerning property, agree to stand in the shoes of another as to any loss which may result to that other in case a measure of this sort should be adopted by the government. The effect of an interest created in one man by such a contract, in opposition to the measure itself, is too remote as to its influence upon the conduct of the government to be regarded. If a contract can be avoided, because it may possibly become the interest of one of the parties at some future day to oppose the passage of a law which may then be thought beneficial to the state, it is not easy to foresee all the consequences of such a principle; because there is no supposable subject concerning which a contract may be made, which may not, at some time or other, become also a subject of legislative consideration; and it can seldom happen that any interference of the government, in relation to that subject, will be equally beneficial to both parties. In the case of *Hadley v. Clark*, the contract of affreightment raised as strong an interest in the ship-owner in opposition to the embargo as if he had bound himself to indemnify the freighter against it. Yet this circumstance was not even thought of by the counsel who argued in opposition to the obligations of the contract. In *Touting v. Hubbard*, 3 Bos. & Pull., 291, which respects the embargo laid by Great Britain on Swedish vessels, Lord Alvanley declares, in the most unqualified terms, that a common embargo does not put an end to *any contract* between the parties, but that it is to be considered as a temporary suspension of it only; and that the parties must submit to whatever inconveniences may arise, *unless they have provided against it by the terms of their contract*. He goes on to state the principle of *Hadley v. Clark* to be, "that an embargo is a circumstance against which it is equally competent to the parties to provide, as against the dangers of the sea." Now, it is to be apprehended that in this case the effect of the American embargo is provided against by the general terms of the policy, and these cases declare explicitly that such a provision is lawful. Neither is it perceived by the court that an insurance against a domestic embargo has a tendency to induce a violation of the law in case it should be enacted. If the insured be at liberty to abandon, and to recover his indemnity, every temptation to a breach of the law, to which he would have been exposed, if not insured at all, or if he were not at liberty to abandon, is taken away. If he were even bound by a warranty to depart by a certain day, still it could not be his interest to violate the embargo; because, by so doing, he would lose the benefit of the policy as certainly as he would have done by not complying with the warranty, and would stand precisely in the situation of one who had not insured

at all. Upon general principles, therefore, the court is satisfied that such a contract would infringe no rule of law, and would in no respect be inconsistent with the sound policy of the nation. We agree with Lord Alvanley "that there is no great reason why one British subject may not insure another against the effects of an embargo laid on by the British government; that the policy of the state is not concerned in preventing such an insurance." 3 Bos. & Pull., 291. We cannot, however, yield our assent to the hypothesis started by the learned judge, and which was strongly pressed upon us by the counsel for the defendants in this cause, by which the individual is identified with his government, in order to expose him to the rule of law that he who, by his own conduct, prevents the fulfillment of a contract, shall not take advantage of a non-performance on the other side. The doctrine is too refined to be safely applied to the common transactions between man and man. Were we to follow its light it would probably lead us too far from those legal and practical principles in relation to questions upon contracts which the wisdom of ages has matured.

§ 884. *Authorities reviewed.*

A short examination of the authorities cited by the defendants' counsel will close this opinion. The general proposition laid down in *Salk.*, 198; *Rolle's Ab.*, 451; *Dy.*, 28; 1 *Ld. Ray.*, 321; 1 *Mod.*, 169, and some other books, that wherever a contract is lawful when made, and a subsequent statute makes it unlawful, the contract becomes void, has been already noticed, and the distinction taken between a contract declared to be illegal, and one the performance of which is only suspended. The quotation from *Park*, 234, does not support the point contended for by the defendants' counsel, that a domestic embargo puts an end to a contract of insurance previously made and in operation. If it did, that author would contradict an opinion which he had before expressed. In the pages referred to, he obviously alludes to an insurance made pending an embargo, as is manifest from the case of *Delmada v. Motteux*, which he cites in support of the principle.

The case of *Kellner v. Le Mesurier*, 4 East, 396, decides only that an insurance against capture, generally, does not include a capture as prize by the government of the country where the policy was made, for a reason before acknowledged to be a sound one; because such an engagement, *eo nomine*, would be illegal, being obviously repugnant to the interest of the state. It is for a similar reason that a policy is void if war should afterwards take place between the respective countries of the assurer and assured.

The case of *Lacausset v. White*, 7 T. R., 535, is certainly very strong. 2 *Esp. Cas.*, 631, was looked at by the court with a view to discover the ground upon which the wager in that case was admitted by the counsel to be illegal. We agree with Lord Kenyon in the general proposition that a wager or a contract of any kind cannot support an action which is contrary to the policy of the state; but we are compelled to differ from him in the application of the principle to that case. *Allen v. Hearn*, 1 T. R., and *Cotton v. Thurland*, 5 T. R., 405, are referred to in the *nisi prius* report of that case. The first was the case of a wager between two voters as to the success of the respective candidates of each; and every person must yield his assent to the reasons assigned by Lord Mansfield against the validity of such a wager. The latter case was a wager upon a boxing match, the illegality of which cannot be questioned. It will be found very difficult, we think, to reconcile the principle admitted in *Lacausset v. White* with that laid down in *Jones v. Randall*, Cowp., 37. There

is, however, this difference between the former case and that now before the court. That is a mere gambling contract, nor could any injury arise to either party by declaring it void. This is a contract of indemnity, against a real loss of property, which a certain measure of government might produce.

Upon the most mature consideration which it has been in the power of the court to give to this cause, we think that upon legal principles, upon the reason and policy of the thing, and upon a fair construction of the contract, the plaintiff is entitled to recover for a total loss.

QUEEN v. UNION INSURANCE COMPANY.

(Circuit Court for Pennsylvania: 2 Washington, 331-335. 1808.)

Opinion by WASHINGTON, J.

STATEMENT OF FACTS.—This was an action on a policy of insurance, dated the 9th August, 1805, on the ship *Experiment*, on a voyage at and from New York to any port or ports on the north side of Jamaica, and at and from either or all of said ports, back to New York. The policy was subscribed by the defendants, to the amount of \$10,000, at a premium of ten per cent. The policy was in the usual form, and contained a warranty of American property, and free from any charge or loss which might arise in consequence of seizure or detention on account of illicit or prohibited trade.

On the 28th August, the ship sailed from New York on the voyage insured, with a cargo principally on freight (twelve thousand staves, only, being the property of the owner), for account, in part, of persons at Falmouth, on the north side of Jamaica, and in part for persons at Montego Bay; at which ports the freight for the goods, intended for them respectively, was to be paid. The ship arrived in safety at Falmouth, delivered that part of her cargo which was intended for that port, and received the freight thereon; which, together with the proceeds of the staves belonging to the owners, was invested in rum at 4s. per gallon. The whole amount of this investment was 576*l.* 16s. Jamaica currency. On the 20th of October, the ship left Falmouth, on her voyage for Montego Bay, with the rum so taken in, and the residue of her original cargo; and after having proceeded about five miles, she was brought to by a Spanish privateer, and was taken possession of, but within about four hours afterwards she was recaptured by a British sloop of war, and conducted back to Falmouth, where she continued, in the possession of the recaptors, until the 3d of November, when she was carried by them to Montego Bay, and arrived there the next day.

From an affidavit, made by the captain and his mates, at Montego Bay, on the 5th of November, it would appear that some suspicions existed in the minds of the recaptors, that the ship was chargeable with having on board a few parcels of prohibited goods; and the captain seems to have been, at first, apprehensive that proceedings would be instituted against her on that ground.

On the 7th of November, he wrote to his owners, informing them of his capture and recapture, and stating that, in consequence of some report on shore that the ship had contraband goods on board, she had been searched, but that only three packages of nankeens, belonging to one of the mariners, had been found; that, on account of these goods and three barrels of sugar, also belonging to the same person, the ship had been seized and ordered for Montego Bay, where he was landing the cargo, agreeably to bills of lading. He adds, that he knows not whether the vessel will be condemned for this; that letters

from Kingston say she will not, and that such is the opinion of his consignee; but that salvage he will have to pay.

On receipt of this letter the plaintiffs gave information of the state of the ship to the defendants, on the 27th of November, and offered to abandon, which was not accepted. By subsequent letters from the captain to his owners, but which had not been received at the time of the abandonment, it appears that he still entertained some fears as to the condemnation of the vessel, but states that she will certainly be sold, to ascertain the salvage. The vessel and cargo were libeled for salvage, and one-eighth was decreed to the recaptors. They were sold on the 30th of December, 1805, and were purchased in, at the instance of the captain, by Messrs. Longlands, for the benefit of whom it might concern, for £1,000. She completed her lading at Montego Bay, and arrived safe at New York, under a bottomry bond, given to Longlands for \$1,010, due to him as a balance of his advances. The whole expenses of the vessel and cargo, occasioned by the capture and recapture, including the salvage, was about \$2,364. The salvage on the vessel was £98, Jamaica currency. The freight received at Montego Bay amounted to about £806, Jamaica currency.

§ 835. *Capture authorizes abandonment, if loss continue until abandonment is made.*

Two questions have been made in this cause: First, whether the plaintiffs had a right, on the 27th of November, to abandon and go for a total loss; and secondly, if so, what part of the outward freight the defendants have a right to be credited with. First. The law respecting the right of abandonment in a case of capture and recapture is so intelligibly treated in the three great cases of *Goss v. Withers*, *Mills v. Fletcher* and *Hamilton v. Mendez*, that it will be only necessary to state the principles which they establish, and then apply them to the present case. These principles are, that a capture, as prize, will authorize the insured to abandon as soon as he has notice of that fact, provided the loss continues up to the time when the abandonment is made. If the vessel be recaptured by a friend, before the abandonment is made, the right of abandonment may or may not be defeated according to the circumstances of the case.

§ 836. *Rule when recapture is made with a view to salvage; and when recapture is made with a view to prize.*

If the recapture be made merely with a view to salvage, and this, together with the expenses, do not exceed one-half the value of the vessel, and the recapture is productive of a temporary interruption of the voyage, the insured is not at liberty to throw the whole loss upon the underwriters, by abandoning to them. But if the recapture be with a view to make prize of the vessel; or if, in consequence of the recapture, the voyage be lost or not worth pursuing; if the salvage be very high; or if further expense be necessary, and the insurer will not agree to pay it, the insured is at liberty to abandon.

In the case of *Goss v. Withers* the captors deprived the vessel of all her men but two; the vessel was so disabled in a storm that she could not have prosecuted her voyage without refitting at a considerable expense; the cargo was spoiled whilst lying at Milford Haven, in possession of the recaptors; one-half the value was paid for salvage; her charter-party was dissolved, and her freight lost. In *Mills v. Fletcher* the voyage was completely lost, in consequence of the capture and recapture. But in *Hamilton v. Mendez*, which was also a case of capture and recapture, the vessel was conducted by the recaptors

to the port of her destination, the insurer offered to pay the salvage, no injury had been sustained by the vessel, and she earned her freight.

In the case before the court the vessel was libeled for salvage only, and one-eighth was decreed; the whole outward freight was received, and in possession of the captain, amounting to more than would have discharged the whole salvage, and expenses resulting from the capture and recapture. The vessel received no injury, and the consequence of the recapture was a temporary obstruction of the voyage; which it was at all times in the power of the captain to have removed, by applying for a commission of appraisement, instead of inviting a sale, which he obviously preferred, with a view to the interest of his owners, and which it is as obvious he promoted by the measure. We do not think that this case affords one solid reason for throwing this vessel upon the hands of the underwriters.

It was said in argument, by the plaintiff's counsel, that the recaptors had, at one time, a view to the condemnation of the vessel and cargo, on account of contraband goods which they suspected were on board; but the argument was not pressed; for, if this had been the fact, the insured would have been estopped from recovering anything in consequence of his warranty. It was also contended that the sale and purchase by Longlands divested the right of the insured, and in this way a total loss took place. The fact, however, is mistaken. She was purchased for the insured, and Longlands was nothing more than the agent and banker of the captain, who found it more to the interest of his owners to make the purchase with the funds of Longlands than to sell any part of the cargo.

Upon the whole, we are clearly of opinion in favor of the defendants upon the first point, which renders the consideration of the second unnecessary.

Judgment for defendants.

WILLIAMS v. SUFFOLK INSURANCE COMPANY.

(Circuit Court for Massachusetts: 3 Sumner, 510-514. 1839.)

STATEMENT OF FACTS.—This was a case upon a policy of insurance, which had been heard before and now came on upon the report of Willard Phillips, Esq., an assessor appointed to report the facts, whether there was a loss of the vessel insured, the Breakwater, from necessity. The assessor made his report in substance as follows:

By the policy the plaintiff was insured \$3,500 on the Breakwater, and \$2,000 on outfits at and from Stonington, commencing the risk on the 12th of August, 1830, to the southern hemisphere for a sealing voyage, with liberty to put skins on board of any other vessel "until she returns to her port of discharge in the United States. It being understood that the value of the interest hereby insured, as it relates to his insurance, is not to be diminished thereby."

At the end of the first season,—about March, 1831,—the Breakwater visited the Falkland Islands, within the liberty given in policy, and for purposes connected with the voyage. The captain, with the second mate and four of the best men, and a seal boat, were captured by Lewis Vernet, acting governor of those islands. The schooner was also captured or seized, and, after being in the hands of the captors two or three days, was recaptured by the mate and part of the crew, remaining on board, who brought her home. After her arrival she was libeled for salvage in the district court of Connecticut, and sal-

vage was awarded of one-third part of the proceeds of the vessel and property.

In regard to a total loss by the breaking up of the voyage, the mate testified, explicitly, that the capture deprived the Breakwater of the following requisites for prosecuting the voyage:

1. A navigator, he being the only one after the detention of the captain, and it being necessary that there should be two at least on board, one to go out with the boats, the other to remain with the vessel, and he had no certain means of finding another navigator short of returning to the United States, if he had proposed still to prosecute the voyage.

2. The best men had been taken out and detained, and he could not procure other suitable hands to supply their places without returning to the United States, it being requisite that a vessel should have a certain number of men skilled in this kind of voyages.

3. The loss of the muskets, the method of killing the fur seals of late years being by shooting, for the most part, or, at least, in a great part, and that a vessel is not equipped for such a voyage without a supply of muskets and ammunition. These he supposed he might have obtained short of the United States, had he been otherwise prepared and disposed to pursue the voyage.

4. Loss of seal boat with the captain, which he could not have replaced short of the United States, and a vessel with one seal boat only would not be fit to prosecute this species of sealing, and could not prosecute it to any advantage, or with any safety, since two boats always go in company to render each other assistance in case of accident.

5. Another reason for not prosecuting the voyage was the danger of being captured by Vernet, who then had at his command three vessels,—a part, or all, of which he had captured,—and seventy or eighty men.

6. The loss of the ship's papers by the capture was one objection to prosecuting the voyage, though the mate was of opinion, that, as it was a time of peace, this objection would not of itself have been conclusive.

7. He could not prosecute the voyage without coming home to refit, and he could not come home to refit without losing the sealing season.

Upon these facts the assessor reported that, by reason of the capture, there was a loss of the Breakwater by necessity.

Opinion by STORY, J.

It appears to me that the assessor is right in the conclusion which he has drawn, that there was a loss of the voyage by necessity from the capture and other events stated in his report. I cannot treat this as the case of a voyage to a port of necessity for the mere purpose of new equipments and repairs to resume the voyage; but there was a total loss of the voyage itself. The sailing season was lost. The vessel was compelled to return home. A new master and crew were to be hired, and to be hired upon new terms, exactly as if a new voyage was commenced. New outfits were required, and to be useful they must be co-extensive with the whole period of the new voyage.

§ 837. *Necessary sale to defray salvage creates total loss.*

Besides, the vessel was liable to, and was libeled and sold for salvage. That sale put an end at once to the original ownership and voyage; for after the sale it was utterly impossible to resume the voyage insured. New interests, new rights and new parties had intervened. The necessary sale of a vessel in the course of a voyage to defray salvage creates of itself a total loss of the vessel

for the voyage; and in a case like the present, there was thereby a total loss of the voyage also as to the outfits insured.

§ 838. *General average, a sacrifice for common benefit.*

The question, therefore, of general average which might arise, if the voyage to Stonington were a mere voyage to a port of necessity to refit and resume the original voyage, does not in my judgment become material to be considered. General average can only arise where the sacrifice has been made for the common benefit, and has accomplished the object. The expenses and charges of going to a port of necessity to refit can properly be a general average only when the voyage has been, or might be, resumed. If it has been abandoned from necessity, then it is not a case for the application of the doctrine. The present case may be treated upon the basis of a constructive total loss by the perils insured against, where there has been a due abandonment to the underwriters.

As I understand the policy, the value insured upon the outfits is to continue undiminished during the whole voyage; that is to say, it is to be treated as a case where the outfits are valued at the sum insured for the whole voyage, without any regard to their diminution by waste or by consumption, or by the transshipment of any of the seal skins, the product of the enterprise, in any other vessel during the voyage. I do accordingly confirm the report of the assessor, and recommit the report to him, with directions to ascertain and report the amount due to the plaintiffs upon the basis of a constructive total loss of the Breakwater and her outfits during the voyage.

MAGOUN v. NEW ENGLAND MARINE INSURANCE COMPANY.

(Circuit Court for Massachusetts: 1 Story, 157-168. 1840.)

STATEMENT OF FACTS.—This was the case of a policy of insurance, underwritten by the defendants on the 20th of March, 1838, whereby they insured the plaintiff, for whom it concerns, payment to him \$4,000 on the schooner Yankee, and on her freight at and from St. Thomas to Rio de la Hache, and at and from thence to New York, viz., \$3,200 on the schooner and \$800 on freight, against the usual risks in the Boston policies. The declaration alleged a total loss by the arrest and detainment by the authorities of the republic of New Grenada, and also a total loss by the peril of the seas. The parties agreed to a statement of the substantial facts, which was as follows:

The schooner proceeded from St. Thomas to Rio de la Hache, in ballast, under a charter-party, to take on board a cargo of hides and logwood at the latter port, to be carried to New York, for the freight of which \$600 was to be paid. A cargo was accordingly taken on board at Rio de la Hache, about the 7th of March, 1838; and the schooner being then ready for sea, the master applied for a clearance, which was refused, and he was arrested and imprisoned, and his vessel was seized and forcibly taken possession of by the local authorities. The asserted ground of the arrest of the master and the seizure of the vessel was on account of a supposed illicit and prohibited trade. It appears that about the time when the vessel was about to sail, six bags of beans were supposed to have been landed in a canoe from the schooner, without a permit, they being of the value of about \$25. The beans were seized on shore by the custom-house officers; and afterwards on searching the schooner they found certain bags of beans of her stores were missing; and thereupon they arrested the master, and seized the schooner as forfeited, presuming that the missing beans

were those illegally landed. Proceedings were duly had against the vessel, in the proper tribunal of the district of Magdalena; and on the 23d of May, 1838, a sentence was pronounced, confiscating the beans seized and the canoe, condemning the master to pay \$25, the value of the beans found missing from his vessel, and the costs of suit, but acquitting the vessel. Up to the time of this decree the master was held in imprisonment. From this sentence an appeal was taken to the superior tribunal of the republic, at Carthagena, where a sentence was pronounced on the 25th of July, 1838, by which the sentence of the court below, as to the acquittal of the vessel and the condemnation of the beans, was affirmed; but was reversed as to the canoe, on account of the value of the beans not being sufficient to justify the confiscation thereof. The sentence then proceeded to declare that the master was guilty of a fraud in allowing the landing of five bags of beans from the schooner without a permit; but that the fraud not being to the value of \$50, the vessel was not subject to any forfeiture therefor; and it then directed that the master should pay the value of the five bags of beans landed, viz., \$25, and condemned the judge below to the payment of costs. The vessel was accordingly restored; but when restored, it was found, from her long exposure to the weather in a hot climate, in an open roadstead, that her hull and sails and rigging were so much injured that she could not, without very great repairs, be enabled to perform the voyage; that the repairs could not be made at Rio de la Hache, or at any other port to which the vessel could proceed; and that the repairs would cost more than the vessel was worth. That the hides belonging to the cargo had become rotten, and were thrown overboard; and that no other vessel could be found at the port to carry the residue of the cargo to New York. Under these circumstances the master refused to receive back the vessel without indemnity, and abandoned her. On the 8th of October, the plaintiff, as soon as he received information of the facts, abandoned the vessel and freight to the underwriters, who refused to accept the abandonment.

Opinion by STORR, J.

The first question which arises in the present case is whether there has been a total loss in the sense of the law of insurance. It is clear that there has been no loss by the perils of the seas. But there has been a restraint and detainment of the government within the words of the policy. Has there been a total loss by reason of that restraint and detainment? I think there has been.

§ 839. *Causa proxima.*

The argument is, that the injury to the vessel, by the long delay and exposure to the climate, was the immediate cause of the loss, and the seizure and detainment the remote cause only; and that therefore, the rule applies, *causa proxima, non remota, spectatur*, and the underwriters are not liable for injury by mere wear and tear, or by delays in the voyage, or by worms, or by exposure to the climate. But it appears to me that this is not a correct exposition of the rule. All the consequences naturally flowing from the peril insured against, or incident thereto, are properly attributable to the peril itself. If there be a capture, and, before the vessel is delivered from that peril, she is afterwards lost by fire, or accident or negligence of the captors, I take it to be clear that the whole loss is properly attributable to the capture. It would be an over-refinement and metaphysical subtlety to hold otherwise; and would shake the confidence of the commercial world in the supposed indemnity held out by policies against the common perils. The decision of the

supreme court of the United States in *Peters v. Warren Ins. Co.*, 14 Pet., 99 (§§ 522-26, *supra*), is directly in point; and in my judgment fully settles that the restraint and detention under the seizure are to be treated as the proximate cause of the loss in the sense of the rule. The vessel was never delivered from that peril, until she was virtually destroyed and incapable to perform the voyage. But, if it were possible to get over this point, as I think it is not, the loss of the voyage arising from the total incapacity of the vessel to perform it would, under the circumstances, it being by a peril insured against, be decisive upon this point.

§ 840. *Decision of foreign court in regard to probable cause for seizure for alleged violation of revenue laws conclusive.*

In the next place, as to the sentence of the court of appeals. The policy contains a clause "that the assurers shall not be answerable for any charge, damage, or loss, which may arise in consequence of seizure or detention for or on account of illicit or prohibited trade, or trade in articles contraband of war." The true construction of this clause of the policy was finally settled by the supreme court of the United States, in the case of *Carrington v. Merchants' Ins. Co.*, 8 Pet., 495 (§§ 575-78, *supra*). It was there held that it was not necessary, to bring the case within the clause, that there should be a justifiable cause of condemnation, but only that there should be a justifiable cause of seizure, or, in other words, a probable cause of seizure. If the seizure be tortious, and without such cause, it is treated as not *bona fide* done, as an act of lawless violence, or of arbitrary power, or of gross fraud, or at all events of unjustifiable force, according to circumstances.

The question then arises, whether the seizure in this case was justifiable, or founded upon probable cause. Now, the sentence of the appellate court expressly affirms that there was no justifiable ground for the seizure of the schooner; that the very act of illegality in landing the six bags of beans, asserted in the libel or proceeding *in rem*, supposing it to be true, furnished by law no ground for the seizure of the schooner, because the value was only \$25, and no penalty could attach upon the vessel by law, unless the goods illegally landed from the vessel were of the value of \$50. Now, this is an adjudication upon the very point in controversy, as to probable cause; and it negatives the existence of it.

Then, is this sentence conclusive, or are the parties at liberty to go behind it, and to prove *aliunde* the existence of a probable cause of the seizure? It appears to me, that, independently of fraud (a point which will be presently considered), the sentence is conclusive. This is the established doctrine of the supreme court of the United States, which was fully examined and considered by this court in the recent case of *Bradstreet v. Neptune Ins. Co.*, 3 Sumn., 600; S. C., 2 Chandler's Law Reporter, 262; and, therefore, it need not be here further discussed.

But then, it is said, that here the sentence was founded in fraud. It is not pretended that there was any fraud, or participation in any fraud, on the part of the court; and certainly, if contended for, there are in the case no proofs to support it. The only ground asserted for the imputed fraud is that the master of the schooner swore falsely, in relation to the matters in controversy before the court, upon the trial of the seizure, and thereby procured the sentence of reversal of the appellate court; and that it is apparent from the other evidence now produced that there was probable cause of the seizure.

Now, in the first place, I do not know that it anywhere appears that the master was a witness, or what in fact he did swear to, if a witness, at the time of the hearing of the trial of the cause; for it is not stated in the transcript of the proceedings, nor does it appear what effect, if any, the evidence given by him had, or could have, upon the ultimate decree pronounced by the court below, or by the appellate court. What the master said, if he was a witness, might have had no influence upon the decision, for aught that the record directly states or discloses. The most that can be said is, that the master concealed the fact that eleven bags of beans had been illegally landed from the schooner instead of six; and that thereby both courts were misled in their decrees. But concealment of facts would be a new head of the law upon which to avoid a sentence of condemnation or acquittal in case of a seizure and proceedings *in rem*. Nor do I know (but I give no opinion on the point) that it has ever been judicially held that a sentence of a foreign court, acting *in rem*, as in cases of revenue seizures and cases of prize, has ever been held to be re-examinable as to its validity, either in cases of condemnation or of acquittal, upon the mere ground that there had been false swearing in the case by the agents of some of the parties in interest. That would be a very broad ground, and open a wide door to impeach the validity and conclusiveness of such sentences. If such evidence be admissible at all, it is equally admissible to disprove and vacate a sentence of condemnation, as well as a sentence of acquittal. It seems to me that, if evidence of false swearing in such cases be admissible to disprove the sentence and establish fraud in it (on which I give no opinion), it ought to be clearly shown that it was the real, substantial and efficient cause of the sentence, and not that it might have formed an ingredient to it.

In the present case it is far from being clear that eleven bags of beans were illegally landed from the schooner. There is considerable confusion in the evidence on this point. But it is unnecessary to consider it, since it is plain, upon the very face of the proceedings, that the only asserted ground of forfeiture was the illegal landing of six bags of beans. No other matter was, or could be, brought into controversy in the suit. The seizure was for that act, and for that alone. It is wholly immaterial what other causes might have existed to justify a seizure. The only question is, what in fact was the positive cause of the seizure, not what might have been a good cause. From what has been already stated, the professed cause of the seizure was an act which, by law, could not induce any forfeiture, and consequently could furnish no justifiable or probable cause for the seizure. By our law (Act of 1799, ch. 128, § 50) the landing of goods of the value of \$400 from a vessel without a permit will subject the vessel to forfeiture. But, if a vessel were seized for landing goods of the acknowledged value of not more than \$50, it would be impossible for the court to hold that there was any justifiable or probable cause for the seizure of the vessel.

In truth, therefore, whether there was any false swearing or not, or any fraudulent concealment or not, by the master, it is clear that the appellate court proceeded in its sentence upon the fact that the illegal landing of six bags of beans was the sole cause of the seizure; and that, consequently, it was without any justifiable or probable cause in law or in fact.

This view of the matter disposes of the whole merits of the defense; and it is unnecessary to discuss the other points, incidentally suggested at the argument. Upon the whole, my opinion is, that the loss is clearly a total loss

within the policy; and that the case does not fall within the clause exempting the underwriters from losses and charges and damages occasioned by seizure or detention on account of illicit or prohibited trade.

HART v. DELAWARE INSURANCE COMPANY.

(Circuit Court for Pennsylvania: 2 Washington, 346-352. 1809.)

STATEMENT OF FACTS.—Action on a policy of insurance dated 3d of September, 1806, on freight of brig Hannah, at and from New York to Wilmington in North Carolina, at and from thence to Barbadoes with liberty to go to another British island, at and from thence to the city of St. Domingo, there, and at the usual loading places on the coast, and after completing her cargo, to return to New York. The usual memorandum was at the foot, which proceeded to state that it was understood the vessel was insured in and out of port during the whole voyage. The policy, as to the printed part, was the common form of a policy on cargo, but at the foot was declared to be on freight. Two thousand dollars was subscribed at a premium of eleven per cent. The same defendants also underwrote policies on the vessel and cargo at the same premium. The order of insurance stated that the cargo was to be taken on board at Wilmington.

It appeared in evidence that the brig, on the 25th of August, sailed on the voyage insured, but was so injured by tempest on the coast that she was obliged to cut away her masts, and got into Norfolk, a wreck, about the middle of September. The defendants having an agent at Norfolk (viz., Mr. Granberry), the plaintiffs' agent (Mr. Myers) applied to him to have the vessel repaired. It appeared from the testimony of Myers that Granberry refused to have all the repairs made that were necessary, and also refused to agree to pay for the whole that might be made, although he consented to pay for the repairs in part.

About the middle of December, Myers wrote a note to Granberry, calling upon him to have the necessary repairs made, or to direct what repairs should be made, and to agree to pay Myers all such sums of money as he should expend in the repairs and in supplying the wants of the captain. In answer to this note, Granberry declined making the repairs himself, but consented that Myers should have such as are usually made, and promised to pay whatever sum the defendants may be liable to pay. It was proved by a Mr. Williamson, a shipwright, that he was directed to repair the vessel, and that he went on board to do so, but that the captain refused to allow him, saying that Myers had spoken to another shipwright to do it. The vessel was about fourteen years old, her tonnage one hundred and forty-six, and it is stated by the witnesses that her repairs would have cost upwards of \$3,000. She was insured at that sum. On the 1st of January the plaintiffs offered to abandon, which was refused. The vessel was sold as she lay, at public auction, for \$325. It was proved that a cargo of staves was provided and was waiting for her at Wilmington, which after the loss of the vessel were sold at a small loss. Had she performed the voyage, she would have earned a freight equal to the sum insured.

§ 841. *If injury exceeds half value of vessel, insured has a right to abandon.* Charge by WASHINGTON, J.

The first question is, was there in this case a total loss? It is strongly to be presumed, from the age of the vessel, her tonnage, the cost of her neces-

sary repairs, and the price at which she sold, that the injury to be repaired would have exceeded more than half her value; but of this you are to judge. If this was the fact, the insured had a right to abandon, unless the underwriters would agree, at all events, to pay for the repairs, although they should exceed what the underwriter would have been answerable for if only a partial loss had happened. It is true that the underwriter is not bound to make, or to direct, the necessary repairs, in any case. But if the injury sustained is such that the insured may turn it into a total loss, the underwriter, if he would prefer the voyage being prosecuted, must engage to pay what may be necessary to fit her to prosecute the voyage, though it should exceed what otherwise he might be liable for.

The question then is, did the agent of the underwriters agree to answer for such repairs? Mr. Myers declares that he would only consent to pay for partial repairs; and it appears, by his answer to Mr. Myers' note, that he would only agree to pay what the underwriters were legally bound to pay. But the underwriters were not bound to pay beyond their subscription, and the repairs would have cost between three and four thousand dollars. The insured, therefore, was not bound to make those repairs at his own risk, and was consequently at liberty to treat the loss as total, unless you should be satisfied, by Williamson's evidence, that whatever difference may have arisen between Myers and Granberry, the latter did consent to repair the vessel, and would have done so had he not been prevented by the captain. If Williamson is believed, it is certainly very difficult to account for, and still more so to justify, the conduct of the agents of the insured upon this occasion, in refusing a compliance with their own proposition; and if you are satisfied that this offer was made, and a willingness shown to carry it into effect, the plaintiffs had no right to turn this into a total loss. You are alone proper to decide how this fact was; and, having satisfied yourselves respecting it, you will find no difficulty in applying the law to it, as the court has stated it to you.

§ 842. *Until risk commences, insurance does not attach.*

The next question is purely a point of law. Had the plaintiffs an insurable interest, before or at the time when the loss happened, as stated by one of the counsel; or had the risk then commenced, as it is put by another? There is no difference between them. Risk is the subject of the contract of insurance. If there be no risk, there can be no contract. Until the risk commences, the contract does not attach. If the insured cannot or will not commence the risk, he has no claim to indemnity, and the underwriters cannot retain the premium.

§ 843. *Generally, inchoate right to freight does not commence until cargo is put on board.*

In an interest policy there can be no risk if there be no interest. The risk, then, can only commence when the interest commences; which leads to the question, when does an inchoate right to freight commence? The answer is, when the goods are put on board. This is the general rule as laid down in the case of *Tonge v. Watts*, which, I believe, has never been questioned. It is true that, if the policy be valued, the right to indemnity attaches, if only a part of the cargo is taken on board and then a loss happens; because in such a case it is only necessary to prove some interest to entitle the insured to recover the whole sum insured. So, likewise, if the insured, in virtue of a contract with a third party, has an inchoate right to freight, as soon as the voyage commences, though before the cargo is taken on board; the risk com-

mences and the policy attaches, in virtue of the contract, as soon as the voyage is commenced. This is the case of *Thompson v. Taylor*. But the general rule is as before stated.

§ 844. *Circumstances under which a policy attaches to profits expected to arise out of the freight.*

But although, in this case, the plaintiffs had not an insurable interest before the cargo was taken on board, it may be asked, had they not a right to insure expected profits, although they were dependent upon no contract with third persons? The answer is, that if the defendants agreed to insure in this way they are liable in case of a loss from any of the perils insured against, and not otherwise. The difficulty is, was this the understanding of the parties? We have had two opinions upon the point, and therefore state our present impression with some diffidence. But when we consider all the circumstances of this case,—that the defendants knew that the cargo was to be taken on board at Wilmington; that they insured the vessel and freight at the same premium, and stipulated, in the memorandum to the policy, that the vessel was insured, in and out of port, during the whole voyage,—we are of opinion that the risk in respect to the freight was understood to commence as soon as the voyage commenced; that is, that the profit expected to be made by the freight of the vessel should not be prevented by any of the perils insured against.

In answer to a question by the jury, it was said that if the repairs had been made by Williamson, under the orders of Granberry, the agent of the defendants, the defendants would have been liable for the whole expense, though it had exceeded the amount insured. But if the repairs had been made by Myers, they must have been upon the terms of Granberry's letter, which did not bind the defendants further than the law bound them, and that would not have been to an amount exceeding the sum insured. (Verdict for defendants.)

HUMPHREYS v. UNION INSURANCE COMPANY.

(Circuit Court for Massachusetts: 3 Mason, 429-448. 1824.)

STATEMENT OF FACTS.—Suit on a policy of insurance on the schooner *Zephyr*, appurtenances and cargo, at and from Messina to Boston, with liberty to touch at Gibraltar. The loss stated was a total loss by the perils of the seas. Upon a summary hearing of the facts at the last term, the court intimated an opinion that the plaintiff was not entitled to recover for a total loss, and the cause was thereupon, by consent, referred to auditors to report and state the loss, with liberty for the plaintiff to argue the case upon the questions of law upon the coming in of the report.

The schooner duly sailed on the voyage from Messina for Boston, and having met with severe injuries from the perils of the sea, was obliged to put into Lisbon for repairs, and was there repaired at an expense exceeding half her value, to pay which the master, having no other funds, was obliged to give a bottomry bond on ship, cargo and freight. After being repaired, that portion of her cargo (which was principally fruit) which remained undamaged was taken again on board, together with some additional cargo, and the schooner sailed for and safely arrived at Boston. Proceedings were there had against her upon the bottomry bond, under which she was sold, and the proceeds ap-

plied to the payment thereof. The abandonment was actually made about four days before the arrival of the schooner at Boston, the plaintiff, who was owner, not having previously had knowledge of the loss so as to make an abandonment. The policy contained the usual memorandum against losses on perishable articles.

Opinion by STORRY, J.

The first question is as to the right of the plaintiff to recover for a total loss of the vessel. She sustained an injury, the repairs of which cost more than half her value. A bottomry bond was executed to secure the payment of the amount of the repairs. She sailed on the voyage and safely arrived at Boston. The abandonment was made while she was on the high seas in the prosecution of her voyage in good safety, a few days only before her arrival in port. She was subsequently proceeded against upon the bottomry bond, sold by a decree of court, and the proceeds applied to the payment of the bond.

§ 845. *Loss must be total at the time to justify abandonment.*

Under these circumstances the question arises, whether the abandonment was valid, so as to bind the underwriters. It has been settled in the courts of the United States, that an abandonment is not good unless the loss is, in fact, *total at the time of the abandonment*. The state of the information, or the existence of a total loss at an antecedent period, if it has no longer a continuance, gives no title to abandon. And when once the right of abandonment is fixed and acted upon, no subsequent events, which change the total into a partial loss, have any effect to divest the antecedent right of the parties. Such are the principles decided by the court, whose judgment I am bound to follow; and, as far as I have knowledge, they have received the sanction of the state tribunals most conversant with subjects of this nature throughout the union. *Rhineland v. Ins. Co. of Penn.*, 4 Cranch, 29; *Marshal v. Delaware Ins. Co.*, 4 Cranch, 202 (§§ 820–21, *supra*); 6 Mass., 479; 3 Binn., 287; 7 Johns., 412; *Peele v. Merchants' Ins. Co.*, 3 Mason, 1.

§ 846. *If owner elect to repair, he cannot afterwards abandon for the injury.*

Applying this doctrine to the present case, how can it be said that at the time of the abandonment there was a total loss? The vessel was physically safe and in good repair. The voyage was not lost, for it was then in a successful progress, and was afterwards accomplished without further loss. It is true that the vessel had been injured more than half her value; and if the owner had then elected to abandon without repairing her, he would have been justified by the established law on this subject. But the owner is in no case bound to abandon. He is entitled to repair the injury, however great, at the expense of the underwriter, and proceed in the voyage. In the present case, he elected through his agent, the master, to make the necessary repairs and continue the voyage; and for this purpose the hypothecation of the vessel became necessary. The underwriters do not object to pay these expenses; but the attempt is made, after the adventure is again put successfully in motion, to compel them to pay a total loss. If there had been no bottomry bond given for the repairs, there would be no pretense to say that the loss was total. But it is said that the bottomry bond constituted a lien, which incumbered the vessel in her whole progress, and that she never came free to the possession of the plaintiff. The existence of such a lien is not *per se* a cause of abandonment. The vessel is not either technically or physically lost by it. It constituted during the voyage a *contingent* right. If the vessel had been subsequently lost in the

voyage, all right under it would have been gone from the bottomry holder. But nevertheless the plaintiff would have been entitled to recover for a total loss from the underwriters.

In the present case, the bottomry bond was not at the time of the abandonment a fixed and absolute lien; and the proceedings, under which the vessel was sold were long after the abandonment. A subsequent total loss will not aid an abandonment, bad at the time and ineffectual. In point of fact, however, the subsequent loss of the vessel was not occasioned by any peril insured against. *Causa proxima, non remota, spectatur*. The ultimate loss was by the act of the owner himself, in not paying the bond after the successful termination of the voyage. If there was any default, it was his; and he ought consequently to sustain the loss. The case of *Da Costa v. Newnham*, 2 Term R., 407, is distinguishable. There, the repairs had been made by the *express order of the underwriters*, who afterwards refused to pay the bottomry bond given for expenses, and the vessel was sold upon proceedings under the bond occasioned solely by this default of the underwriters. *No abandonment was ever made* in that case; and the question was, notwithstanding, whether the owner was not entitled to recover for a total loss. At the trial, Mr. Justice Buller held that he was. He said, "the bottomry bond was only £600, but the ship never came free into the plaintiff's hands; for in consequence of the refusal of the underwriters to discharge it, she was obliged to be sold. As for all the subsequent injury which had accrued to the plaintiff in consequence of that refusal, and by which the plaintiff was damnified to the whole amount of the insurance, the underwriters were liable, because it was their own fault in not taking up the bond for the expenses of those repairs, which had been incurred by their own express directions." The court affirmed his opinion. In the present case there are no correspondent circumstances. The underwriters never advised the repairs, and never refused to pay for them. In 2 Term R., 407, the existence of the bottomry bond was not deemed a continuance of the total loss. But the subsequent loss was attributed to the express default of the underwriters. The case of *McIver v. Henderson*, 4 Maule & Selw., 576, does not apply. Independently of all other circumstances, there the voyage was lost. My opinion on this point is, that in no legal sense was the loss total at the time of the abandonment, and therefore the plaintiff is not entitled to recover for more than the partial loss.

§ 847. *Deduction of one-third new for old, where loss by owner was voluntary.*

The next point is as to the deduction of the one-third new for old from the repairs. The case of *Da Costa v. Newnham*, 2 Term R., 407, as to this point need not be disputed. There the court said that the ground why the deduction of one-third new for old was ordinarily made was because the owner had the possession of the vessel, and she was so far made better by the repairs. But in that case, by the default of the underwriters, the owner never had possession again of the vessel; and therefore the court very properly held that he ought not to pay for a benefit which he had never received. But in the present case, the loss has been voluntary on the part of the owner by his own default. He was never dispossessed of his vessel but under a decree, which he suffered because he did not choose to pay the ship's debt contracted for his benefit and by the order of his own agent. The underwriters are therefore entitled to the deduction, because they had done no act to prevent the fullest possession by the owner.

§ 848. *Underwriter to pay for actual expense of repairs at true amount,—not with reference to depreciated currency.*

As to the third point, the question is, whether the underwriters are to pay the actual expense at its true and real amount, or an increased amount by calculating it at a nominal value in a depreciated currency. The real sum paid by the owner was in *milreas* calculated at ninety-six cents, and he now attempts to get, not what he has paid, but an increased sum, such as the *milrea* would amount to, calculated in a depreciated currency at \$1.25 *per milrea*. It is sufficient to say that the underwriter is to pay the real and not the imaginary expenses.

§ 849. *In cases of general average, contributory value of freight ascertained by deducting one third the gross amount.*

As to the fourth point, the practice in this state has long been in cases of general average to ascertain the contributory value of the freight by deducting one-third of the gross amount. The rule was doubtless originally arbitrary, but founded upon a general average estimate of the usual deductions of wages and expenses from the freight in ordinary voyages. The object was to relieve each particular case from the embarrassment of nice calculations and questions about small items which could not always be fixed by evidence absolutely exact. It has the benefit of certainty and universality in its application; and this consideration outweighs any slight deviation from principle, which may possibly be involved in it. It as often works in favor of one party as the other. If such a practice, existing for a long time by the acquiescence of the commercial community, were now for the first time in question, I should not hesitate to adopt it as reasonable. But it has been long acted upon by the profession, and has received general sanction in our courts. It cannot now be departed from without removing landmarks. See Phillips on Insurance, 363. The auditors, in their report, state, "the net freight brought into contribution is, according to usage, two-thirds of the freight, viz., \$745. The assured proposes to determine the amount of the contributory interest of freight by deducting from the gross freight, *i. e.*, \$1,117.50, the whole amount of the wages actually paid, viz., \$546.58, leaving the contributory value of freight to be \$570.92. But as wages are allowed in *general average* from the time of turning off for Lisbon to the time of sailing from that port (4 Mass., 548; Phillips on Insurance, 348; 14 Mass., 74), if the wages for this time be deducted, the remainder of wages will be less than one-third of the gross freight." The rule, therefore, adopted by the auditors is, in this particular case, the most favorable for the assured. But I confirm it, as standing upon a reasonable and settled usage.

§ 850. *Plaintiff not entitled, in this case, to recover for total loss of oranges under memorandum clause exempting underwriter from particular average on "salt, fish, fruit," etc.*

The fifth and last point is, whether the plaintiff is entitled to recover for a total loss of the oranges. The argument is that the memorandum is not designed to exclude losses where there is a total destruction of any specific, separated portion, as a box, hogshead, or bale of the memorandum articles; and *a fortiori* not, where there is a total destruction of the whole of any single memorandum article.

The present insurance is upon *cargo* generally, and the memorandum in express terms exempts the underwriter from particular averages or partial losses on "salt, fish, fruit, grain," etc., etc. The memorandum does not designate

oranges particularly by name, but they are comprehended merely because they fall under the general description of "*fruit*." In the present case there were one thousand one hundred boxes of lemons and two hundred and ninety-nine boxes of oranges on board. Of the lemons eight hundred and six boxes were saved; and supposing there was, upon the facts stated by the auditors, a total loss of the oranges, still there is no pretense to say that the whole of the memorandum article "*fruit*" was lost. The argument, therefore, if it is to stand at all, must stand upon the ground that the loss of the whole of any one article falling under the description of "*fruit*" in the memorandum is a loss for which the underwriters are liable. It is not distinguishable in principle from the case of the loss of a whole hogshead of sugar, in policies where sugar is warranted free from particular average. The case of *Dyson v. Rowcroft*, 3 Bos. & Pull., 474, seems to me to be perfectly correct in principle, but it turned altogether upon different principles. The insurance was on fruit, and in the course of the voyage the fruit was so much damaged by the perils of the seas that it was rotten, and was necessarily thrown overboard at an intermediate port into which the ship was driven. The loss was completely total by the destruction of the fruit before it arrived at the port of destination. That case applies to the present no further than it has a tendency to prove that there was in contemplation of law a total loss of the oranges by the events of the voyage. That point has not been much contested at the argument and may be passed over without further observation.

The case of *Davy v. Milford*, 15 East, 559, is however a very strong authority for the plaintiff. There, the policy was on "*flax*" valued at £400, and warranted free from particular average. The ship was wrecked in the voyage. Part of the packages of flax was wholly lost, and part of them was saved in a damaged state. The court held the plaintiff entitled to recover for the packages entirely lost, but not for those of which there was a partial loss or damage. It was admitted by the court that the point was new, and finding no authority against it, they construed the policy *divise*; as to the damaged part within the warranty; as to that which was totally lost, not. Upon this case I confess myself to have great difficulties. No reasons are assigned by the court for the determination, and as at present advised I think the rationale to be the other way. What is this but a determination that the loss of the whole or any portion of the thing insured, capable of a distinct enumeration and separated from the rest, is out of the warranty? Suppose the insurance had been on coffee or corn, what difference is there between the loss of a single kernel, and a bag? Between the loss of part of an aggregate made up of artificial and separate parcels, and of an aggregate made of things in their own nature single and separate? The loss of the whole of a bag of coffee or corn does not seem to me to differ in principle from the loss of an equal quantity of coffee or corn in bulk. The true meaning of the memorandum has hitherto been supposed to be that it shall exempt the underwriter from all partial losses or particular averages of *the thing insured*. What difference is there in principle or reason between a partial loss or average by the damage of a part, and a partial loss by the destruction of an integral part of the *thing insured*? To ascertain what the loss is, it must be estimated with reference to the whole. The insurance is not on each separate parcel or part of the thing insured as an integral subject, but on the whole as an aggregate. The insurance in *Davy v. Milford* was not on each parcel of flax separately, but on the aggregate as a totality. The memorandum warrants the underwriter free of particular average *on the thing*

insured. It binds him only to a total loss of *the thing insured*. It seems to me that the error of the reasoning is in considering the insurance as a separate insurance on each distinct parcel, and not as an insurance on the aggregate. This is a departure from the words of the policy. The court in *Thomson v. Royal Exch. Ins. Co.*, 16 East, 214, and *Hedbury v. Pearson*, 7 Taunt. R., 214; 2 Marsh., 432, refused to apply the same rule where sugars were insured and a part of the contents of each of the hogsheads was lost by sea damage. In the former case the policy was on "goods" [tobacco and sugar] generally, in the latter "on hogsheads of sugar." In each case the sugar was not merely damaged, but a part of the contents was wholly gone and destroyed. The distinction is certainly nice between the loss of a whole hogshead and the loss of the whole of a part of several hogsheads. If it had been the case of tobacco or rice or coffee, where the whole might have been saved, but in a damaged state, the ground of distinction would be more obvious. But when the very substance is gone, what difference can it make whether it is the whole of one parcel or a part of many parcels?

If, therefore, I were called upon to decide this question *de novo*, my judgment would reluctantly acquiesce in, if it did not lead me to dissent from, the opinion in *Davy v. Milford*. But the question has been definitively settled against the distinction in *Davy v. Milford*, by the supreme court of the United States in *Biays v. The Chesapeake Ins. Co.*, 7 Cranch, 415 (§§ 893-94, *infra*), and *Morean v. United States Ins. Co.*, 1 Wheat., 219 (§§ 891-92, *infra*). These decisions are imperative upon me, and coincide with what I cannot but consider as the true and rational exposition of the memorandum. The report of the auditors is therefore confirmed.

Decree accordingly.

ALEXANDER v. BALTIMORE INSURANCE COMPANY.

(4 Cranch, 370-382. 1808.)

ERROR to U. S. Circuit Court, District of Maryland.

STATEMENT OF FACTS.—Action to recover the amount of a policy insuring the ship John and Henry, from Charleston to Port Republican, or one other port in the Bite of Leogane. On the 2d of October, 1803, the John and Henry, while prosecuting her voyage, was seized by a French privateer, and carried into the port of Mole St. Nicholas, where the cargo was taken by M. de Noailles, the French commandant, for the use of the garrison. On the same day the master of the vessel received a written engagement from M. de Noailles to pay for the cargo in coffee, after which the vessel was unladen. The captain remained at the Mole in expectation of receiving payment, until the 29th of October, when he sailed in the John and Henry for Cape François, with an order on that place for payment in coffee. On the 4th of November she was seized by a British squadron then blockading Cape François, and condemned as prize. Cape François is not in the route to Port Republican, nor to any port in the Bite of Leogane; nor in the route to return from Mole St. Nicholas to the United States. The abandonment was made in December, on account of the capture by the French privateer. The declaration claims the amount of the policy in consequence of that capture. The judgment of the court below was for the defendant.

Opinion by MARSHALL, C. J.

It has been decided in this court that during the existence of such a deten-

tion as amounts to a technical total loss the assured may abandon, but it has also been decided that the state of the fact must concur with the state of information to make this abandonment effectual. The technical total loss, therefore, occasioned by the capture and detention at Mole St. Nicholas, must have existed in point of fact in December, when this abandonment was tendered, or the plaintiff cannot succeed in this action.

§ 851. *Seizure of cargo no ground per se for abandoning ship.*

Previous to that time the vessel had been restored to the captain; all actual restraint had been taken off; and it does not appear that her ability to prosecute her voyage was in any degree impaired. But her cargo had been taken by Monsieur de Noailles, the commandant at Mole St. Nicholas, and had not been paid for. The restoration of the vessel, without the cargo, is said not to terminate the technical total loss of the vessel.

The policy is upon the vessel alone, and contains no allusion to the cargo. Had she sailed in ballast, that circumstance would not have affected the policy. The underwriters insure against the loss or any damage to the vessel, not against the loss or any damage to the cargo. They insure her ability to perform her voyage, not that she shall perform it. If, in such a case, a partial damage had been sustained by the cargo, no person would have considered the underwriters as liable for that partial damage; why, then, are they responsible for the total destruction of the cargo? It is said that by taking out the cargo the voyage is broken up. But the voyage of the vessel is not broken up; nor is the mercantile adventure destroyed from any default in the vessel. By this construction the underwriter of the vessel, who undertakes for the vessel only, is connected with the cargo, and made to undertake that the cargo shall reach the port of destination in a condition to answer the purposes of the assured. Yet of the cargo he knows nothing, nor does he make any inquiry respecting it.

If it be true that the technical total loss was not terminated until the cargo was paid for, because the voyage was broken up, then the underwriters would have been compellable to pay the amount of the policy, although the vessel had returned in safety to the United States. To prosecute the voyage, it is said, had become useless, and, therefore, the engagement of the underwriters was forfeited, although this state of things was not produced by any fault of the vessel. If this be true, it would not be less true if, instead of proceeding to Cape François, the Henry and John had returned from Mole St. Nicholas to the port of Charleston. The contract, then, instead of being an insurance on the ability of the ship to perform her voyage, and insurance against the loss of the ship upon the voyage, would be a contract to purchase the vessel at the sum mentioned in the policy, if circumstances, not produced by any fault or disability in the vessel, should induce the captain or the assured to discontinue the voyage after it had been undertaken.

This is termed pushing a principle to an absurdity, and, therefore, no test of the truth of the principle. But if it be a case which would occur as frequently as that which has occurred, and if the result which has been stated flows inevitably from the principle insisted on, the case supposed merely presents that principle in its true point of view, deprived of the advantages it derives from its being adapted to the particular and single case under argument. Either the technical total loss of the ship did or did not terminate when she was restored to the master uninjured, and as capable of prosecuting her voyage as when she sailed from the port of Charleston. If it was then terminated,

this action cannot be sustained. If it was not then terminated, on what circumstance did its continuance depend? At one time it is said to depend on the ability or inability of the owner to employ her to advantage. But this position requires a very slight examination to be discarded entirely. So far as respected the vessel herself, and her crew, she was as capable of being employed to advantage as she had ever been. Only the funds were wanted to enable her to purchase a return cargo on the spot, or to proceed to her port of destination, and there purchase one. Or she might have returned immediately to the United States, and if any direct loss to the vessel was sustained, by being turned out of her way, that, after restoration, would be a partial, not a total loss. Besides, what *dictum* in the books will authorize this position? And what rule is afforded to ascertain the degree of inconvenience which, when in point of fact the vessel is in safety, in full possession of the master, and capable of prosecuting her voyage, shall warrant an abandonment?

No total loss of the vessel, then, existed after her restoration, so far as that total loss depended on the incapacity of the owner to employ his vessel to advantage. If the total loss continued after the restoration, that continuance was produced singly by the non-payment for the cargo, which is said to have broken up the voyage. If, then, the vessel had returned to a port in the United States, the voyage would still have been broken up, and the right to abandon would have been the same as it was while she was on the ocean, in full possession of her captain.

But it is apparent that the captain had terminated the voyage on which the vessel was insured. Had his contract with De Noailles been complied with at Mole St. Nicholas, or at Cape François, he would not have proceeded to the Bite of Leogane. Had it not been complied with, he would have had no more inducement to go to a port in the Bite of Leogane from Cape François, than from Mole St. Nicholas. The voyage to Port Republican, then, which was the voyage insured, was completely terminated at Mole St. Nicholas; the voyage to Cape François, in making which she was captured, was a new voyage, undertaken, not for the benefit of the underwriters of the vessel, but for the benefit of the owners and underwriters of the cargo. Consequently, so far as respects the underwriters of the vessel, who insured only the voyage to the Bite of Leogane, the capture at Cape François is an immaterial circumstance, and the technical total loss produced by carrying the vessel into Mole St. Nicholas was either terminated when she was restored without her cargo, or would have continued had she returned to an American port without her cargo.

Upon principle, then, independent of authority, it is very clear that the underwriter of the vessel does not undertake for the cargo, but engages only for the ability of the vessel to perform her voyage, and to bear any damage which the vessel may sustain in making that voyage.

But it is contended that adjudged cases have settled this question otherwise. The case has frequently occurred, and a direct decision might be expected on it, if a construction so foreign from the contract had really been made. It often happens that the cargo of a neutral vessel is condemned as enemy property, and the vessel itself is discharged.

Not an instance is recollected in which the right to abandon in such a case, after the vessel was restored, has been claimed. Yet, if the loss of the cargo amounted to a destruction of the voyage, so far as respected the vessel, and thereby created a total loss of the vessel herself, notwithstanding her restora-

tion to the captain uninjured, and in a full capacity to prosecute her voyage, such claims would be frequently asserted, and vessels would be valued high in the policy, for the purpose of selling them on a contingency which so often occurs. It would be strange, indeed, to admit, that if this cargo had been condemned in Mole St. Nicholas, and the vessel had been liberated, the right to abandon would not have been produced by the loss of the cargo, and yet to contend that non-payment for the cargo does produce that right.

§ 852. *Authorities reviewed.*

In recurring to precedent, no direct decision by a court on the point, no direct affirmance of the principle, has been adduced; but the counsel for the plaintiff relies on general *dicta* in the books which are used in reference to other principles. Thus in 1 Term Rep., 191, Judge Buller says, "It is an assurance on the ship for the voyage. If either the ship or the voyage be lost, it is a total loss."

In that case the counsel for the plaintiff contended that the insurance was on the ship and on the voyage, and insisted that, as the vessel returned unfit for use, it was a total loss. The counsel for the defendants was stopped, and Judge Buller said, "Allowing total loss to be a technical expression, the manner in which the plaintiff's counsel have stated it is rather too broad." Why too broad? Judge Buller answers, "It has been said that the insurance must be taken to be on the ship as well as on the voyage, but the true way of considering it is this; it is an insurance on the ship for the voyage. If either the ship or the voyage be lost, that is a total loss."

In what consists the difference between an insurance on the ship and the voyage, which is laying down the principle too broad, and an insurance on the ship for the voyage, which is the true way of considering it? If the destruction of the voyage by the loss of the cargo is a loss of the ship, then it is an insurance on the ship and the voyage. But this, according to Judge Buller, is not the true principle. The true principle is, that "it is an insurance on the ship for the voyage," that is, that the voyage shall not be destroyed by the fault of the ship, or, in other words, that the ship shall be capable of making her voyage. And when he says that if either be lost, it is a total loss, he must be understood to mean, if the voyage be lost by the happening to the ship of any of the perils insured against. To understand Judge Buller otherwise would be to make him inconsistent with himself; to illustrate a proposition by cases incompatible with that proposition; and to support a distinction by cases which confound the principles intended to be distinguished from each other. But these expressions are used in a case in which the whole contest respected the damage actually sustained by the ship insured, and must be understood in reference to such a case.

So in 1 Term R., 615, *Mitchell v. Edie*, Buller, J., says, "A total loss is of two sorts. One where in fact the whole of the property perishes" (that is, the property insured); "the other where the property exists, but the voyage is lost, or the expense of pursuing it exceeds the benefit arising from it." This was a case in which the cargo, which was the thing insured, was, by one of the perils insured against, prevented from reaching its destined port, and was greatly damaged. The expressions must be explained by the case, for the case itself is in view when the expressions are used.

A *dictum* of Judge Buller, in 1 Term R., 310, is more applicable to this case than either of those before quoted. He says, "if the ship had arrived, and the goods had been lost, the assured could not have recovered." That was an

insurance on the arrival of the ship. It is said that *dictum* was founded on its being a wagering policy, but it appears to be a construction of the terms of the policy. He proceeds to say that, "in policies on interest, if the voyage be lost, it is not necessary to proceed on with the hulk of the ship." But to what case does this apply? To an insurance on goods or on the ship? To a loss of the voyage by default of the thing insured and abandoned, or by default of the thing not insured? The *dictum* is too vague and too unsatisfactory to form the basis of a great legal principle of infinite importance in commercial transactions. If that case be read throughout, *dicta* may be found interspersed through it which militate against the doctrine this single sentence is supposed to support.

In the case of *Goss v. Withers*, 2 Bur., 683, there were two policies, one on the ship and the other on the cargo. The language of Lord Mansfield, in delivering the opinion of the court with respect to the ship, does not even insinuate the idea that any damage sustained by the cargo would have affected the policy on the ship. In deciding on the claim for the cargo, his language is to be considered with reference to the case itself. It does not appear whether, in the passage quoted from *Le Guidon*, the author of that work was treating of an abandonment as to the ship or cargo, or both. Nor does it in any degree tend to establish the principle contended for, that after stating the actual total loss of the goods, Lord Mansfield mentions, as an additional circumstance, showing the complete destruction of the voyage, that the ship was lost also.

In the case of *Hamilton v. Mendez*, 2 Bur., 1198, neither the ship nor cargo was lost. Lord Mansfield puts cases in which there might be a total loss, but those cases are not stated with such precision as to throw any light on the present question. He says it does not absolutely follow that, because there is a recapture, the loss ceases to be total. "If the voyage is absolutely lost, or not worth pursuing," and in many other instances, the owner may disentangle himself and abandon, notwithstanding there has been a recapture.

It is extremely dangerous to take general *dicta* upon supposed cases not considered in all their bearings, and at best inexplicitly stated, as establishing important law principles. Let the *dictum* in the present case be examined. Suppose the ship and cargo to be owned by different persons and insured by different underwriters. If the voyage be lost by the infirmity of the ship, the abandonment might unquestionably be made. If the goods be damaged or injured, so as to occasion a technical total loss, so as to render the voyage not worth pursuing, the owner of the cargo may abandon; but how does this render the voyage not worth pursuing by the owner of the vessel? The value of the cargo does not affect him or injure the vessel. With respect to him, the voyage is not destroyed. These *dicta* of Lord Mansfield are uttered in terms which demonstrate that no case like the present was in his view at the time, and they are not adapted to such a case.

The cases from *Weskett* are upon a peculiar kind of policy. They are in the nature of wager policies, and the nature of the undertaking is said to be, that the ship shall perform her voyage in a reasonable time. "In these two last kinds of policies," says *Weskett*, "valued free from average" and "interest or no interest, it is manifest that the performance of the voyage or adventure in a reasonable time and manner, and not the bare existence of the ship and cargo, is the object of the insurance." This remark applies only to policies of the particular specified description; and even with respect to them it would not appear that the fate of the ship depended on that of the cargo. In

illustration of this principle he states the case of the *Ludlow Castle* (Weskett on Insurance, 416), insured from Jamaica to England. She was compelled by one of the perils insured against to put into Antigua, where she was stopped from proceeding on her voyage, and her cargo was sent to England in another vessel. At the time of the abandonment, and even at the time of the trial, the vessel had not arrived in England and was not restored to the owner. In this case the voyage was lost by the inability of the vessel to prosecute it.

The case of the *Sarah Galley* (Weskett on Insurance, 416) bears a much stronger resemblance to that under consideration, but is not so fully stated as to give the court all its circumstances. It does not precisely appear what damage was sustained by the seizure at Gibraltar, nor what effect that loss might have on the jury. Nor are we informed at what time and for what cause the abandonment was made.

But the great objection to that case is, that it was the verdict of a jury, not the solemn decision of a court, which verdict was rendered at a time when the law of insurance was not settled, and most probably on a point which has since been overruled in England and in this country. The loss of the ship on a voyage from Gibraltar to Dunkirk could not be the fact on which the plaintiff recovered, because that was a voyage not within the policy. The seizure at Gibraltar was the fact on which the jury founded their verdict. The defendant contended that this total loss was terminated by the restoration of the ship; "yet as the taking at Gibraltar was a taking whereby the return voyage was prevented, a special jury gave the plaintiff a verdict for a total loss." The verdict, then, is found not on the subsequent actual loss of the vessel, but on the technical loss occasioned by the seizure. This verdict was rendered in the reign of George II. At that time it was doubtful whether a technical total loss occasioned by capture did not vest in the assured a right to abandon, which right was not divested by restoration. In the case of *Hamilton v. Mendez*, which came on afterwards, this point was perseveringly maintained at the bar, and settled by the court. Had the case of *The Sarah Galley* been decided after the case of *Hamilton v. Mendez*, a different verdict must have been rendered. But this decision was given exclusively on the circumstances which had befallen the ship, without a view, so far as is stated, to any loss of the cargo, and is considered by Millar (288) as not being law.

The case of *The Anna* (Weskett on Insurance, 416) turned entirely on the inability of the ship to prosecute her voyage.

The case of *The Dispatch Galley* (Weskett on Insurance, 417) is a case in which we are not informed of the amount of loss occasioned by capture and recapture; and is also a case decided before *Hamilton v. Mendez*, most obviously upon the principle that the right to abandon, which was vested by the capture, was not divested by the restoration of the vessel. This case serves to show that the verdict in the case of *The Sarah Galley* did not turn on the subsequent loss of the vessel, for this vessel was not lost. There is in it no allusion to any influence which the loss of a cargo might have on the insurance of a vessel.

The principles laid down by Miller (284) do not militate against those which are contained in this opinion. When he speaks of a loss which defeats the voyage, he alludes to a loss which has befallen the thing insured.

The court can find in the books no case which would justify the establishment of the principle, that the loss of the cargo constitutes a technical loss of the vessel, and must, therefore, construe this contract according to its obvious

import. It is an insurance on the ship for the voyage, not an insurance on the ship and on the voyage. It is an undertaking for the ability of the ship to prosecute her voyage, and to bear any damage which she may sustain during the voyage, not an undertaking that she shall, in any event, perform the voyage.

It is the unanimous opinion of the court that the judgment must be affirmed with costs.

GLOUCESTER INSURANCE COMPANY v. YOUNGER.

(Circuit Court for Massachusetts: 2 Curtis, 322-340. 1855.)

STATEMENT OF FACTS and opinion by SPRAGUE, J.—Libel on a policy of insurance. It was admitted or appeared that the libelant was part owner of the schooner E. P. Howard, and that his interest was insured by the defendants by a policy which makes part of the case. The other owners with the master were also insured by the defendants and Gloucester Fishing Company, which is also sued in other libels, and in their doings in relation to this vessel both offices acted together. The libelant offered evidence to show that on the 29th of September, 1853, while at anchor off Chittacamp, in the Bay of St. Lawrence, a gale arose in which the vessel dragged her anchors, struck upon a ledge, and was, as libelants allege, but it was not admitted, very seriously damaged, and the master, fearing she would sink or go to pieces, slipped his cables and ran the vessel ashore on a sand beach. Several vessels were driven ashore at the same time, and all but one got off.

The libelants introduced evidence to show that the vessel was so much injured that she could not be got off and permanently repaired at that place, and that there were not means at that place to put temporary repairs upon her, and that she could not be taken with reasonable safety to another port until the following summer, if at all.

The respondents offered evidence to show that she might have been got off without any difficulty by her own crew, that she was very slightly damaged, and that men and materials to make her safe to go to Canso, sixty miles off, or to Pictou, one hundred miles off, where permanent repairs could have been made, or to Gloucester, were to be had there. The master proceeded to strip the vessel, and stored the sails, rigging and outfits there, and left the vessel in charge of the Jersey Company and came home.

While at Chittacamp, the master wrote to one McKean, at Canso, who, on receipt, sent a telegraphic dispatch to one of the directors of the Fishing Insurance Company in the following words: "October 5, E. P. Howard, stranded at Chittacamp, bilged, no prospect of getting her off, master waiting instructions." On receipt of which the insurers telegraphed to one William Tarr, who was usually there, as follows: "Do all that you can, with the advice of the shippers, that will be to the advantage of all concerned and draw on the office. Please report. Get the vessel off if possible." On arrival at Canso, October 8, the master sent to the defendants a telegraphic dispatch as follows: "Schooner E. P. H. ashore, tide ebbs and flows into her, keel injured badly, started out of wood ends by striking on a reef of rocks, strained badly, I abandon her to you and claim a total loss." On receipt of this the two insurance companies sent to him the following dispatch, which was not received by him: "Unless the vessel and materials can be sold at private sale for about

\$1,000, strip her and store the sails and rigging, outfits, etc., at some proper place, say with the Jersey Company or at Port Hood."

The companies subsequently received information which led them to suppose that the vessel was not much damaged, and then telegraphed and wrote to said Tarr to get her off and bring her home. The master had previously returned and had an interview with the insurers. No exception was taken at the time of the receipt of the master's despatch to it, as being an informal or unauthorized abandonment, nothing being said about it.

November 28th, the insurers made an agreement with four persons at Gloucester to go down and get the vessel off and bring her home; this was done, and the vessel arrived in Gloucester in February, with the outfits on board; there was no evidence that they were tendered to the owners. The insurers caused her to be repaired at an expense less than half her valuation and tendered her to the owners, March 15, 1854, who refused to take her, insisting upon a claim for total loss, and that she was not thoroughly repaired nor in reasonable time.

No evidence was introduced on the part of the owners of any express abandonment, other than that of the master's dispatch, or of any express demand of payment of the sums insured up to March 14. Evidence was at hand, on both sides, as to the cost and sufficiency of the repairs made and the reasonableness of the time of the tender, but those questions not being deemed material by the court in the posture of the case, they were not gone into.

Opinion by SPRAGUE, J:

In this case two principal questions arise, depending partly on law and partly on facts; *first*, whether there has been abandonment, and *second*, whether the abandonment has been accepted.

I find it more convenient to consider the latter question first, namely, if there has been an abandonment, has it been accepted?

The respondents took possession of the vessel and repaired her and offered to return her to the owner upon his paying a portion of the expenses of repairs, intending, no doubt, the one-third new for old, and perhaps a part of the expense of getting her off, as a general average claim. The libellant contends that this was an acceptance. The case of *Peele v. The Merchants' Ins. Co.*, in 3 Mason, 27, is a direct decision to the point that if the vessel is abandoned and the underwriter takes possession, repairs and offers to return her, it is an acceptance of the abandonment by operation of law, although he refuses in terms to accept it. The taking possession and repairing is an acceptance, notwithstanding the actual intention or the declaration to the contrary. This decision of the circuit court I adopt as binding on this court.

In the state courts of Massachusetts the doctrine is that the underwriter may, after an abandonment, refuse to accept it, and take possession of the vessel and repair her, and if the loss is proved to have been less than fifty per cent. may return her to the former owner within a reasonable time. This doctrine is peculiar to Massachusetts. I believe it is not to be found anywhere else, either in the decisions of the federal courts, or in the state courts of any other state, or in the law of England, or of the continent of Europe. But the other principle is the law of the courts of the United States, and of the other states of the Union.

The great controversy in this case, therefore, is whether there was an abandonment.

§ 853. *Master, as such, has no authority to abandon.*

I am of opinion that the master, as master, has no authority to abandon the vessel. There must be a legal authority to transfer the property to the underwriters. It is urged that the acts of the insured are a waiver of the defects in the abandonment. The underwriter may waive informalities, and may waive his right to anything which he is entitled to have. For instance, he may waive a notice of the nature of the loss, or may waive an objection to want of reasonable time; and if he does acts which are justifiable only under an abandonment, he waives all such objections to its sufficiency. But here it is not the insurer's right, but the owner's right, that the person who makes the abandonment shall have authority to do so. The underwriters cannot waive the owner's right and get property in the vessel without the owner's consent.

§ 854. *Owner may ratify act of master.*

But an act by an agent may be subsequently ratified and confirmed by the principal. Has there been such a ratification here? There is no doubt that there has been an assent, at some time, as a demand for a total loss was made prior to the commencement of the suit. An abandonment must be in a reasonable time. This is a material right possessed by the underwriter. Must the ratification be governed by the same rule, as to time, with the original abandonment? The ordinary rule of the law of agency is that a ratification may be made at any time. But is there not something peculiar in the case of an abandonment?

§ 855. *Ratification must take place within reasonable time.*

The reason why an abandonment is justified and held good in a case not actually one of total loss is that the underwriter may take the vessel and use her to the best advantage. Therefore, the insured should give the underwriter, at the earliest reasonable time, all the benefits in his power. Until a valid abandonment is made, the underwriter can exercise no act of ownership upon the vessel. Consequently, as the owner may ratify or not, at his pleasure, the act of the master, the question remains undecided in the interval; and if the owner shall refuse to ratify the abandonment the acts of ownership exercised by the underwriter would be illegal. It is clear, therefore, that the ratification by the owner must be within such reasonable time as to give the underwriter the opportunity to decide early, whether to accept or not, and, if he does accept, the opportunity to make the best use he can of the wreck. The same reason which requires the abandonment to be made seasonably requires the ratification of the act of assumed agency to be made seasonably. The owner is not obliged to abandon on mere rumor. He may wait a reasonable time to ascertain the actual state of things respecting the disaster. But he is not to wait in order to ascertain what his interests may be, in the state of the market, or as developed by subsequent events.

Was the ratification in this case made within a reasonable time? If we confine ourselves to the direct evidence, it has not been shown when the libellant first knew of the loss and of the act of Howard. He does not appear in the case, until the letter of the respondents to him, tendering him back his vessel. His reply to this letter by his proctor shows that he had claimed a total loss and relied upon the abandonment. On the direct evidence, therefore, there is no proof of unreasonable delay. But the proper course of inquiry includes also the circumstantial proof.

It appears that, before the master's dispatch, the news of the disaster had been communicated to the respondents by Mr. Tarr. They replied to him,

authorizing him to get the vessel off if possible, at their expense. They also authorized Capt. Howard to strip the vessel and store the rigging and outfits, and to sell in a certain contingency. No act was done in consequence of these dispatches, but this was not by reason of an invalidity in the abandonment. Late in October, Capt. Howard returned, and Capt. Reed and others returned, who had been at the place. Full inquiries were made of all these parties, and the respondents, as far as they thought it expedient, made their contract with Reed and others to get off the vessel. She was got off and brought to Gloucester in February. She was then repaired and tendered to the former owners in March. The respondents do not complain that they were delayed at all in their action. On the contrary, they say that the vessel was got off, repaired, and returned, within a reasonable time. There is nothing to indicate that they have not had all the advantages they could have had if the abandonment by Howard had been authorized.

§ 856. *Ratification need not be direct, but may be presumptive.*

This series of acts by the underwriters shows that they treated the abandonment as valid. By the contract of insurance, the underwriter gets no property in the vessel, and no right of possession. It is a mere contract of pecuniary indemnification. He cannot interfere and take control of the vessel to prevent a loss, or to change the character of a loss. His right to possession and control is derived solely from the abandonment. The owner keeps control of the vessel and of the wreck, until he chooses to abandon it to the insurer, and he need not abandon in any case, unless he chooses to change the property in the remnants into money. Even under the doctrine of the supreme court of Massachusetts, the insurer cannot take possession and repair before there has been an abandonment. No case has gone the length to assert such a right. One reason given by the Massachusetts court for their rule is that the insurer may show by the repairs that the loss, alleged to be over fifty per cent., was in fact less than that amount. This assumes that the owner has abandoned. The acts of the respondents in this case can, under neither rule, be reconciled with any other view than that they considered the vessel legally abandoned to them; and it seems that they had all the advantages of a valid abandonment. When both the insured and insurers have treated the abandonment as valid, an objection by the insurers to its original validity becomes little else than a formal objection.

I will now look at the acts of the owners to see if they did not, in fact, make a seasonable notification. The owners and underwriters, the master and most of the crew, and Mr. Tarr and Capt. Reed, all reside in Gloucester. It is not a very large place, and it is quite improbable that the owners did not know of the facts as they occurred. The vessel was brought to Gloucester, kept in the possession of the respondents some six weeks, undergoing such repairs as the respondents thought proper. The owners did not interfere or object to any of these acts. The course of conduct on both sides can only be reconciled with one hypothesis, and that is that each understood that the vessel was abandoned and a total loss claimed, and that the only question was whether the facts were such as to justify it. After such an acquiescence, the owners would not be permitted to deny the authority of Howard, and treat the insurers as trespassers.

Since the decision of *Peele v. Merchants' Ins. Co.*, a clause has been introduced into the Boston policies and is found in this policy, in the following words: "The acts of the insured or insurers in recovering, saving and preserv-

ing the property insured, in case of disaster, shall not be considered as a waiver or acceptance of an abandonment." The respondents have referred to this clause as justifying their acts. But the object of this clause is to enable either party, after an abandonment, to labor in rescuing and preserving property, without fear of the effect of their acts as evidence of an acceptance or waiver. The clause supposes an abandonment. The acts of the underwriters in getting off the vessel and bringing her to Gloucester, including temporary repairs for that purpose, might be protected by that clause of the policy. But they went much further. Having brought the vessel to the home port, they kept possession of her for six weeks, and made repairs of a permanent character, confessedly for the purpose of tendering her back to the owners as a fully repaired vessel. These acts are not protected by the clause. Such seems to have been the view of this clause taken by the supreme court of Massachusetts.

It is argued that the implied authority given to Capt. Howard to sell was only for the purpose of obviating the effect of a restriction specially introduced into this policy, in these words,—“In case of loss in the bay of St. Lawrence, no sale of the vessel to be made on their (insurers’) account,” and to leave the master to act as by the common maritime law. But the restriction is not on his right to sell as master, on the owner’s account, but upon sales on the insurers’ account, after abandonment. A release from that clause authorizes a sale on the insurers’ account, and implies an abandonment. Moreover, the dispatch is not confined to authorizing a sale. It gives orders in answer to his request for orders, as to what shall be done with the vessel and her outfits, in case she is not sold.

§ 857. *Subsequent events justifying abandonment.*

There is another view that may be taken of this matter of the abandonment. Subsequent events, after an invalid abandonment, may justify a new one; as condemnation after capture, or new events altering the nature of the original loss. Now, I am by no means certain that if there had been no valid abandonment before the insurers got off the vessel and brought her to Gloucester, their subsequent acts, which amounted to a conversion of the vessel to their own use, would not have justified a new original abandonment. The offer to return the vessel is accompanied by a claim upon the owner for the payment of a sum of money to be afterwards ascertained. The letter of the libellant’s proctor treats this as a conditional offer. He desires to know what the amount is, which his clients are required to pay, saying that if it is not too large, and that if the vessel is found sufficiently repaired, they may, waiving no right, be willing to accept the vessel, as a compromise. The reply of the respondents does not waive this demand.

I am of opinion that there has been a sufficient abandonment, treating Capt. Howard only as master. On this abandonment, the acts of the respondents are, in law, an acceptance. It is not, therefore, necessary to go into the other questions which have been opened.

On the point of jurisdiction, I consider the jurisdiction of the admiralty over policies of insurance to be the settled law and practice of this circuit. Decree for the libellant, for a total loss.

[This point of jurisdiction affirmed on special argument. The point settled as above decided in *Insurance Co. v. Dunham*, 11 Wall., 1.]

Opinion by CURTIS, J. (After considering a question of practice in regard to appeals.)

On examining the opinion of the judge of the district court it appears he has found: 1. An offer by the master to abandon the interest of the assured in the vessel, seasonably ratified by the assured. 2. That the insurers took possession of the vessel for the purpose of repairing and restoring it to the insured, and in the execution of that intention brought the vessel to the home port and there made repairs rendered necessary, by perils within the policy.

§ 858. *Acceptance of an offer of abandonment may be indirect.*

The fact that an offer of abandonment was seasonably made, by the ratified act of the master being found, the principal question is, whether this offer of an abandonment was accepted by the insurers. There can be no doubt, that, if what was done by them was in the exercise of rights derivable only from an accepted offer of abandonment, their acts are conclusive evidence of such acceptance. *Peele v. Mer. Ins. Co.*, 3 Mason, 27; *Badger v. Ocean Ins. Co.*, 23 Pick., 355; *Griswold v. New York Ins. Co.*, 1 John., 205; S. C., 3 John., 321; *Mar. and P. Ins. Co. v. Bathurst*, 5 Gill & John., 235. Upon the same principle the supreme court held that an offer of abandonment would be waived by an assertion of ownership inconsistent therewith. *Chesapeake Ins. Co. v. Stark*, 6 Cr., 272; *Col. Ins. Co. v. Ashby*, 4 Pet., 144 (§§ 864-67, *infra*). Nor is there any doubt that this court decided, in *Peele v. Mer. Ins. Co.*, that if the insurer take and retain possession of the vessel for the purpose of repairing it, he does thereby accept an offer of abandonment.

§ 859. *Local law not to govern.*

But the insurers insist that the contract in question was made, and was to be executed, in the state of Massachusetts; and that by nature of the law of that state, the insurers had, under this policy, a right to take possession of the vessel when an offer of abandonment was made, and seasonably repair and restore it to the insured, and thus perform their contract.

It must be admitted that the law of the place of this contract determines the rights which the insurers have, upon an offer to abandon; and also that the supreme court of Massachusetts have held that the insurer has the right which is here insisted on. But this court held in *Peele v. Merchants' Ins. Co.* that the insurer had no such right; and this being a question, not of mere local municipal law, but arising under the law merchant, though this court must consider with unaffected respect the decisions of that court on this question, yet they are not binding on our judgments, and we have no right to conform to them, when we believe they do not announce the true rule.

This is the settled doctrine of the supreme court of the United States, and has been frequently applied in this court. *Swift v. Tyson*, 16 Pet., 1 (BILLS AND NOTES, §§ 382-86); *Carpenter v. Prov. W. Ins. Co.*, 16 Pet., 495 (§§ 1362-73, *infra*); *Foxcroft v. Mallett*, 4 How., 379; *Williams v. Suffolk Ins. Co.*, 3 Sumn., 277. Being satisfied of the correctness of the decision of this court in *Peele v. Mer. Ins. Co.*, and of its conformity with sound principles, I cannot overrule it because the highest court of the state has, subsequent to that decision, taken a different view of the rights of insurers. The laws of the place of the contract being the general law merchant, I am bound to declare that in my opinion it did not confer on the underwriter the right claimed, to take possession on an offer of abandonment, and repair and restore the vessel, and thus perform his contract.

§ 860. *Decisions as evidence of usage.*

It has been argued that these decisions of the supreme court of Massachusetts are evidence of a local usage by which this contract should be governed. A judicial decision, founded on a local usage, may be evidence of its existence at the time the decision was made. *Cookendorfer v. Preston*, 4 How., 326 (BILLS AND NOTES, §§ 998-1000). But the supreme court of Massachusetts have not rested their decisions upon any local usage, but upon their understanding of the principles of mercantile law.

§ 861. *No presumption of usage growing out of local law.*

It is also urged that we may fairly presume that a practice in conformity with these decisions has grown up, amounting to a local usage. If this argument were so far sound as to determine this case, it would preclude all inquiry in every case as to the correctness of any decision respecting any contract where time enough had elapsed since it was made to have a practice in conformity with it obtain. No doubt it is a strong argument against overruling a decision, that it has been practiced on, and rights acquired in conformity with it. But this is a practical view only; and I have never understood that there was also a theoretical objection, quite conclusive, if well founded, that the decision proved a local usage, which, though not in pursuance of a rule of law, bound the parties.

I do not think any such effect can be allowed to a decision which professes to declare a rule of commercial law. It must stand or fall upon its reasoning and its authority, not upon the strength of a local usage supposed to have grown up under it. And especially must this be so, where, as in this case, there is no presumption that there has been any other practice than to conform to the law of the land on the subject, and the very question is what that law allows.

§ 862. *"Right to recover, save and preserve" refers to temporary needs.*

Nor do I think the clause giving to each party the right to act in recovering, saving and preserving the property insured, confers on the insurer the right here claimed. It seems to me to have no reference to any other repairs than such as may be needful for the temporary preservation of the property, and its relief from perils within the policy. And such I understand to have been the view taken of it in *Reynolds v. Ocean Ins. Co.*, 1 Met., 160.

§ 863. *Case not brought within Massachusetts rule.*

I am also strongly inclined to the opinion that the respondents do not bring the case within the rule held by the supreme court of Massachusetts. For they did not tender the vessel to the insurer, except upon condition of his paying a part of the expense of the repairs. As I understand that rule, the insurer has not the right to prescribe this condition; but I would not be understood to speak with confidence concerning it. Considerable embarrassment in the application of the rule would seem to exist in a case like the present, where a part owner obtains separate insurance. But I do not rest the decree on this ground, and therefore do not pursue the inquiry. Decree of the district court affirmed.

COLUMBIAN INSURANCE COMPANY v. ASHBY.

(4 Peters, 139-146. 1830.)

Opinion by MR. JUSTICE THOMPSON.

STATEMENT OF FACTS.—This case comes up on a writ of error to the circuit court of the District of Columbia, for the county of Alexandria. It is an ac-

tion upon a policy of insurance, bearing date the 28th of May, 1825, on the brig Hope, on a voyage from Alexandria to Barbadoes, and back to a port in the United States. The vessel is valued at \$3,000, and the sum insured is \$1,000.

The loss as alleged in the declaration is that the vessel, whilst proceeding on her voyage and before her arrival at Barbadoes, was by storm and peril of the sea sunk and wholly lost to the plaintiffs. The whole evidence is spread out upon the record; and upon which the defendants' counsel prayed the court to instruct the jury that it was competent for them to infer, and that they ought to infer, from the evidence that the plaintiffs had revoked the abandonment which they had made to the defendants; which instruction the court refused to give, and a bill of exceptions was duly taken to such refusal. And whether the court erred in refusing to give the instruction prayed is the only question in the case.

From the evidence it appears that Captain Brown, the master of the vessel, put into Hampton Roads for the purpose of making a harbor and securing his vessel from an approaching storm, which, from the appearance of the weather, threatened to be very severe. And on the 5th of June, by the violence of the storm, the brig was driven on shore, above high-water mark, near Crany Island. On the next day a survey was held upon her, and the surveyors, after examining her situation and the injury she had received, recommended her to be sold for the benefit of all concerned. And on the 14th of June, Stribling, one of the owners, being at Norfolk, sent a letter of abandonment to the defendants, which was received by them on the 17th of June. There was no pretense but that the injury which the vessel had sustained justified the abandonment. But the question was, whether such abandonment had not been revoked; and the circumstances relied upon to show such revocation were that James Sanderson, the secretary of the Columbian Insurance Company, arrived at Norfolk on the evening of the 16th of June, being before the letter of abandonment was received by the defendants, and on the same evening offered to Stribling, one of the plaintiffs, to supply the money necessary to get the vessel off. And two days afterwards he made the same offer to James D. Thorborn, the agent of the plaintiffs, stating that he had come to Norfolk at the request of the defendants, and to take such measures as he might think advisable for their interest, and to give every aid to the owners of the brig; and he forbid Thorborn and Stribling from proceeding in the sale, which was then about to take place, according to an advertisement which had been previously published in the Norfolk papers. But Stribling, on consultation with Thorborn, directed the sale to be continued. The refusal of Stribling to accept the offer of Sanderson to supply the money necessary to get the vessel off, and proceeding in the sale after being forbid by Sanderson, are the acts alleged to have constituted a revocation of the abandonment.

§ 864. *Jury should not have been instructed to find revocation of abandonment,—a question of intention.*

The instruction prayed for to the jury ought not, in its full extent, to have been given unless the evidence was such as, in judgment of law, amounted to a revocation of the abandonment. If the court had only been requested to instruct the jury that they might from the evidence infer a revocation, the prayer would not have been so objectionable. But a positive direction that they ought to infer such revocation would have been going beyond what

could have been required of the court under the evidence in the cause. There can be no doubt but that the revocation of an abandonment before accepted by the underwriters may be inferred from the conduct of the assured, if his acts and interference with the use and management of the subject insured be such as satisfactorily to show that he intended to act as owner, and not for the benefit of the underwriters. But this is always a question of intention, to be collected from the circumstances of the case, and belongs to the jury as matter of fact, and is not to be decided by the court as matter of law. We do not, however, in the present case, see any evidence which would have fairly warranted the jury in finding that the abandonment had been revoked. The injury was such as to occasion almost an actual total loss of the vessel; and there could have been no possible inducement for the assured to revoke the abandonment.

§ 865. *Assured becomes agent of underwriter after abandonment.*

There is no evidence to justify the conclusion that Stribling was acting for his own benefit, and not for that of the underwriters. The assured, by operation of law, became, after the abandonment, the agent of the underwriters, and was bound to use his utmost endeavors to rescue from destruction as much of the property as he could, so as to lighten the burden which was to fall on the underwriters. The assured had received no information from the underwriters whether they accepted or refused the abandonment. Nor did Sanderson, who professed to act as their agent, communicate any information to Stribling on that subject; and it would seem from the testimony of Thorborn that the conduct of Sanderson was calculated to cast some suspicion upon his motives. He says, "he then thought, and still thinks, the course pursued by him must have been designed to perplex and embarrass the persons who were engaged in the management of the affairs of the vessel; since his letter was not delivered until the sale had commenced, and no authority was shown by him from the defendants to make arrangements for getting the vessel off, or to defray the expense that had already been incurred on her account." Although Stribling knew Sanderson as secretary of the Columbian Insurance Company, he could not thereby know that he was clothed with authority to bind the company by whatever arrangement he should make. His authority as secretary did not clothe him with any such power. It is true Stribling did not demand of him to show his authority from the company, and this might be considered as open to the conclusion that such authority was admitted; but all this was matter for the consideration of the jury, and the court could not assume that he was or was not authorized to bind the underwriters.

In the case of *The Chesapeake Ins. Co. v. Stark*, 6 Cranch, 272, this court lays down the general rule, that if an abandonment be legally made it puts the underwriter completely in the place of the assured, and the agent of the latter becomes the agent of the former; and that the acts of the agent, interfering with the subject insured, will not affect the abandonment. But the court takes a distinction between the acts of an agent and the acts of the assured; that in the latter case, any acts of ownership by the owner himself might be construed into a relinquishment of an abandonment, which had not been accepted.

The court in that case did not say, and we think did not mean to be understood as intimating, that every such act of ownership must necessarily, and under all possible circumstances, be construed into a relinquishment of an

abandonment. The practical operation of so broad a rule would be extremely injurious. It would deter owners from interfering at all for the preservation of the subject insured, and leave it to perish, for fear of prejudicing their rights under the abandonment. All such acts must be judged of from the circumstances of each case. The *quo animo* is the criterion by which they are to be tested.

§ 866. *Sale by owner after abandonment not per se a revocation of that act.*

If, in this case, Stribling, the owner, had become the purchaser of the brig, and had got her off and fitted her up, it would have afforded very strong, if not conclusive, evidence of a relinquishment of the abandonment. But such was not the fact; and whatever he did appears to have been done in good faith and with a view to the preservation of the property. But this case is very distinguishable from that of *Chesapeake Ins. Co. v. Stark*. There, the underwriters had refused to accept the abandonment, and the court applied the rule to that case. In such a case the assured is at liberty to revoke the abandonment. But here the owner did not know whether the underwriters would refuse or accept the abandonment. No answer had been received to the letter of abandonment, and the assured was left in uncertainty as to his right of revocation. We think, therefore, that there was no act of ownership exercised by Stribling, which the law would pronounce a revocation of the abandonment, or which called upon the court below to instruct the jury that they ought to infer a revocation from any such acts.

§ 867. *Refusal by owner, after abandonment, to accept offer of agent of underwriter to furnish money to relieve ship, not per se a revocation of abandonment.*

The other circumstance relied upon is, that Sanderson, who professed to act as the agent of the underwriters, offered to supply the money necessary to get the vessel off, and put her in a situation to pursue the voyage.

What effect this offer would have had upon the right of the assured to abandon, until the experiment to get off the vessel had been tried, provided such offer had been unconditional and made before the abandonment, either by the underwriters themselves, or by an agent fully authorized for that purpose, is a question upon which we give no opinion; the case does not require it. The authorities on this point do not appear to be in perfect harmony. 6 Mass., 484; 5 Serg. & Rawle, 509; 3 Mason, 27; 2 Term Rep., 407; 2 Wash. C. C. Rep., 347.

The present case, however, is not accompanied with these circumstances. The abandonment here had actually been made, before the offer to pay the expenses of getting off the vessel, and no answer from the underwriters had been received; nor did Sanderson undertake to decide that question for them. Although he professed to act as the agent of the underwriters, he showed no authority for that purpose, and one of the witnesses swears that he thought the course pursued by him was designed to perplex the proceedings in relation to the vessel; and his letter to Thorborn, making the offer of the money, has this condition: "I reserve to the company all right of defense, in case they should not be liable for any part of the expenses attending the business."

Under such circumstances, it is very clear the assured could not be required to waive an abandonment, which, from anything that he knew, might, at that time, have been accepted; in a case, too, where there was a clear and undeniable right to abandon. The court below did not, therefore, err in refusing to instruct the jury that they ought to infer from the evidence that the abandonment had been revoked. The judgment must be affirmed.

2. Of Cargo.

SUMMARY—*Capture*, § 868.—*Election to abandon*, § 869.—*Proceeds and profits*, §§ 870, 871.—*What constitutes total loss*, §§ 872-876.—*Half value*, §§ 877-879.—*Destruction in specie*, §§ 880-882.—*Deterioration*, § 883.

§ 868. In an action upon two marine policies, one valued on the vessel, the other open on the cargo, on a voyage from New York to Gibraltar, it appeared that the vessel was captured and carried into Algeiras. There, though the cargo was not condemned, the vessel was not permitted to sail with it unless security should be given that it would not be carried to a British port in the Mediterranean. The cargo was accordingly sold, and the vessel, which had not been detained with a view to condemnation, sailed for New York with cargo on freight and was lost. *Held*, abandonment of cargo proper. *Held*, also, that refusal to give a deed of cession of the cargo to the underwriters unless they would accept abandonment of the vessel insured in another policy did not vacate the abandonment of the cargo. *Held*, also, that there could be no abandonment of the vessel. *Hurtin v. Phoenix Ins. Co.*, §§ 884-90.

§ 869. The assured must, within reasonable time after notice of loss, make his election to abandon, and give notice. *Ibid*.

§ 870. In cases of abandonment, the underwriters are entitled to all proceeds of the thing abandoned, and to all profits arising from investment thereof. *Ibid*.

§ 871. The expenses incurred at Algeiras are subjects of general average; but her repairs are chargeable to the vessel, the cargo having been previously landed. *Ibid*.

§ 872. A policy on corn, *inter alia*, on the Betsey, from Cape Henry to Lisbon, contained the usual memorandum clause exempting the underwriter from liability except for total loss of the articles named, corn among them. The Betsey was driven ashore near Lisbon. The agent of the assured unladed as much of the corn as could be saved, and nearly half was landed, dried, sent to Lisbon, and sold at about a quarter the price of sound corn, leaving a sum for the owner after payment of expenses. *Held*, not a total loss. (Affirming S. C., * 8 Wash., 256.) *Morean v. United States Ins. Co.*, §§ 891-92.

§ 873. There cannot be a total loss of part of a cargo consisting of memorandum articles of only one species, such as hides. Nor are the underwriters liable for salvage upon such articles under the clause which authorizes the assured to labor and travel for the preservation of the cargo, unless perhaps in a case where the salvage may have prevented an actually total loss of the cargo. *Biays v. Chesapeake Ins. Co.*, §§ 893-94.

§ 874. Potatoes are perishable articles within the memorandum clause. *Robinson v. Commonwealth Ins. Co.*, §§ 895-97.

§ 875. Where insurance is made by the memorandum clause upon a perishable cargo there can be no recovery unless there is a complete loss of the same. *Ibid*.

§ 876. It is a total loss where, by reason of the perils insured against, the cargo is permanently prevented from arriving at the port of destination. *Ibid*.

§ 877. If a vessel is injured to half her value, and no other can be found to carry forward the cargo within reasonable time and before the cargo, being perishable, will be destroyed by the delay to repair, the assured may abandon and recover for total loss. *Ibid*.

§ 878. With regard to the half value, the rule is that the vessel, after she has been repaired, shall be of double the value of the cost of repairs, without deduction of one-third new for old. The deduction of one-third new for old is solely applicable to cases of partial loss, where the owner has come again into possession of the vessel, and has received the benefit of the repairs. *Ibid*.

§ 879. A clause in the policy that "the insured shall not have the right to abandon the vessel for the amount of damage merely, unless the amount which the insured would be liable to pay under an adjustment for a partial loss shall exceed half the amount insured," is applicable only to insurance on the ship. *Ibid*.

§ 880. To constitute a total loss of memorandum articles by destruction there must be a destruction of them in specie. If the goods have not lost their original character, but remain in specie, and in that condition are capable of being shipped to the destined port, there is not a total loss, whatever may be the extent of the damage. *Hugg v. Augusta Ins. Co.*, §§ 898-907.

§ 881. In the case of memorandum articles in a perishing condition, lying in an injured vessel at an intermediate port, *held*, that if the repairs upon the vessel, or the procurement of another vessel, would necessarily produce such delay as would in all probability occasion a destruction of the articles in specie before they could arrive at the port of destination, or from their damaged condition could not be reshipped in time consistently with the health of the crew or safety of the vessel, or would not be in a fit condition, from pestilential effluvia, or otherwise, to be carried on, the master should sell the goods, and the underwriter will be liable. *Ibid*.

§ 882. It is not necessary to constitute a total loss of goods insured by a marine policy that there should be an actual destruction of all of them in specie. *Insurance Co. v. Fogarty*, §§ 908, 909.

§ 883. Where a technically total loss is sought to be maintained upon the mere ground of deterioration of the cargo at an intermediate port, to half its value, all deterioration of memorandum articles must be excluded from the estimate. Hence in a cargo of mixed character no abandonment for mere deterioration during the voyage can be valid unless the damage to the non-memorandum articles exceed half the value of the whole cargo, including the memorandum articles. *Marcadier v. Chesapeake Ins. Co.*, §§ 910-13.

[NOTES.—See §§ 914-971.]

HURTIN v. PHOENIX INSURANCE COMPANY.

(Circuit Court for Pennsylvania: 1 Washington, 400-408. 1806.)

STATEMENT OF FACTS.—Action on two policies; one on the *Monongahela Farmer*, and the other on her cargo, from New York to Gibraltar; the former a valued, and the latter an open policy. The vessel sailed on the voyage insured, and was seized by two Spanish privateers in the Gut of Gibraltar, and carried into Algeiras, where attempts were made to condemn her cargo, but without success; the cargo consisting of articles in general contraband of war, but within the exceptions of the treaty between Spain and the United States. The government consented that the captain should depart upon his giving security not to carry the cargo to any British port in the Mediterranean. The supercargo, under these circumstances, considering it most for the advantage of all concerned to dispose of it at Algeiras, procured this to be done, under an order from a judge; and the sales amounted to about half the sum insured on it. The detention produced by this step kept the vessel at the port of Algeiras from about the 13th of May till the 17th of July; during which time the supercargo, by means of a credit which the plaintiff had given him, on certain merchants there, purchased a brig and cargo and sent her to the United States. About the 17th July he went with the *Monongahela Farmer* to Malaga, where he took in a cargo of wines, on freight to New York, but she was lost returning to the United States. On or before the 30th July, in the same year (1805) the plaintiff received notice of the capture, in two letters from the supercargo, of the 21st May and 11th June, which stated that he had been cleared on condition of not going to any British port in the Mediterranean, advising him to abandon the cargo, and that the vessel would return with a cargo of Malaga wine, on freight, and advising him to insure her. On the 30th July the plaintiff wrote to Macky, his agent, in Philadelphia, to abandon the vessel and cargo. Macky, after perusing the letters from the supercargo, advised him not to abandon the vessel, as he would thereby lose the freight she would earn from Malaga. The plaintiff, in answer to this letter, on the 3d August desires him to abandon the cargo, observing that if he should do so as to the vessel, he should lose the freight. On the 5th the agent went to the office and gave in a written abandonment of the cargo, and showed the two letters from the supercargo to the plaintiff. The president inquired if he did not mean to abandon the vessel, to which he answered that he had no orders to do so. The abandonment was accepted in writing, and the president agreed to pay the loss, but required that the plaintiff should send on a regular *cession*, proofs of property, and a full disclosure of all circumstances respecting the loss, and respecting the vessel and cargo on the voyage. This answer was immediately communicated to the plaintiff, who, having now determined to abandon the vessel also, wrote on the 6th to his agent to do so,

and agreeing to send on a cession of the cargo, as demanded by the company, provided they would agree to accept the abandonment of the vessel also. The company refused the abandonment of the vessel, and, considering the refusal of the plaintiff to make a cession as a waiver of his abandonment of the cargo, they declared themselves exonerated from their former acceptance of it, and refused to pay the loss on the vessel or the cargo.

§ 884. *If usual to carry bills of lading, no need of mentioning them to underwriters; if not usual, jury must find as to materiality of non-disclosure.*

Charge by WASHINGTON, J.

The first objection, if well founded, goes to the destruction of both policies; but it appears that as it is usual to carry general bills of lading, if you should be satisfied of this, then the assured was not bound to mention the circumstance. It would rather seem that the risk was lessened, than increased, by having a general bill of lading. But if it is unusual to carry such bills, you are the proper judges whether the not disclosing the circumstance was material to the risk. The important question is whether the plaintiff can recover as for a total loss on the vessel and cargo, or either; and, in considering each case, it will be proper to inquire, first, whether the plaintiff had a right to abandon; and, secondly, whether the abandonment was made in a proper manner and was effectual.

§ 885. *What is a complete destruction of voyage.*

As to the cargo. 1st. Had the plaintiff a right to abandon? The cargo was destined for Gibraltar, but was captured and carried into Algeiras, from whence it could not be removed without security being given not to carry it to a British port. This amounted to a complete destruction of the original voyage; and it appears that the supercargo, who upon the spot must have been the best judge what it was most prudent to do, considered it most for the benefit of the parties concerned to sell it there under the sanction of the government. It does not appear that he could have done better had he gone elsewhere; but even if he could, he was not at liberty to leave the port without giving security not to carry the cargo to a British port. He was the agent of the assured; and I admit that as such he could not without necessity convert a loss but partial in its nature into a total loss. But here the voyage was broken up; it could not be further prosecuted; and if he acted for the best for all concerned, of which you are the judges, then the loss became total and the plaintiff had a right to abandon.

§ 886. *Assured entitled to a reasonable time to decide whether he will abandon.*

2d. It is true that as soon as the assured receives notice of the loss he must make his election to abandon or not; and in the former case, he must within a reasonable time give notice of his intention. What is a reasonable time must always depend upon circumstances to be judged by a jury. If he waits a reasonable time to obtain advice, whether he may legally abandon or not, the delay being in all respects fair and *bona fide*, it might well enter into the consideration of the question whether his determination was communicated in due time. There may be other circumstances. But if he waits with a view to place the loss on the underwriter, as events might turn up to render it prudent or otherwise, although he at last determines, before he has received any further information on the subject, the delay would be less excusable.

§ 887. *Refusal to make cession does not vacate abandonment.*

Now, in this case, the plaintiff made an absolute abandonment of the cargo

within five days after he appears to have received notice of the loss, which was accepted. It is said, however, that his refusing to make a cession, except upon terms with which the insurers were not bound to comply, amounted to a waiver of the abandonment. If a cession, as it is called, had been necessary to make the abandonment complete, there might be something in the argument. But this is not the case. The abandonment amounts to a legal transfer of the right of the insured, so as to enable the underwriters to pursue, to manage and to recover the property as effectually as if a regular deed had been made to them. It is said to be the uniform practice in Philadelphia for the insured to make a formal conveyance. This may be so; because, I presume, it is never objected to. But when it comes to be made a question whether the abandonment is invalid, if the cession is refused, we must say it is not; because such an instrument is not necessary to pass the right of the insured to the underwriters. The refusal, therefore, of the plaintiff to execute such an instrument did not affect the prior abandonment, which had been made and accepted. It appears that he was ready to send forward all such papers as might be required to prove the property. Upon the policy on the cargo, therefore, the plaintiff has a right to recover for a total loss.

§ 888. *Assured not having abandoned the vessel when he abandoned the cargo loses his right to abandon her thereafter.*

Next, as to the vessel. First. Had the plaintiff a right to abandon? It is true the vessel was detained for a short time with a view to condemnation; but soon after the captain was at liberty to go where he pleased with her, but he could not take the cargo with him without giving security not to carry it into a British port in the Mediterranean. If the captain had landed his cargo immediately, there was nothing to prevent the departure of the vessel, which was in perfect safety, free from injury by any of the perils insured against, except a temporary interruption. It is said that the voyage was broken up. As to the cargo, it was; and therefore the underwriters, on that and on the freight, are answerable; but this is nothing to the underwriters on the vessel. Suppose she had been met with at sea by pirates and plundered of all her cargo and then dismissed; would the underwriters on the vessel be answerable, because *the object of the voyage* was put an end to? Certainly not. But it is contended that she was detained for two months at Algeiras, as is proved by the depositions of the supercargo and mate. The conclusive answer is, that the same letters which informed the plaintiff of the loss informed him also that the vessel was clear and would proceed to Malaga, to bring home a cargo of wine; and the supercargo, to prove his idea of her safety, desired the plaintiff to abandon only the cargo. Knowing, therefore, that the danger was over, at the same time that he knew of the capture, it was not competent to the plaintiff to abandon. But if these letters had informed the plaintiff that the vessel was still detained; so as to authorize an abandonment, the plaintiff is not entitled to recover as for a total loss on her; because, secondly, the abandonment was not made in proper time and in a proper manner.

§ 889. *Election not to abandon, final.*

As soon as the insured hears of the loss he should make his election and communicate to the underwriters his determination to abandon, if he chooses it. But if he makes his election not to abandon, and particularly if he communicate this determination to the underwriters, he cannot afterwards change his mind and say he will abandon, and thus throw the whole loss on the underwriters. And here is the difference between the vessel and the cargo in the

present instance. In the latter case he made his election promptly to abandon, and it was accepted. In the former, he first determined to abandon all; but adopting the advice of his agent, he directed him to abandon only the cargo; assigning the very reason which should prevent him from afterwards changing his mind, namely, that he should by giving up the vessel, lose the freight which the letter from the supercargo induced him to accept. This letter confining the abandonment to the cargo was shown to the defendants on the 5th, at the time the abandonment of the cargo was accepted. The plaintiff knew that he had barred himself of a right to abandon the vessel by stipulating afterwards the acceptance of it as the condition of his making a formal cession of the cargo. The plaintiff, therefore, cannot recover on the vessel more than for any partial loss which he may prove.

§ 890. *In case of abandonment, underwriter entitled to all profits accruing from the thing abandoned, and from actual investments of proceeds.*

5th point. The argument that the underwriter, in case of abandonment, is entitled to the proceeds of the thing abandoned, and if they be invested by the agents of the insured in other articles which produce a profit, to those profits also, is well founded, but does not fit this case. It is clearly proved and was at first admitted that the brig and her cargo, purchased by the supercargo at Algeiras, was paid for by bills drawn on the plaintiff, and by money received on letters of credit; the defendants at first supposed and insisted that this brig and her cargo should be accounted for. But it would seem that they were afterwards satisfied upon this subject.

6th. It is contended that the money for which the cargo was sold is stated to have been laid out in the repairs and expenses of the vessel at Algeiras, which could not legally be done; and, therefore, that sum at least must be considered as invested in the purchase of the brig and cargo, to the proceeds of which the defendants are entitled. Whether the cargo could or could not be charged with the repairs and expenses, it is a sufficient answer to this claim that they were in fact appropriated to the making of these repairs, and, therefore, could not also have been invested in the purchase. It is not enough to sanction the claim to say that they might have been so invested; it cannot be supported unless it appear that in reality they were so invested, for the benefit of the insured, or for the concerned.

It, however, becomes a necessary question, what part of the proceeds of the cargo sold at Algeiras is to go to the credit of the defendants. It appears by the account that the expenses incurred during the detention at Algeiras amounted to between four and five hundred dollars, and that the repairs of the vessel exceeded the sales of the cargo. As to the former, that may properly be a subject of general average; but as to the latter, they are certainly not chargeable against the cargo, either *in toto*, or as general average; since, being landed at Algeiras, it was to receive no benefit from the future repairs of the vessel. They may be charged to the ship, if they were rendered necessary from any of the risks mentioned in the policy; and as the defendants are underwriters on both ship and cargo, it will come to the same thing.

MOREAN v. UNITED STATES INSURANCE COMPANY.

(1 Wheaton, 319-331. 1816.)

ERROR to U. S. Circuit Court, District of Pennsylvania.

Opinion by MR. JUSTICE WASHINGTON.

STATEMENT OF FACTS.— This was an action commenced by the plaintiff in error upon a policy of insurance, dated the 14th of December, 1812, on goods on board the brig Betsey, at and from Cape Henry to Lisbon, at a premium of six per cent., on which \$5,000 were underwritten by the defendants, and valued at that sum, declared to be against all risks, except British capture, warranted American property. The jury found a verdict for the plaintiff, subject to the opinion of the court, upon the following facts agreed by the parties: The cargo consisted of four thousand four hundred and six bushels of Indian corn, one hundred barrels of navy bread, and twenty barrels of corn meal. The brig sailed from Baltimore on the 11th of November, 1812, and from Cape Henry on the 13th of the same month. She experienced on her voyage many and severe gales of wind. On the 18th of December she passed the rock of Lisbon and came to anchor about four miles below Belem Castle. She leaked considerably, in consequence of the injury she had sustained from the severe gales to which she had been exposed. After passing the rock the wind died away, and the current being adverse she came to anchor. The master and supercargo landed, went through the customary forms at Belem to obtain a permit to pass the castle, and then proceeded to Lisbon. The health boat visited the brig, and ordered her to get above the castle as soon as possible. On the 19th she was again exposed to a heavy and fatal gale, and drove ashore near to the Belem Castle, the sea breaking over her and the crew hanging by the rigging to preserve their lives. The supercargo considered both vessel and cargo as totally lost. By directions of the custom-house, as much of the cargo as could be got out was unladen by a number of French prisoners who were employed for that purpose. The cargo was all wet, and the part of it which was then taken out was carried to the fort, where it was spread and dried. From thence it was carried to Lisbon in lighters, and was sold in the corn market by the consignee of the cargo. The quantity so saved and sold amounted to about one thousand nine hundred and eighty-eight bushels, which was sold at fifty cents a bushel, whereas the price of sound corn was \$2.25 a bushel. The supercargo petitioned for liberty to sell the corn at the place where it was first deposited and dried, which could not be granted, and he was obliged to submit to the custom of the place and allow it to be sold at the corn market. The brig was so completely wrecked that she was sold, with her materials, where she lay, in lots. Had the supercargo been left to the free exercise of his own judgment, he would not have attempted to save any part of the cargo, in consequence of the total damage and the great expense of saving it. The net proceeds of the cargo were not much more than the expenses of saving it, including those of the supercargo. The port of Lisbon commences above Belem Castle, and the custom of the place is to discharge cargoes of corn between that castle and Cantara, which latter place is from one to two miles below Lisbon. The vessel never arrived at her port of discharge. On the 22d of December she was entered at the custom-house by the American vice-consul, which, he said, was necessary; but port dues do not attach to vessels till they pass the castle. Still, as part of the cargo was carried to Lisbon, the entry was made by the

consul, and the dues were paid. On the 11th of March, 1813, the plaintiff, having received notice of the shipwreck, offered to abandon, which was refused. Upon these facts the circuit court gave judgment for the defendants, and the cause was brought by writ of error into this court.

§ 891. *Memorandum articles must be totally lost to create liability.*

All considerations connected with the loss of the cargo, in respect to quantity or value, may, at once, be dismissed from the case. As to memorandum articles, the insurer agrees to pay for a total loss only, the insured taking upon himself all partial losses without exception.

§ 892. — *if they arrive at destination, no liability arises, though they are reduced in quantity more than half.*

If the property arrive at the port of discharge, reduced in quantity or value to any amount, the loss cannot be said to be total in reality, and the insured cannot treat it as a total, and demand an indemnity for a partial loss. There is no instance where the insured can demand as for a total loss that he might not have declined an abandonment and demand a partial loss. But if the property insured be included within the memorandum, he cannot, under any circumstances, call upon the insurer for a partial loss, and, consequently, he cannot elect to turn it into a total loss. These principles are clearly established by the case of *Mason v. Skurray*, at N. P., 1780; *Park*, 116; *Marshall* (Condry's ed.), 223; *Neilson v. Columbian Ins. Co.*, 3 Caines, 108; *Cocking v. Frazer*, *Park*, 114; *Marshall* (Condry's ed.), 227; *M'Andrews v. Vaughan*, at N. P., 1793, id.; *Dyson v. Rowcroft*, 3 Bos. & Pul., 474, and *Magrath and Huggins v. Church*, 1 Caines, 196. The only question that can possibly arise, in relation to memorandum articles, is whether the loss was total or not; and this can never happen where the cargo, or a part of it, has been sent on by the insured, and reaches the original port of its destination. Being there specifically, the insurer has complied with his engagements: everything like a promise of indemnity against loss or damage to the cargo being excluded from the policy. If the question turn upon the totality of the loss, unconnected with the subject of loss, by deterioration of the cargo in value, or reduction in quantity, there is no difference between memorandum and other articles. If the loss be total in reality, or is such as the insured is permitted to treat as such, he is entitled to abandon and recover as for a total loss in the case of memorandum articles, but always with this exception, that he is not permitted to turn a partial into a total loss. Keeping this distinction in view, the loss of the voyage by capture, shipwreck, or otherwise, may be treated as a total loss. This is the doctrine in the case of *Dyson v. Rowcroft*, in which the right to abandon was placed not upon the ground of deterioration of the cargo, but upon the justifiable necessity which resulted from it of throwing the cargo overboard; this was, in effect, the same thing as if it had, in a storm, been swept from the deck. Such, too, was the case of *Manning v. Newnham*, *Park*, 169. In *Cocking v. Frazer* no such necessity existed, and the breaking up of the voyage was attempted to be justified by the damaged state of the cargo, which, *per se*, did not justify the insured in putting an end to the voyage, and thus to turn a partial loss, for which the insurer was not liable, into a total loss. *Magrath and Huggins v. Church* establishes the same doctrine. Now, what is the present case? The ship being thrown on shore within a mile or two from her port of destination, the agent for the insured employs persons to unlade as much of the cargo as could be saved, and nearly one-half was, by his exertions, landed, dried, and sent to the market at Lisbon,

and sold by the consignees at about one-quarter the price of sound corn, leaving a very inconsiderable sum for the owner, after paying the expenses. Is not this precisely the case of *Neilson v. Columbian Ins. Co.* and *Anderson v. The Same*, 3 Caines, 108, with this difference only, that in the first case the insured declined sending on the corn, when he might have done so, and, consequently, he was not permitted to turn a partial into a total loss by his own neglect; and, in the latter case, part of the cargo having been rescued from the wreck before the offer to abandon was made, the insured could not claim as for a total loss, either on account of the injury which the corn had sustained, or of his own act in not sending it forward to its port of destination? In the case now before the court the cargo which was saved was sent forward and sold at the port of its destination.

In addition to the cases above referred to, the cases of *Biays v. Chesapeake Ins. Co.*, 7 Cranch, 415 (§§ 893-94, *infra*), and *Marcadier v. The Same*, 8 Cranch, 39 (§§ 910-13, *infra*), in this court, are strongly applicable to the present, and seem in a great measure to settle it. But it is contended by the counsel for the plaintiff that if the loss be such as that the insured might at one time have treated it as total, it continues to be so, unless at the time when the offer to abandon is made it is restored to his possession, clear of the effects of the peril, and in a condition to prosecute the voyage. Now, this is certainly not the condition of property which, at the time of the offer to abandon, is in the possession of a recaptor, who has a right to retain it until he is paid his salvage. But in the present case the corn never was out of the possession of the agents of the insured, who exercised every act of ownership over it, subject, nevertheless, to the laws and customs of the country to which it was sent, with which the insurer and insured are supposed to have been acquainted at the time they entered into this contract, and to which they impliedly agreed to submit. The cargo which was landed not only continued in the possession and under the direction of the agents of the insured, but it was relieved from the effects of the peril, as between the insurer and insured, and it was not only in a condition to prosecute the voyage, but it did, in reality, complete it. Upon the whole, it is the opinion of the court that this is not such a loss as the defendants engaged to indemnify against, and that judgment should be given in their favor.

Judgment affirmed.

BIAYS v. CHESAPEAKE INSURANCE COMPANY.

(7 Cranch, 415-420. 1813.)

ERROR to U. S. Circuit Court, District of Maryland.

Opinion by MR. JUSTICE LIVINGSTON.

STATEMENT OF FACTS.—This is an insurance on hides, “warranted by the assured free from average, unless general.” The declaration is for a total loss by perils of the seas, but it came out in evidence that three thousand two hundred and eighty hides, the whole number insured being fourteen thousand five hundred and sixty-five, were put on board of a lighter, to be transported from the vessel to their place of destination; that the lighter on her passage to the shore was sunk, by which accident seven hundred and eighty-nine of the hides, of the value of \$4,000, were totally lost, and the residue, to the number of two thousand four hundred and ninety-one more, were fished up and saved, at the cost of \$6,000, which was paid by the plaintiff. The hides thus saved

were delivered to the plaintiff's agent and sold on his account. The whole sum insured on the cargo of hides by the defendants was \$25,000.

§ 893. *No total loss of part of memorandum articles of one species.*

On this state of facts it has been contended that this insurance, although on perishable commodities, being in gross on a cargo consisting of a distinct number of articles, there may be a total loss as to some of them, although others be saved, and that, for the part of the cargo thus totally lost, the underwriters are liable, notwithstanding the agreement respecting what are generally called memorandum articles. In support of this position it is said that the only intention of the parties in coming to this agreement was to obviate disputes concerning losses arising from the perishable nature of the goods insured, but that as this loss happened in another way, and is total as to the portion of the property in question, it ought not to be considered as excluded by the memorandum.

Whatever may have been the motive for the introduction of this clause into policies of insurance, which was done as early as the year 1749, and most probably with the intention of protecting insurers against losses arising solely from a deterioration of the article, by its own perishable quality, or whatever ambiguity may once have existed from the term average being used in different senses, that is, as signifying a contribution to a general loss, and also a particular or partial injury falling on the subject insured, it is well understood at the present day, with respect to such articles, that underwriters are free from all partial losses of every kind which do not arise from a contribution towards a general average. It only remains then to examine, and so the question has properly been treated at bar, whether the hides, which were sunk and not reclaimed, constituted a total or partial loss, within the meaning of this policy. It has been considered as total by the counsel of the assured, but the court cannot perceive any ground for treating it in that way, inasmuch as out of many thousand hides which were on board not quite eight hundred were lost, making in point of value somewhat less than one-sixth part of the sum insured by this policy. If there were no memorandum in the way, and the plaintiff had gone on to recover, as in that case he might have done, it is perceived at once that he must have had judgment only for a partial loss, which would have been equivalent to the injury actually sustained. But without having recourse to any reasoning on the subject, the proposition appears too self-evident not to command universal assent, that when only a part of a cargo, consisting all of the same kind of articles, is lost in any way whatever, and the residue, which in this case amounts to much the greatest part, arrives in safety at its port of destination, the loss cannot but be partial, and that this must forever be so, as long as a part continues to be less than the whole. This loss then being a particular loss only, and not resulting from a general average, the court is of opinion that the defendants are not liable for it.

§ 894. *Underwriters not liable for salvage.*

Having disposed of this point, it would seem as if much difficulty could not occur in deciding the other question which has been made in this cause, and that is whether the assured is not entitled to recover the expenses which he was put to in saving part of the hides which had sunk.

This liability is supposed to result from that clause in the policy which authorizes the assured, "in case of any loss or damage, to sue, labor and travel for, in and about the defense, safeguard and recovery of the goods, or any part thereof, to the charges whereof the assurers will contribute according to

the amount of the sum insured." If this clause be construed with reference to what is most evidently its subject-matter, that is a loss within the policy, and in connection with other parts of the instrument, it seems impossible to misunderstand it, or that it should receive so extensive an application as the plaintiff is desirous of giving to it. The parties certainly meant to apply it only to the case of those losses or injuries for which the assurers, if they had happened, would have been responsible. Having, in such cases only, an interest in rescuing or relieving the property, it is reasonable that then only they should defray the charges incurred by an effort made for that purpose; but when a loss takes place which cannot be thrown on them, it would require a much stronger and more explicit stipulation than we find in the policy to render them liable to contribute to such expenses. If a cargo be insured for a long voyage against sea risks only, and a capture intervene the very day after the vessel leaves port, it is very clear that the underwriter is not only not liable for such a loss, but that he derives an advantage from it, as his risk may be terminated thereby and the whole premium be earned; and yet, if the construction now endeavored to be put on this clause should prevail, all the expenses of claiming a property, in which he had no interest, and which if condemned is a matter of indifference to him, and all the costs of pursuing it through an almost endless litigation, would be thrown, whether the pursuit were successful or otherwise, on an insurer who had taken care to restrict his liability to losses by perils of the sea only. The court cannot subscribe to such an interpretation when a more natural, rational and obvious one, and that without departing from the letter of the instrument, presents itself, which is that this clause can never apply but in such cases as would, if they happen, be losses, either partial or total, within the meaning of the policy. We are therefore of opinion that the underwriters, not being answerable for the principal loss in this case, they cannot be so for the subsequent expenses which were incurred in recovering the property. The judgment of the court below is affirmed, with costs.

ROBINSON v. COMMONWEALTH INSURANCE COMPANY.

(Circuit Court for Massachusetts: 3 Sumner, 220-228. 1838.)

STATEMENT OF FACTS.—Action on a policy of insurance, whereby the company insured for the plaintiff, "\$1,000 on property on board the schooner Pantaloon, at and from Portsmouth to Baltimore, also \$400 more at the same risk for the assured," at one per cent. premium. The policy contained the usual clause in Boston policies, "that the insurers shall not be liable for any partial loss on hemp, flax, etc., etc.; nor for any partial loss on salt, grain, fish, fruit, hides, skins or other goods that are esteemed perishable in their own nature, unless it amount to seven per cent. on the whole aggregate value of such articles, and happen by stranding," etc., etc. The breach alleged in the declaration was a total loss by the perils of the seas. Plea, the general issue.

At the trial it appeared that the cargo insured consisted principally of potatoes, the remaining part consisting principally of fish. The cargo was taken on board in January, 1837, and the schooner sailed on the voyage in the same month. On her passage she encountered a very severe gale of wind, and was thrown upon her beam ends, and remained so for several hours, and had six feet of water in her hold, and lost a great part of her sails and rigging and spars. She was afterwards righted, and encountered in succession two other very

severe gales, in one of which she lost her compass and log-book, and drifted about for some time at the mercy of the winds and waves. She finally, after sixty-seven days, arrived at the island of St. Martin's, in the West Indies. The master there caused a survey to be had upon the schooner, and, in pursuance of the recommendation of the surveyors, the vessel was sold and the voyage was broken up. When the schooner arrived at St. Martin's, the fish was totally destroyed, and the potatoes were nearly all rotten, or so much injured as to be of little value; and the whole of the cargo was sold for a very small sum, being a balance only of about \$30, as the net proceeds. It was in proof that there was but one other vessel in the port of St. Martin's capable of carrying on the cargo to its port of destination; and that vessel had a cargo on board, and was bound on another voyage. There was also evidence that the cargo was in such a state as that it was incapable of being carried to the port of destination without a total destruction of it by rot and decay. There was also evidence that while the potatoes were taken on board at Portsmouth, some of them were injured by the frost.

§ 895. *Total loss of perishable goods necessary to recovery.*

Charge by STORX, J.

The principle of law is very clear, that, as this is an insurance on a perishable cargo, the plaintiff is not entitled to recover, unless there has been a total loss of the cargo by some peril insured against. If the schooner had arrived at the port of destination, with the cargo on board, physically in existence, the plaintiff would not have been entitled to recover, however great the damage might have been by a peril insured against, even if it had been ninety-nine per cent., or in truth even if the cargo had there been of no real value. This seems to be the result of the authorities; although it is certainly pressing the principle of the memorandum clause to an extreme. See *Marcadier v. Chesapeake Ins. Co.*, 8 Cranch, 39 (§§ 910–13, *infra*); *Morean v. Chesapeake Ins. Co.*, 1 Wheat., 219 (§§ 891–92, *supra*); *Dyson v. Rowcroft*, 3 Bos. & Pull., 474; 3 Kent, Comm., 298, 299, 3d edit. But in the present case, the cargo never did arrive at the port of destination. The question then is, whether there has been a total loss of the voyage and a non-arrival, by the peril of the seas. Now, the underwriters undertake that the cargo shall be capable of arriving at the port of destination, notwithstanding any of the perils insured against. It is, therefore, an insurance on the cargo for the voyage; and if, by reason of the perils insured against, the cargo is permanently prevented from arriving at the port of destination, that constitutes a total loss, for which the insured is entitled to recover, upon a policy like the present.

§ 896. *Abandonment of vessel for cost of repairs, or for time to be consumed in making them.*

If the vessel, during the voyage, is injured by the perils of the seas to the extent of half her value, and no other vessel can be procured to carry on the cargo to the port of destination; or, if the vessel, though reparable, cannot be repaired within a reasonable time, and before the cargo, being of a perishable nature, will be irretrievably destroyed by the delay to repair,—in such a case, the insured is entitled to abandon, and recover for a total loss. *Patapsco Ins. Co. v. Southgate*, 5 Pet., 604. In calculating the half value, the rule laid down by the supreme court of the United States is, that the vessel, after she has been repaired, must be of double the value of the costs of the repairs, without any deduction of one-third new for old, and that the deduction of one-third new for old is not to be made in cases of this nature, but is solely appli-

cable to cases of a partial loss, where the owner has come again into possession of the vessel and has received the benefit of the repairs. *Bradlie v. Maryland Ins. Co.*, 12 Pet., 378 (§§ 822-29, *supra*). I am aware that a rule somewhat different has been laid down by the supreme court of Massachusetts, for whose judgments I entertain the most unfeigned respect. *Deblois v. Ocean Ins. Co.*, 16 Pick., 303, 313. But questions of a commercial and general nature like this are not deemed by the courts of the United States to be matters of local law in which the courts of the United States are positively bound by the decisions of the state courts. They are deemed questions of general commercial jurisprudence, in which every court is at liberty to follow its own opinion, according to its own judgment of the weight of authority and principle. On the present occasion I feel myself bound to follow the doctrine of the supreme court of the United States, by whose judgment, indeed, I am bound, although, even as a new question, I have no hesitation to say that I entirely concur in that judgment. The clause in the policy, "That the insured shall not have the right to abandon the vessel for the amount of damage merely, unless the amount which the insured would be liable to pay under an adjustment for a partial loss shall exceed half the amount insured," does not vary the principle, for it is solely applicable to the case of an insurance on the ship, and has nothing to do with an insurance on cargo.

The questions, then, for the jury to decide on this point are, (1) whether the vessel could have been repaired at St. Martin's at all, or at a cost not exceeding half her value after the repairs were made, in a reasonable time to carry on the cargo to the port of destination. (2) Whether, if she could be repaired for less than the half value, she could have been repaired before the cargo would have been so deteriorated as to have lost all value or to have been totally destroyed. (3) Whether, if the vessel were not so reparable, another vessel could have been procured to carry on the cargo to the port of destination in its then damaged state. If the jury should find all these points in the negative, then the plaintiff will be entitled to recover, so far as this question as to the totality of the loss is concerned. Otherwise, he will not be entitled to recover at all in the present case.

§ 897. *Necessity of sale. Master may sell in cases of moral necessity.*

In regard to the necessity of the sale, it is to be regretted that the usual evidence in these cases, the survey, and the testimony of the surveyors as to the state of the vessel, and the nature and extent of the repairs and the expense of making the repairs, or even the practicability of making the repairs, are not before the court. It is certainly unusual for the assured to go to a trial without the production of such documents and proofs. But it is also unusual for the other side wholly to rely upon the mere absence of such documents and proofs, and to make no inquiries as to the state of the ship and the other facts when they have been called upon to cross-examine witnesses who might have spoken to such facts. Still, the plaintiff, notwithstanding the deficiency and infirmity of the direct proofs in these particulars, may rely, if he chooses so to do, upon the inferences deducible from the facts positively in evidence as to the state of the ship, and the practicability and the costs of the repairs, and the necessity of the sale; and it will be for the jury to decide whether, under these circumstances, they are enabled to arrive at a satisfactory conclusion as to the facts, and as to the necessity of the sale. Now, certainly, the master has an authority to sell only in cases of extreme necessity; not indeed of physical necessity, but of moral necessity. By moral necessity, I un-

derstand not an overwhelming and irresistible calamity or force, but a strong and urgent, and, if one may so say, a vehement exigency, which justifies and requires the sale to be made as a proper matter of duty to the owner, to prevent a greater sacrifice, or a total ruin of the property. In short, I know not how better to put the case of such a moral necessity, than to say that it is such an act of sale as, under like circumstances, a considerate owner, who was uninsured, would adopt for his own true interest, and that of all concerned in the voyage. See 1 Phillips on Insur., 409, 410, 1st edit.; 2 Phillips on Insur., 291, 292, 293, 294, 295, 296, 1st edit.; Abbott on Shipp., pt. 1, ch. 1, p. 10, and note; 3 Kent Comm., Lect. 46, pp. 174, 175 and note, 3d edit.; Winn v. Columbian Ins. Co., 12 Pick., 279; Gordon v. Mass. Ins. Co., 2 Pick., 264, 265; Hall v. Franklin Ins. Co., 9 Pick., 466; Hayman v. Moulton, 5 Esp., 65; Idle v. Royal Exch. Assur. Co., 3 Moore, 145, 148; S. C., 8 Taunt., 755; Green v. Royal Exch. Assur. Co., 6 Taunt., 68; Read v. Bonham, 3 Brod. & Bing., 147; Robinson v. Carruthers, 2 Stark., 571; Robertson v. Clarke, 1 Bing., 445; Allen v. Sugrue, 8 Bam. & Cres., 561; Somes v. Sugrue, 4 Carr. & Payne, 276; Patapsco Ins. Co. v. Southgate, 5 Pet., 604, 620.

In cases of a sale of the ship by the master, it is certainly not sufficient that he has acted with good faith, and in the exercise of a fair discretion; but he must also have acted under the pressure of a moral necessity, such as has been already suggested. But the actual conduct of the master is certainly an ingredient to be taken into consideration, in connection with the other circumstances, in order to ascertain the fact of the necessity of the sale. It is certainly the duty of the master, both to his owner and to the shippers, to repair the ship, and continue the voyage, if it can be done at a reasonable expense. It is equally his duty not to sell the ship except in cases of necessity. Now, it is a general principle of law, that every man is presumed to do his duty until the contrary is shown; and, *a fortiori*, this doctrine applies to the perilous responsibility of a master in ordering a sale of his ship. This presumption ought not, indeed, to prevail in the absence of all other proper proofs of the necessity of the sale; but it is certainly an ingredient, fit for the consideration of the jury, in cases like the present. (Verdict for plaintiff for a total loss.)

HUGG v. AUGUSTA INSURANCE & BANKING COMPANY.

(7 Howard, 595-611. 1848.)

CERTIFICATE OF DIVISION from U. S. Circuit Court, District of Maryland.

STATEMENT OF FACTS.—Action upon a policy on freight of goods warranted free from average. The goods in question were not destroyed in specie so as to be incapable of transmission to the port of destination; but the vessel was so badly disabled in the course of the voyage that part of the goods had to be thrown overboard to lighten her, and it was found, upon putting into port for repairs, that the cost of the same would have been more than half her value, and there was no vessel obtainable to forward the remainder of the cargo; which being in a bad condition was sold in consequence. Other facts appear in the opinion.

Opinion by MR. JUSTICE NELSON.

The first point certified, upon the assumptions stated, involves the question whether the underwriter of a policy upon freight of goods warranted free from average is liable, as for a total loss, unless the goods be actually destroyed by one of the perils insured against, so as to be incapable of shipment to the port of

destination; or whether a total loss may result at the port of distress from the goods having been so much damaged that, if sent on, they would become of no value at the time they reached the port of destination; and hence, instead of being sent on, may be sold for the benefit of whom it may concern.

§ 898. *Nature of insurance on freight.*

The contract of insurance upon freight is, that the goods shall arrive at the port of delivery notwithstanding the perils insured against; and that, if they fail thus to arrive, and the owner is thereby unable to earn his freight, the underwriter will make it good. It does not undertake that the goods shall be delivered in a sound or merchantable state, or that the vessel in which they are shipped shall be safe against the dangers of the sea, but that it shall be in the power of the insured to earn his freight; that is, that the perils insured against shall not prevent the ship from earning full freight for the assured in that voyage. If the ship and cargo remain, notwithstanding the disasters, in a condition to continue the voyage, it is in his power to earn freight, and he is bound to proceed; but if damage happens to either, and the voyage is broken up, so that no freight can be earned, the owner is entitled to recover, as for a total or partial loss, according as he may or may not have earned freight *pro rata itineris*.

If the damage happens to the vessel, and that can be repaired at the port of distress in a reasonable time and at a reasonable expense, it is the duty of the owner to make the repairs, and to continue the voyage and earn his freight; and, on the other hand, if the damage happens to the goods, and the ship be in a capacity to proceed, or, if disabled, another can be procured upon reasonable terms, the owner of the ship will still be entitled to perform the voyage and recover his freight, unless the goods have been totally destroyed. In every case, before he can recover of the underwriter, he must show that he was prevented by one of the perils insured against from completing the voyage, and for that reason had failed to entitle himself to freight from the shippers.

§ 899. *Destruction in specie necessary to total loss, unless destruction inevitable before reaching destination.*

The first point certified to us assumes that the ship was capable of carrying on the cargo to the port of delivery, notwithstanding the injuries received; and the only question is, whether the cargo was so much damaged, and in such a condition, as to have dispensed with that duty.

In the case of memorandum articles, the exception of particular average excludes a constructive total loss; and, of course, the principle which allows an abandonment where the loss exceeds half the value does not apply. There must be an actual total loss of the goods. The object of the clause is to protect the underwriter from any partial loss on articles of a perishable nature, which are liable to inherent decay and damage, independently of the damage occasioned by the perils insured against; and where it would be difficult, if not impossible, to distinguish between them. In case of a total loss, consequent upon the happening of one of the perils, the whole damage is presumed to have arisen from that cause, and thus all dispute is avoided as to the origin or nature of the loss.

What constitutes a total loss of a memorandum article has been the subject of frequent discussion, both in the courts of England and this country, and in the former of some diversity of opinion; but, in the most cases, the decisions have been uniform, and the principle governing the question regarded as settled;

and that is, so long as the goods have not lost their original character, but remain in specie, and in that condition are capable of being shipped to the destined port, there cannot be a total loss of the article, whatever may be the extent of the damage, so as to subject the underwriter. The loss is but partial. The cases are numerous on the subject, and will be found collected in *Park on Marine Ins.*, c. b., subd. 13, p. 247; 2 *Phillips on Ins.*, c. 18, p. 483; and 3 *Kent's Com.*, 295, 296. It would be useless to refer more particularly to them.

The only doubt that has been expressed in respect to the soundness of this rule is whether a destruction in value for all the purposes of the adventure, so that the objects of the voyage were no longer worth pursuing, should not be regarded as a total loss within the memorandum clause, as well as a destruction in specie. But although this has been suggested in several cases in England as a proper qualification, and as coming within the obligation of the underwriter, there is no case to be found in which the suggestion has received the sanction of judicial authority.

In this country the rule has been uniform that there must be a destruction of the article in specie, as will be seen by a reference to the following authorities: *Maggrath v. Church*, 1 *Caines*, 196; *Neilson v. Col. Ins. Co.*, 3 *id.*, 108; *Le Roy v. Gouverneur*, 1 *Johns. Cas.*, 226; *Griswold v. New York Ins. Co.*, 1 *Johns.*, 205, *Livingston, J.*; *S. C.*, 3 *id.*, 321; *Saltus v. Ocean Ins. Co.*, 14 *id.*, 138; *Whitney v. N. Y. Firemen Ins. Co.*, 18 *id.*, 208; *Brooke v. Louis. State Ins. Co.*, 4 *Martin, N. S.*, 640; *S. C.*, 5 *id.*, 530; *Morean v. U. S. Ins. Co.*, 1 *Wheat.*, 219 (§§ 891-92, *supra*); *McGaw v. Ocean Ins. Co.*, 23 *Pick.*, 405; 3 *Sumn.*, 544; 1 *Story*, 342.

Whether the test of liability is made to depend upon the destruction in specie, or in value, would, we are inclined to think, as a general rule, make practically very little, if any, difference; for while the goods remain in specie, and are capable of being carried on in that condition to the destined port, it will rarely happen that, on their arrival, they will be of no value to the owner or consignee. The proposition assumes a complete destruction in value, otherwise the uncertainty attending it would be an insuperable objection; and, in that view, it may be a question even if the degree of deterioration would not be greater to constitute a total loss than is required under the present rule.

The rule as settled seems preferable, for its certainty and simplicity, and as affording the best security to the underwriter against the strong temptation that may frequently exist on the part of the master and shipper, to convert a partial into a total loss. *Mr. Park*, in speaking of the case of *Cooking v. Fraser*, 4 *Doug.*, 295, a leading one in the establishment of the rule, observes that the wisdom of the decision is apparent; for, otherwise, it would be a constant temptation to the assured, whenever a cargo of this description was likely to reach the port of destination in an unsound state, to throw the loss upon the underwriters, by voluntarily giving up the further prosecution of the voyage, to which they were not liable by the terms of the memorandum. 1 *Park*, 249.

The rule, it will be observed, as we have stated it, contemplates the arrival of the goods, or some part of them, in specie, at the port of delivery; or that they were capable of being shipped to that port in specie. And hence, if the commodity be damaged so that it would not be allowed to remain on board consistently with the health of the crew, or safety of the vessel, or if permission be refused to land the same by the public authorities at the port of distress for fear of disease, and, for these and like causes, should, from neces-

sity, be destroyed by being thrown overboard, notwithstanding the article existed in specie, and might have been carried on in that condition, there would still be a total loss within the meaning of the policy. In the cases supposed, it is as effectually destroyed by a peril insured against, as if it had gone to the bottom of the sea from the wreck of the ship. The same result follows, also, if the goods be so much damaged as to be incapable of reaching the port of destination in their original character.

These principles are either stated in or are fairly deducible from several cases, but especially from the cases of *Dyson v. Rowcroft*, 3 Bos. & Pul., 474, and *Roux v. Salvador*, 3 Bing. N. C., 266, and S. C., 1 Bing. N. C., 526.

In *Roux v. Salvador*, in the exchequer, it was observed that the argument rested upon the position that if, at the termination of the risk, the goods remained in specie, however damaged, there was not a total loss; and it was admitted that the position might be just, if, by the termination of the risk, was meant the arrival of the goods at their place of destination; but that there was a fallacy in applying those words to the termination of the adventure before that period by a peril of the sea, as the object of the policy is to obtain an indemnity for any loss that the assured might sustain by the goods being prevented by the perils of the sea from arriving in safety at the port of destination. It was also remarked that if the goods once damaged by the perils of the sea, and necessarily landed before the termination of the voyage, were, by reason of that damage, in such a state, though the species be not utterly destroyed, that they could not with safety be reshipped into the same or any other vessel, or, if it was certain that before the termination of the original voyage the species itself would disappear, in any of these cases, the circumstance of their existence in specie at the forced termination of the risk was of no importance.

The jury had found in that case that the hides were so far damaged by a peril of the sea that they never could have arrived at the port of destination in the form of hides; and as the destruction was not complete when they were taken out of the vessel at the port of distress, they became, in their then condition, a salvage for the benefit of the party who was to sustain the loss. In respect to the first point, therefore, the court direct that it be certified to the circuit court, that, if the jury find that the jerked beef was a perishable article within the meaning of the policy, the defendant is not liable as for a total loss of the freight, unless it appears that there was a destruction in specie of the entire cargo, so that it had lost its original character at Nassau, the port of distress, or that a total destruction would have been inevitable from the damage received, if it had been reshipped before it could have arrived at Matanzas, the port of destination.

§ 900. *If for the interest of insurer and assured that damaged cargo be sold, and transmission to destination impracticable, cargo may be sold at intermediate port and claim made for total loss.*

The second point certified assumes that the vessel, notwithstanding the disaster, was in a condition to carry on the cargo, or that another could be procured; and the question is, whether the plaintiff is entitled to recover, as for a total loss of freight, if it appeared that it was for the interest of the insured and insurer of the cargo, on account of the damaged condition of the portion sold, that it should have been sold, and not carried on to Matanzas, the port of delivery.

Many of the considerations stated in our examination of the first point cer-

tified have a direct application to this one, as it there appears that the interest of the insured, or of the underwriter of the cargo, is not taken into the account, nor in any way regarded in determining whether or not a total loss of the freight has happened from any of the perils insured against, but whether there has been a destruction of the entire cargo in specie, or such damage received as would inevitably prevent the arrival of any portion of it in specie at the destined port.

The interest of the owner of the cargo may frequently be adverse to that of the owner of the ship; for although the goods remain in specie, and in that condition capable of being carried on, it may be for the interest of the owner, or of the insurer of the cargo, to have it sold in its then damaged state at the intermediate port, instead of taking the risk of further deterioration. But, in that case, the owner, or those representing him, must act upon their own responsibility; for, if he elects to receive the goods voluntarily at a place short of the port of destination, he is responsible for the freight. The loss cannot be total or partial at his will, or as his interest may dictate.

It was said in *Griswold v. New York Ins. Co.*, 3 Johns., 328 (which was an action on a policy on freight), that whether it would have been wise or foolish in the shipper to have sent on the flour in the condition it was in, was a question not to be put to the plaintiffs. It was none of their concern. The risk of the value of the cargo at the port of delivery lay with the owners of the cargo. All that the plaintiffs had to do by their contract was to provide the means to take on the cargo, by repairing their ship, or procuring another. Other considerations may arise as between the owner and insurer of the cargo, but it is not important now to go into them.

On looking into the facts in this case, it will be seen that the portion of the beef landed at Nassua, and sold, was wet and heated, and that the board of health had recommended to the authorities that it should be removed as soon as it conveniently could be without too great a sacrifice of the property. It is obvious, therefore, that the perishable condition of the article must be taken into consideration in deciding upon the obligation of the master, in the emergency, to repair his vessel, or to procure another, for the purpose of sending it on to the port of delivery. If it should be made to appear that the repairs or procurement of another vessel would necessarily produce such a retardation of the voyage as would, in all probability, occasion a destruction of the article in specie before it could arrive at the port of destination, or, from its damaged condition, could not be reshipped in time consistently with the health of the crew or safety of the vessel, or would not be in a fit condition from pestilential effluvia, or otherwise, to be carried on, it then was the duty of the master to sell the goods for the benefit of whom it might concern.

The cargo being in a perishable condition, the extent of the repairs, or difficulty of procuring another vessel, and consequent delay attending the same, are material considerations influencing his judgment in deciding upon the necessity of a sale; for it would be unreasonable to require him to subject his owner to this expense, when, at the same time, a strong probability existed that the cargo would not be in a condition to be reshipped. 18 Johns., 208; 6 Cow., 270; 1 Bing. N. C., 526; 3 id., 266; 3 Brod. & Bing., 97; S. C., 6 Moore, 288; 6 Taunt., 383; 1 Holt, 48; 3 Kent's Com., 212, 213; 2 Phillips, 331 *et seq.*

The quantity and value of the portion saved are also material circumstances to be considered in exercising a sound discretion in respect to the extent of

the repairs required to be made, or of expense in the procurement of another vessel, with a view to the earning of salvage for the benefit of the underwriter on freight. The owner of the cargo is liable for any increased freight arising from the hire of another vessel, and unless it can be procured at an expense not exceeding the amount of the freight to be earned by completing the voyage, the underwriter on freight has no right to insist upon this duty of the master. Beyond this, it becomes a question between him and the owner or underwriter of the cargo. 3 Kent's Com., 212; *Shipton v. Thornton*, 9 Ad. & Ell., 314; *Searle v. Scovel*, 4 Johns. Ch., 218; *American Ins. Co. v. Center*, 4 Wend., 45; 2 Phillips, 216.

In respect to the second question, therefore, we direct it to be certified to the circuit court, if the jury find that, from the condition of that portion of the cargo sold at Nassau, it was for the interest of the insured and insurers of the cargo that it should have been so sold, and not transported to Matanzas, still, the plaintiffs are not entitled to recover as for a total loss of freight, provided their own vessel could have been repaired in a reasonable time, and at a reasonable expense, so as to perform the voyage, or they could have procured another at Nassau, the port of distress, and have transshipped the portion sold in specie to the port of destination.

§ 901. *Policy construed, and held not to be for one entire voyage out and home.*

The third question is, assuming that the plaintiffs are entitled to recover, is the policy on the amount mentioned for one entire voyage round from Baltimore out and home again; and are the defendants entitled to deduct from the amount insured the freight earned in the voyage from Baltimore to Rio upon the outward cargo?

The policy provides that the defendants, in consideration of \$156.25, agree to insure the plaintiffs, etc., on freight of the bark *Margaret Hugg*, at and from Baltimore to Rio Janeiro and back to Havana or Matanzas, or a port in the United States, etc., to the amount of \$5,000 upon all kinds of lawful goods, etc., beginning the adventure upon the said freight from and immediately following the lading thereof aforesaid at Baltimore, and continuing the same until the said goods, wares and merchandise shall be safely landed at the port aforesaid.

It is insisted on the part of the defendants, that the voyage insured is one entire voyage from Baltimore out to Rio Janeiro, and then to Matanzas, or home; and that they are entitled to a deduction of the freight earned on the outward cargo from Baltimore to Rio. The court are of opinion, that, upon a true construction of the policy, the insurance was upon every successive cargo that was taken on board in the course of the voyage out and home, and is to be applied to the freight at risk at any time, whether on the outward or homeward passage. This was the construction given to these terms in a freight policy in *Davy v. Hallett*, 3 Caines, 16, and *Columbian Ins. Co. v. Catlett*, 12 Wheat., 383 (§§ 657-63, *supra*). The insurance was regarded as, in effect, covering freight upon separate voyages out and home, to the amount of the valuation; and in the former case the payment of double premium was deemed a pretty sure index to the intent of the parties that the policy should attach on the outward or homeward freight according to events, and was to be valid and operative as long as there was aliment to keep it alive. All the considerations urged in favor of this construction in the cases referred to apply with equal force to the policy in question.

The court direct, therefore, that it be certified to the circuit court, that, assuming the plaintiffs are entitled to recover, the defendants are not entitled to deduct from the insured the freight earned on the voyage from Baltimore to Rio upon the outward cargo, as the policy is not for one entire voyage round from Baltimore out, and home.

[The case now went back to the circuit court for trial, where the jury were charged as follows: *Hugg v. Augusta Insurance & Banking Co.*, Taney's Decisions, 159-170. 1851.]

Charge by TANEY, C. J.

The first question to be decided is, whether the plaintiffs are entitled to recover for a total loss of freight. In deciding this question it is not material to inquire whether the loss is to be adjusted by the terms of the Baltimore Insurance Company, or by those of the Augusta Insurance Company, without regard to the memorandum of George C. Morton, at the foot of that policy.

§ 902. *Repairs in reasonable time and at reasonable expense the test.*

1. There was not a total loss when the cargo of the Margaret Hugg was unladen at Nassau, because a part of the jerked beef still remained in specie, and had not been totally destroyed by the disasters. And the plaintiffs are not entitled for a total loss, if the Margaret Hugg could have been repaired within a reasonable time and at a reasonable expense, and there was reasonable ground for believing that a portion of this beef might, by that means, be transported to Matanzas, although it might arrive there in a damaged condition, but yet retaining the character of jerked beef.

§ 903. *Procuring another vessel.*

2. If this vessel could not have been repaired in a reasonable time and at a reasonable expense at Nassau, yet if another vessel or vessels could have been procured upon reasonable terms, which could have carried it to the port of destination, the plaintiffs are not entitled to recover.

§ 904. *Sale by order of court.*

3. The sale made by order of the court, having been made upon the application of the master, will not entitle the plaintiffs to recover for a total loss, unless the loss was at that time total, independently of such sale.

§ 905. *Effect of delay. Cost of repairs.*

4. The loss was total if the repairs would have produced such a delay as would, in all probability, have occasioned a destruction of the remaining portion of the cargo before it could arrive at its port of destination; or that it would have become so damaged as to endanger the health of the crew, on the voyage, from the noxious affluvia arising from it. It is also total if the expense of making the repairs at Nassau, so as to fit the vessel for carrying cargo, would have exceeded the amount of freight which would have been earned by completing the voyage, and the delivery at Matanzas of the remaining portion of the cargo; provided another vessel or vessels could not have been procured at Nassau, upon terms that would have enabled the master to save some portion of the freight, for the benefit of the underwriters. But in order to justify the sale and entitle the plaintiffs to recover for a total loss, it is incumbent upon them to show that these obstacles existed, and prevented him from completing the voyage.

If, under these instructions, the jury find that the plaintiffs are not entitled.

to recover for a total loss, the next question is whether they are entitled to recover for a partial loss.

§ 906. *Partial loss. Memorandum by agent modifying contract.*

5. Upon that question the court instruct the jury that if the written memorandum at the foot of the policy was made by George C. Morton, the agent of the company, acting within the scope of the authority conferred on him by the company, and was made before the policy was delivered to the plaintiffs and accepted by them, then the loss mentioned in the testimony must be settled according to the terms of the policy, at that time adopted and used by the Baltimore Insurance Company. And according to that policy, the plaintiffs are entitled to recover whatever loss of freight they may have actually sustained by the disasters mentioned in the testimony, provided such loss exceeds five per cent., and was occasioned by one of the perils enumerated and insured against in the Augusta policy.

6. If the jury find that the said George C. Morton was not acting within the scope of his authority, in making and signing the memorandum before mentioned, yet the plaintiffs are entitled to recover the amount of loss of freight actually sustained by them, if the jury find that jerked beef is not a perishable article, in the mercantile sense of the term, as used in policies of insurance; but in determining this question, they are not to look merely at the preparation and quality of this particular cargo, but must inquire and determine whether jerked beef, as an article of commerce, is a perishable one, in the sense in which the other articles enumerated in the policy of the Augusta company are regarded as perishable.

§ 907. *Interest left to the jury where the sum due is unliquidated and in dispute.*

As to interest, in case the verdict was for the plaintiffs, the court were of opinion that, although in some of the states and in the English courts interest would be allowed as a matter of course in a case of this kind, yet, in Maryland, the weight of authority appeared to be in favor of leaving the question to the jury, where the sum due had never been liquidated and was in dispute between the parties. The jury were, therefore, instructed, if they found for the plaintiffs, to allow interest or not, as in their judgment they might deem, just, upon the evidence before them. (Verdict and judgment for the plaintiffs.)

INSURANCE COMPANY v. FOGARTY.

(19 Wallace, 640-646. 1873.)

ERROR to U. S. Circuit Court, Southern District of New York.

STATEMENT OF FACTS.—Open policy of marine insurance on machinery on board the Ella Adele, the machinery consisting of the parts of a sugar-packing machine. On the voyage the vessel was wrecked on rocks, and an abandonment of the machinery made. Many of the pieces of the same were afterwards recovered in specie by the underwriters, and tendered to the plaintiff, who refused to accept them. The policy warranted the property insured free from particular average.

Opinion by MR. JUSTICE MILLER.

The question presented in this case for consideration has been often in the courts, and the discriminations between what is total loss and what is not are frequently very nice and delicate.

§ 908. *Authorities reviewed upon the question of necessity of total extinction of goods in specie.*

The authorities are by no means uniform or consistent with each other, when, as in the present case, the line of distinction is very narrow. Several cases bearing upon the one before us have been decided in this court, and perhaps a short review of them may aid us here better than a more extended examination of the numerous other authorities on the subject.

In the case of *Biays v. Chesapeake Ins. Co.*, 7 Cranch, 415 (§§ 893-94, *supra*), the plaintiff was insured upon hides, the whole number of which was fourteen thousand five hundred and sixty-five. Of these, seven hundred and eighty-nine were totally lost by the sinking of a lighter, and two thousand four hundred and ninety-one of those sunk were fished up in a damaged condition and sold. The hides were memorandum articles, and this court held that inasmuch as less than eight hundred hides insured as part of a much larger number of the same kind were lost, it could not be a total loss, and overruled the argument that it was a total loss as to the seven hundred and eighty-nine hides.

In the case of *Marcardier v. Chesapeake Ins. Co.*, 8 Cranch, 47 (§§ 910-13, *infra*), it is said that "it seems to be the settled doctrine that nothing short of a total extinction, either physical or in value, of memorandum articles at an intermediate port, would entitle the insured to term the case a total loss, where the voyage is capable of being performed. And perhaps even as to an extinction in value, where the commodity *specifically* remains, it may yet be deemed not quite settled whether, under like circumstances, it would authorize an abandonment for a total loss."

In the case of *Morean v. The United States Insurance Co.*, 1 Wheat., 219 (§§ 891-92, *supra*), more than half of a cargo of corn was thrown overboard and lost. The remainder was saved in a damaged condition and sold at about one-fourth the market value of sound corn. This was held not to be a total loss, because part of the corn was saved, and though damaged, was of some value. It was, therefore, only a partial loss.

The next case is that of *Hugg v. The Augusta Insurance Co.*, 7 How., 595 (§§ 898-901, *supra*). The question there arose on an insurance of jerked beef of four hundred tons, part of which was thrown into the sea and part of the remainder so seriously damaged that the authorities of the city of Nassau refused to allow more than one hundred and fifty of it to be landed. This was wet and heated, and not in a condition for reshipment. In answer to a question on this subject, certified to this court by the judges of the circuit court, it was replied: "That if the jury found that the jerked beef was a perishable article within the meaning of the policy, the defendant is not liable as for a total loss of the freight, unless it appears that there was a destruction in *specie* of the entire cargo so that it had lost its original character at Nassau, or that a total destruction would have been inevitable from the damage received if it had been reshipped before it could have arrived at Matanzas, the port of destination." And though there are some very strong expressions of the judge who delivered the opinion as to the necessity of the total destruction of the thing insured to establish a total loss in memorandum articles, no doubt the language here certified is the true expression of the court's opinion. And it will be observed that in this case, as in the case of *Marcardier v. Chesapeake Insurance Co.*, the destruction spoken of is destruction as to species, and not mere physical extinction. Indeed, philosophically

speaking, there can be no such thing as absolute extinction. That of which the thing insured was composed must remain in its parts, though destroyed as to its specific identity. In the case of the jerked beef, for instance, it might remain as a viscid mass of putrid flesh, but it would no longer be either beef or jerked beef. And when the case went back for trial in the circuit, the charge of Taney, C. J., to the jury, places this point in a very clear light. Taney's Decisions, 168 (§§ 902-7, *supra*). He says there was not a total loss at Nassau, because a part of the jerked beef remained in specie, and had not been destroyed by the disaster. And if there was reasonable ground for believing that a portion of this beef could, by repairing the vessel, have been transported to Matanzas, although it might arrive there in a damaged condition, but yet retaining *the character of jerked beef*, there was no total loss. The jury found there was a total loss. The case of *Judah v. Randal*, 2 Caines' Cases, 324, where a carriage was insured and all was lost but the wheels, is another illustration of the principle. A part of the carriage, namely, the wheels, a very important part, was saved; but the court held that the thing insured, to wit, the carriage, was lost — that it was a total loss. Its specific character as a carriage was gone.

In the case of *Wallerstein v. Columbian Ins. Co.*, 44 N. Y., 204, the whole doctrine is ably reviewed with a very full reference to previous decisions, and it is there shown that there is far from unanimity in the language in which the rule is expressed; and the extreme doctrine of an absolute extinction or destruction of the thing insured is not the true doctrine, or at least is not applicable in all cases as a criterion of total loss.

§ 909. *Total extinction in specie not necessary.*

The circuit court was right in holding that what was insured was machinery — pieces or parts of a machine — pieces made and shaped to unite at points with other pieces, so as to make a sugar-packing machine. If parts of them were absolutely lost, and every piece recovered had lost its adaptability to be used as part of the machine; had lost it so entirely that it would cost as much to buy a new piece just like it as to repair or adapt that one to the purpose, then there was a total loss of the machinery. If no piece recovered was of any use, or could be applied to any use connected with the machine of which it was a part, without more expense on it than its original cost, then there was no part of the *machinery* saved, however much of rusty iron may have been taken from the wreck. The court went quite as far in behalf of the defendant as the law justified, when it told the jury that the plaintiff could not recover if any piece or portion of the machinery insured arrived at its destination in a condition so perfect that it could have been used with its corresponding or connecting pieces, had they also arrived in good condition.

We are of opinion that the charge of the court put the case very fairly to the jury, as we understand the law, and the judgment is, therefore, affirmed.

MARCARDIER v. CHESAPEAKE INSURANCE COMPANY.

(8 Cranch, 39-50. 1814.)

ERROR to U. S. Circuit Court, District of Maryland.

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This is an action on a policy of insurance underwritten by the defendants on the 29th of October, 1806, for \$31,000, upon any kind of lawful goods on board the brig Betsey, whereof Alexander M'Dougal

was then master, on a voyage at and from New York to Nantes. M'Dougal was the general owner of the brig, and on the 1st day of October, 1806, by a charter-party of affreightment made with the plaintiff, granted, and to freight let, to the plaintiff, the said brig, excepting and reserving her cabin for the use of the master and mate, and for accommodation of passengers, as therein mentioned, and so much room in the hold as might be necessary for the mariners and storage of water, wood, provisions, and cables, for the voyage from New York to Nantes; and M'Dougal, by the same instrument, covenanted to man, victual and navigate the brig at his own charge during the voyage, and to receive on board any shipment of goods not contraband, which the plaintiff should tender at the side of the ship, or within reach of her tackles, at New York, and to stow and secure the same, and proceed therewith to Nantes, and there discharge the same. The passengers on board the brig were to be at the joint expense of the parties, and the passage money was to be equally divided between them. The other clauses in the charter-party are not material to be stated, except that the plaintiff covenanted to pay the stipulated freight and demurrage. The cargo, put on board by the plaintiff was of the invoice value of \$29,889, of which \$7,439 were in memorandum articles. The brig sailed on the voyage under the command of M'Dougal, on the 9th of November, 1806, and during the voyage was compelled by stress of weather and other accidents to bear away for the West Indies, and arrived at the port of St. John's, in Antigua, on the 22d day of December. There the master made application to the vice-admiralty for a survey, etc., and such proceedings were had upon his application, that the cargo was landed, and by a decretal order of the court of the 31st of January, 1807, the same was ordered to be sold for the benefit of all concerned, reserving the question as to freight. Under this decree the cargo was accordingly sold, and the sales completed before the 28th of March, 1807; and the net proceeds of the whole of the plaintiff's property amounted to \$13,767. The net proceeds of the memorandum articles, included in the same sum, were \$6,863.30. The whole proceeds were paid over to an agent appointed by M'Dougal, and the freight for the whole voyage was allowed him by the admiralty, upon a report of commissioners, to whom the question was referred. The brig was repaired at Antigua, within a reasonable time, at the expense of one-sixth only of her value, and capable of performing the voyage with the original cargo; but M'Dougal voluntarily abandoned the voyage at Antigua, for his own emolument and advantage. Of the cargo, ninety-nine bags of coffee were spoiled and thrown overboard, and the residue greatly damaged by the perils of the seas; and the whole cargo, including the memorandum articles, sustained a damage during the voyage exceeding a moiety of its original value. On the 4th of February, 1807, and within a reasonable time after receiving information of the loss, the plaintiff abandoned the whole cargo to the underwriters.

The declaration contained two counts for a total loss: 1st, by the perils of the seas, and 2d, by barratry of the master. At the trial the court below, upon the facts and circumstances above stated, held that the plaintiff was not entitled to recover as for a total loss of the cargo insured, including the memorandum articles, and the cause came up to this court upon a bill of exceptions to that opinion.

The plaintiff in this case contends that there was a total loss, which authorized an abandonment by both of the perils stated in the declaration, namely: 1st. By the perils of the seas; and 2d. By barratry of the master.

And first, as to a total loss by the perils of the seas.

§ 910. *Technically total loss may arise from deterioration. Damage exceeding half value.*

It seems now clear that a technical total loss may arise from the mere deterioration of a cargo by any of the perils insured against, if the deterioration be ascertained at an intermediate port, of necessity short of the port of destination. In such case, although the ship be in a capacity to perform the voyage, yet if the voyage be not worth pursuing, or the thing insured be so damaged and spoiled as to be of little or no value, the insured has a right to abandon the projected adventure and throw upon the underwriter the unprofitable and disastrous subject of insurance. It has therefore been held that if a cargo be damaged in the course of the voyage, and it appear that what has been saved is less in value than the amount of the freight, it is a clear case of a total loss. It does not, however, appear that the exact *quantum* of damage which shall authorize an abandonment as for a total loss has ever become the direct subject of adjudication in the English courts. The celebrated treatise *Le Guidon*, chapter 7, article 1, considers that a damage exceeding the moiety of the value of the thing insured is sufficient to authorize an abandonment. This rule has received some countenance from more recent elementary writers; and, from its public convenience and certainty, has been adopted as the governing principle in some of the most respectable commercial states in the Union; and perhaps is now so generally established as not easily to be shaken. 1 John. Ch., 141; 1 John. R., 335, 406; Marsh. Ins., 562, note 92, Am. ed., 1810; Park, 194 (6th ed.).

§ 911. *Rule of abandonment for damage of moiety does not extend to cargo wholly of memorandum articles.*

But this rule has never been deemed to extend to a cargo consisting wholly of memorandum articles. The legal effect of the memorandum is to protect the underwriter from all partial losses; and if a loss by deterioration, exceeding a moiety in value, would authorize an abandonment, the great object of the stipulation would be completely evaded. It seems, therefore, to be the settled doctrine that nothing short of a total extinction, either physical or in value, of memorandum articles at an intermediate port would entitle the insured to turn the case into a total loss where the voyage is capable of being performed. And, perhaps, even as to an extinction in value, where the commodity specifically remains, it may yet be deemed not quite settled whether, under the like circumstance, it would authorize an abandonment for a total loss. *Dyson v. Rowcroft*, 3 Bos. & Pull., 474; *Maggrath v. Church*, 1 Caines, 212; *Cooking v. Frazer*, Marshall, 227; Park, 152 (6th ed.).

§ 912. — *nor to cargo of mixed character. Rule as to such cases stated.*

The case before the court is of a mixed character. It embraces articles of both descriptions; some within and others without the purview of the memorandum. If in such a case a deterioration exceeding a moiety in value be a proper case of technical total loss, it will follow that, in many cases, the underwriter will, indirectly, be rendered responsible for partial losses on the memorandum articles. Suppose, in such a case, the damage of the memorandum articles were forty per cent., and to the other articles ten per cent., in the whole amounting to half the value of the cargo, the underwriter would be responsible for a technical total loss, and thereby made to bear the whole damage from which the memorandum meant to exempt him. Indeed cases might arise in which the damage might exclusively fall on memoran-

dam articles; and if it exceeded the moiety, in value, of the whole cargo, might load him with the burden of a partial loss, in manifest contravention of the intention of the parties. A construction which leads to such a consequence cannot be admitted unless it be unavoidable. And we are entirely satisfied that such a construction ought not to prevail. The underwriter is, in all cases of deterioration, entitled to an exemption from partial losses on the memorandum articles, and in order to effectuate this right it is necessary, where a technical total loss is sought to be maintained upon the mere ground of deterioration of the cargo at an intermediate port, to a moiety of its value, to exclude from that estimate all deterioration of the memorandum articles. Upon this principle, on a cargo of mixed character, no abandonment for mere deterioration in value during the voyage can be valid, unless the damage on the non-memorandum articles exceed a moiety of the value of the whole cargo, including the memorandum articles. The case is considered, as to the underwriter, the same as though the memorandum articles should exist in their original sound state. In this way, full effect is given to the contract of the parties. The underwriter is never made responsible for partial losses on memorandum articles, however great; and the technical total losses for which alone he can be liable are such as stand unaffected by the perishable nature of the commodity which he insures.

In the present case the facts alleged by the plaintiff do not show a depreciation of a moiety in value, excluding the memorandum articles. There is no evidence of the *quantum* of depreciation of any part of the cargo. The forced sales at Antigua could not, under the circumstances, constitute a medium by which to ascertain it. Admitting, therefore, the rule to be correct, that the party had a right to abandon where the depreciation exceeds a moiety of the value, the plaintiff has not brought himself within that rule as applied to a cargo of a mixed character like the present. The court below were right, therefore, in deciding that there was no total loss proved by the perils of the seas.

§ 913. *Barratry cannot be committed by master who is owner of ship for the voyage.*

The next question is, whether there was a total loss by the barratry of the master. And this depends exclusively upon the consideration who was owner of the brig for the voyage, for it is conceded on all sides that the conduct of the master was barratrous, if he was in a situation to commit that offense. Barratry is an act committed by the master or mariners of a ship, for some unlawful or fraudulent purpose, contrary to their duty to their owners, whereby the latter sustain an injury. It follows, therefore, from the very terms of the definition, that it cannot be committed by a master who is owner for the voyage, because he cannot commit a fraud against himself. But it may be committed against a person who is owner for the voyage, although he may not be the general owner of the ship. A person may be owner for the voyage, who, by a contract with the general owner, hires the ship for the voyage, and has the exclusive possession, command and navigation of the ship. Such is understood to have been the case of *Vallejo v. Wheeler, Cowp., 143*. But where the general owner retains the possession, command and navigation of the ship, and contracts to carry a cargo on freight for the voyage, the charter-party is considered as a mere affreightment sounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership; such was the case of *Hooe v. Groverman, 1 Cranch, 214*. In the

first case, the general freighter is responsible for the conduct of the master and mariners during the voyage; in the latter case the responsibility rests on the general owner. On examining the charter-party in the present case, there can be no doubt, from the terms and stipulations, that it falls within the latter class of cases. The master, who was the general owner, retained the exclusive possession, command and management of the vessel, and she was navigated at his expense during the voyage. The whole charter-party, except the introductory clause, sounds merely in covenant. The ownership was not divested by the covenant of affreightment, and, consequently, the master was incapable of committing barratry. There was, then, no total loss on the second count in the declaration.

The opinion of the circuit court on this exception must be sustained. But there are other exceptions on the record in which it is admitted by the parties that the circuit court erred. The points intended to be raised in these exceptions have, in effect, been decided by this court in *Caze v. Baltimore Ins. Co.*, 7 Cranch, 358 (§§ 488-89, *supra*). For the errors in these exceptions the judgment must be reversed, with directions to the circuit court to award a *venire facias de novo*.

§ 914. An averment of abandonment is not necessary in an action on an insurance policy. *Hodgson v. Marine Ins. Co.*, * 5 Cr., 100.

§ 915. Half-value.—Abandonment is proper if it will cost half the value of a vessel to repair her at the place of the accident. *Patapsco Ins. Co. v. Southgate*, * 5 Pet., 604.

§ 916. Sale—Urgent necessity.—In case of a sale of an injured vessel the assured cannot recover for total loss unless the sale was in consequence of urgent and inevitable necessity, of which the fact of the sale is not conclusive evidence. *Ibid.*

§ 917. No particular form of abandonment is prescribed; nor is it necessary that it should be notified in writing. But it should be explicit, and not left to inference from equivocal acts. *Ibid.*

§ 918. The assured must yield up all his right, title and interest in the subject insured. *Ibid.*

§ 919. Repair of vessel.—If the injury received by an insured vessel was so great that it could not be repaired so as to make her a seaworthy vessel, except at an expense exceeding her value when repaired, there is an actually total loss, and no abandonment is necessary. *Bullard v. Roger Williams Ins. Co.*, * 1 Curt., 148.

§ 920. The valuation of the vessel by the policy fixes its value, so far as the question of repairs exceeding its known value is concerned. *Ibid.*

§ 921. Goods in specie.—No loss within a policy of maritime insurance, where goods which were abandoned remain in specie, and transportation might have been completed. *Murray v. Aetna Ins. Co.*, 4 Biss., 417.

§ 922. A letter of abandonment must state the cause of the loss, and the cause stated must be a peril insured. *Bullard v. Roger Williams Ins. Co.*, * 1 Curt., 148.

§ 923. When abandonment necessary.—An abandonment is necessary only in case of a constructively total loss. What constitutes such a loss considered. *Ibid.*

§ 924. Abandonment is unnecessary where there is an actually total loss. *Insurance Co. v. Piaggio*, * 16 Wall., 378.

§ 925. Other causes than those stated.—If sufficient cause for abandonment is stated, the assured need not state other causes known to him, assuming that the underwriters refuse to accept the abandonment. *Dederer v. Delaware Ins. Co.*, * 2 Wash., 61.

§ 926. A formal instrument of abandonment is not necessary; an accepted act of abandonment answers the purpose. *Comegys v. Vasse*, * 1 Pet., 193.

§ 927. Informality in deed of cession of abandoned property is immaterial, for if the abandonment is good the title passes thereby. *Chesapeake Ins. Co. v. Stark*, * 6 Cr., 268.

§ 928. Total loss of cargo.—Where cargo insured, in the course of the outward voyage, and before its end, was permanently separated from the ship by the total wreck of the latter, and the cargo being perishable, though not injured to half its value, it became necessary to sell the same, held, a technically total loss. *Columbian Ins. Co. v. Catlett*, 12 Wheat., 883 (§§ 657-68).

§ 929. A partial loss of an entire cargo by sea damage, if over fifty per cent., may under circumstances be converted into a technically total loss, but not if a distinct part of the cargo

be destroyed, and the voyage not broken up or rendered not worth prosecuting. *Seton v. Delaware Ins. Co.*, *2 Wash., 175.

§ 930. In case of total loss, when two insurances have been made, the assured may abandon to the second underwriter, and take so much as the second policy covers. *Murray v. Insurance Co.*, *2 Wash., 186.

§ 931. Where a vessel was stranded, and afterwards, before abandonment, was gotten off without material injury, but meantime was sold by the master at public auction and bought by him, *held*, that plaintiff was not entitled to recover for total loss. *Church v. Marine Ins. Co.*, *1 Mason, 341.

§ 932. Partial loss.—Where the assured claims for only a partial loss, the underwriter cannot claim an abandonment. *Murray v. Insurance Co.*, *2 Wash., 186.

§ 933. The capture even of neutral property, and retention of it until abandonment, justifies abandonment, though the property is afterwards released. *Rhineland v. Insurance Co.*, *4 Cr., 29.

§ 934. Blockade.—If a vessel be prevented by a blockading force from entering a port to which she was entitled to go by the policy, for trade, there may be an abandonment. *Simonds v. Union Ins. Co.*, *1 Wash., 382.

§ 935. Embargo.—Where a vessel insured for a voyage was subsequently prevented from departing by the embargo law, it was held that the insured might abandon and recover as for a total loss. *Odlin v. Insurance Co.*, 2 Wash., 812 (§§ 831-84).

§ 936. An embargo act did not render a contract of insurance for a foreign voyage void, but merely imposed a temporary restraint upon the performance of the voyage. *Ibid*.

§ 937. On the breaking up of a voyage by a peril insured against, the assured may abandon as to freight as well as cargo, and this though the vessel and cargo belong to the same person. *Simonds v. Union Ins. Co.*, *1 Wash., 382.

§ 938. Capture and recapture.—Whether, if a vessel be captured and recaptured, the loss shall be deemed total or partial will depend upon circumstances. *Marine Ins. Co. v. Tucker*, 3 Cr., 357 (§§ 789-47).

§ 939. Capture of a vessel insured affords ground for abandonment, and that right will not be affected by a subsequent unlawful attempt by the master to recapture her. *Dederer v. Delaware Ins. Co.*, *2 Wash., 61.

§ 940. Proof that possession was taken of a vessel by a privateer under Spanish colors, and that she was carried into Porto Rico, is sufficient evidence of a total loss after three years, during which time nothing has been heard of the vessel or cargo. It is not necessary for the assured to show a condemnation. *Ruan v. Gardner*, *1 Wash., 145.

§ 941. Same.—Continuance of interruption of voyage.—A technically total loss must continue until the time of abandonment. *Quere*, of the application of this rule to a case where the loss was by restraint on a blockade, without proof that it continued until the abandonment. *Olivera v. Union Ins. Co.*, 8 Wheat., 188 (§§ 609-10).

§ 942. Blockade—Special case.—Policies of insurance were taken out upon a vessel, her freight and cargo, on a voyage "at and from New York to Cape Francois, with liberty to proceed to another port should Cape Francois be blockaded and the vessel prevented entering that port, from that or any other cause; and at and from thence back to New York." The order for the insurance declared "that the assured is not to abandon if she cannot enter the cape from blockade or other cause, but liberty is given to proceed to some other port." The vessel sailed with instructions "to proceed to Cape Francois, and if she could not enter, from blockade or other cause, to steer towards the Bite of Leogane, and enter either Port au Prince or some other port in the Bite." She was stopped off St. Domingo by a British ship of war, notified of the blockade of the island, and required to proceed, under convoy of a British frigate, to Kingston, Jamaica; was there refused permission to clear for Cuba, and was finally compelled to sell the cargo at Kingston. The proceeds were invested in another cargo, with which the ship returned to New York, where, on arrival, the cargo and freight were abandoned to the insurers, and claimed as a total loss, and action instituted to recover for the same (deducting the proceeds of the cargo and accounting for the profits on the investment homeward). *Held*, that the voyage insured had been destroyed by the superior force of a foreign power, the vessel having, independent of the means taken to prevent a breach of blockade, been constrained, against the express desire of the captain, to proceed to a particular port in exclusion of every other; that the case was one of abandonment for total loss; and that the insured was entitled to the amount of the insurance for goods and freight, subject to a deduction of the proceeds of the homeward investment. *Symonds v. Union Ins. Co.*, 4 Dal., 417.

§ 943. Capture—Special case stated.—A vessel, the property of British subjects, on a voyage from Havana to New York, was captured by a French privateer and carried into Havana. She was there claimed by an English merchant for the British owners, and an order for restitution was granted by the Spanish government, on security given for the

appraised value of ship and cargo, to abide the issue of an appeal made by the captor from the order of restitution. The security was given, at the instance of the ship's officers, by a Spaniard, the plaintiff, party in interest (constituted their attorney), and the ship and cargo were delivered to him on account of the original owners, but accompanied by a written declaration from the English merchant, the claimant for the owners, that ship and cargo were subject to the orders of such surety, until he should be finally indemnified for his disbursement for costs of suit, outfits, commissions, etc., and be released from his security. The surety procured insurance from the defendants, on the vessel and cargo, and dispatched her for the United States with a letter of instructions from himself, and with the cargo invoiced in his name, "on account and risk of the owners, underwriters or others in England, or those who may be concerned in said ship and cargo." On the voyage the vessel was captured by a British man-of-war, sent to Halifax, there libeled in the court of vice-admiralty as prize, and claimed by the captain for the plaintiff; but the claim was rejected, and the ship and cargo pronounced "the property of British subjects, recaptured by his majesty's ship-of-war *Leander*, and decreed to be restored to the original British owners, on payment to the recaptors of one-eighth part thereof, and the claimant to pay costs." From this decree the claimant appealed; but the vessel and cargo were delivered on security to the agent of the original British owners, and by him sent to England. When the ship was captured it was notified to the defendants, who agreed to pay a just proportion of the expense of recovering the property: but no actual abandonment, or offer to abandon, was made until the decree of the vice-admiralty had been received by the plaintiff. *Held*, without deciding whether the capture and sentence had destroyed the plaintiff's lien, that as they had rendered it necessary to pursue the property through an expensive, troublesome and doubtful medium, he had a right to consider the occurrence as a total loss, and to recover the amount of the insurance. *Russel v. Union Ins. Co.*, 4 Dal., 421.

§ 944. *Surety — Taking possession away.*— Action upon a policy of insurance on cargo of a vessel in which the interest of the assured was that of surety for the payment of the value of the vessel and cargo in condemnation in Spain, the cargo having been delivered to him for indemnity. *Held*, that the restitution of the property by a prize court to the original owners, thus taking it out of the possession of the surety, was a loss by one of the perils insured against, and justified an abandonment. *Russel v. Union Ins. Co.*,* 1 Wash., 409.

§ 945. *Sale without condemnation.*— Where a vessel has, upon report of a survey ordered by an American consul, been sold by the captain without regular condemnation, the loss cannot be made total. *Cort v. Delaware Ins. Co.*,* 2 Wash., 375.

§ 946. *Acceptance — Special case stated.*— Policy on ship *Argonaut* and cargo at and from Leghorn to her port of discharge in the United States. Ship sailed on her voyage, being owned at and bound to Salem. She was cast away in March, 1820, on a ledge of rocks near Portsmouth harbor, New Hampshire, and immediately bilged. She was in such a desperate situation that it was extremely probable that she would be totally lost and wrecked in twenty-four hours. In this situation the owners abandoned to the underwriters. There was no verbal acceptance of the abandonment, but the underwriters declined any further agency of the owners, sent their own agent to take possession of the vessel, sell her if he deemed best, and act as he chose in all respects as to the vessel; but directing the agent not to meddle with the cargo (*specie*), which had not been abandoned. The owners never meddled with the ship after the abandonment; but the agent of the underwriters took exclusive possession, and by good fortune and good weather she was gotten off and carried to Portsmouth in about a week. She was injured to about one-half her value, and the necessary repairs could not be made in a period short of three months, which was a longer period than the usual length of the voyage insured. After the vessel was got off, the underwriters offered to return her to the owners. They refused to receive her. The underwriters then repaired her in three months under their own agent, and when repaired offered her again to the owners. The latter again refused to receive her; and never authorized the repairs in any shape. They adhered to their abandonment as good, and that henceforth they had nothing to do with the ship. *Held, first*, that the owners had a good right to abandon under the circumstances, even if the injury was less than one-half the value. *Secondly*, that in estimating that half value, there was not to be a deduction of one-third new for old, as in case of partial loss; that the half value, which authorized an abandonment, was half the sum which the ship, if repaired, would be worth after repairs made. If the ship when repaired would not be worth double the amount of the repairs, the owners had a right to abandon. *Thirdly*, that the underwriters had no right to take possession of the ship, either to move her or to repair her without the consent of the owners. That these acts of taking possession, etc., after the abandonment, were, in point of law, an acceptance of the abandonment, since the underwriters could not be justified in them, except as owners of the property. *Fourthly*, that an abandonment once made and accepted is irrevocable by either party without the assent of the other. *Peele v. Merchants' Ins. Co.*,* 3 Mason, 27.

§ 947. **Utter loss.**—A ship in such a state of damage as to be constructively totally lost, within the meaning of a policy of insurance, is not an utter loss, within the meaning of that phrase in a contract of bottomry, if she still exist in *specie* in the hands of the owner. *Insurance Co. v. Goessler*, 6 Otto, 645.

§ 948. **Bottomry.**—Where an insured vessel and cargo were hypothecated under a bottomry bond, and the vessel was afterward cast ashore, and abandoned, by the owners, as a total loss, to the underwriters, who paid the amount of the policies, the vessel having been broken up and sold, and a portion of the cargo saved from the wreck by the bondholders, the proceeds of the ship and cargo were awarded to the bondholders, as against the insurance company, such proceeds not being sufficient to satisfy the bond. *Ibid.*

§ 949. **Master's relation to parties.**—From the time of abandonment, the master of a vessel becomes the agent of the underwriters, and they are responsible for all proper acts done by him on behalf of the property insured, as, *e. g.*, for the payment of his passage to a port where the property is to be disposed of. *Lawrence v. New Bedford Ins. Co.*, * 2 Story, 471.

§ 950. Under what circumstances a master may sell for the underwriters. *Ibid.*

§ 951. **Same.**—The master is the agent of all concerned in the voyage, and becomes, by relation, the agent of the underwriters, whenever an abandonment has been accepted, from the time of the loss to which that abandonment refers. *The Brig Sarah Ann*, 2 Sumn., 210.

§ 952. **Supercargo.**—Abandonment puts the underwriter in place of the assured, and the supercargo becomes the latter's agent in disposing of the property. *Chesapeake Ins. Co. v. Stark*, * 6 Cr., 268.

§ 953. **Effect of abandonment — Liens.**—Where the holder of a lien upon a vessel and cargo has his lien covered by an insurance upon goods, the underwriters acquire, upon an abandonment, all his rights and remedies against the owners. *Russel v. Union Ins. Co.*, 4 Dal., 421.

§ 954. **Same — Generally.**—The underwriter stands in the position of the assured upon abandonment; he is entitled not only to everything that can be rescued from destruction, but to compensation awarded for an unjust seizure. *Comegys v. Vasse*, * 1 Pet., 198.

§ 955. An abandonment confers on the underwriters every interest and right in the ship possessed by her owners. *The Mut. Safety Ins. Co. v. The Cargo of the Brig George*, Olc., 89.

§ 956. The abandonment of a ship by her owners, to the underwriters, does not operate to ratify the title of one who claims her under an unauthorized sale by the master. *Ward v. Peck*, 18 How., 287.

§ 957. **Refusal to accept.**—An underwriter who has refused to accept an abandoned ship cannot be permitted to claim property in the ship afterwards. *Ship Packet*, 3 Mason, 255.

§ 958. **Acceptance.**—Where a ship is abandoned, and the underwriters accept, they are liable for wages of the master and mariners for the residue of the voyage after they become owners, and are entitled to earnings after abandonment. *Hammond v. Essex Ins. Co.*, 4 Mason, 196.

§ 959. In case of abandonment, and continuance of the voyage by the underwriters without any new arrangements with the master, it will be presumed that they assent to his previous rate of hire, and so with the seamen. *Ibid.*

§ 960. **Insurance by different underwriters.**—In case of abandonment, when the insurance of ship and freight is by different underwriters, the latter are entitled to freight earned *pro rata itineris*, and the former to all earned subsequent to the loss. *Ibid.*

§ 961. **Salvage.**—Underwriters can make no claim for salvage property in the admiralty, unless there has been an abandonment of the property to them which has been accepted by them. *Ship Henry Ewbank*, 1 Sumn., 400.

§ 962. **Subrogation.**—An insurance company which has accepted an abandonment and paid the loss may sue the carrier, *in rem*, in admiralty. *The Keokuk*, 1 Biss., 522; *The Planter*, 2 Woods, 490. See SUBROGATION, *infra*.

§ 963. **Reasonable time.**—To make an abandonment to the underwriter valid, the insured must abandon within a reasonable time after notice of the loss. An interval between the 5th of April and the 20th of June is not such time. *Webster v. Buffalo Ins. Co.*, * 2 McC., 348.

§ 964. What is reasonable time for an abandonment is for the jury under instructions of the court. *Maryland Ins. Co. v. Ruden*, * 6 Cr., 338.

§ 965. The right of abandonment must be exercised within reasonable time during detention under capture; and reasonable time is for the jury under instruction by the court. *Chesapeake Ins. Co. v. Stark*, * 6 Cr., 268.

§ 966. Whether abandonment was made in due time is not a question of fact exclusively, but to be decided by the jury under instructions from the court. *Livingston v. Maryland Ins. Co.*, 7 Cr., 506.

§ 967. **Delay.**—What will be considered a delay of abandonment so as to affect the right of the assured. *Smith v. Delaware Ins. Co.*, 3 Wash., 127 (§§ 599, 600).

§ 968. An election to abandon cannot be made until the calamity has happened; nor to give it effect is it necessary for the assured to give notice of it until he has received certain information. But after receiving such information there can be no delay for the purpose of speculating upon the chances of benefit by abandoning. *Webster v. Buffalo Ins. Co.*, * 2 McC., 348.

§ 969. The right to abandon may be kept in suspense by mutual consent. *Livingston v. Maryland Ins. Co.*, 6 Cr., 274 (§§ 891-94).

§ 970. Waiver—Raising and repairing a vessel are a bar to any right of abandonment under a provision of the policy that the assured shall have no right to abandon until it is ascertained that recovery and repairs are impracticable. *Levi v. Insurance Assoc.*, 2 Woods, 68 (§§ 570-74).

§ 970a. A voyage was broken up during its progress, and the assured abandoned on learning the fact. The instructions to the master and the supercargo showed that the rights and duties of the latter were not to begin until the end of the voyage. On the loss of the voyage the master delivered the specie to the agent of the supercargo, and it was invested in cotton. *Held*, that the supercargo, not being interested in the policy, could not bind the joint owners, and that his position as supercargo suspended any powers he might have had as partner in the cargo, and that the investment by him of the specie was made as agent of the underwriters, and did not constitute an act of ownership so as to waive the abandonment. *Catlett v. Pacific Ins. Co.*, * 1 Paine, 594.

§ 971. Title of owner.—Where the owner abandoned the vessel, and the underwriters settled with him as for a total loss, it was held that he had no title or interest in the vessel by reason of his contributing to the expenses of an expedition to her relief prior to the abandonment. *The Mary E. Perew*, * 15 Blatch., 58.

X. AVERAGE; ADJUSTMENT OF LOSS.

SUMMARY—*Cutting away masts and rigging*, §§ 972, 973.—*Collision and foreign law*, §§ 974, 975.—*Salvage*, §§ 976, 977.—*Partial loss under five per cent.*, § 978.—*Wages, provisions and expenses*, § 979.—*Cargo not necessary*, § 980.—*Deduction of third new for old*, § 981.—*Distributive insurance*, § 982.—*Jettison under valued policy*, § 983.—*Decisions of foreign courts*, §§ 984-986.—*Expenses of suit*, § 987.

§ 972. A policy was underwritten on a vessel for twelve months. In the course of her voyage during this period she sailed from Providence for New Orleans, with a cargo on board belonging to the owner of the ship, and encountering a gale was compelled to cut away her masts and rigging and return to New York for repairs. The cargo was taken out and sold by the owner, who had insured the same. The vessel was abandoned, and claim made for total loss. *Held*, that in adjusting the loss the cutting away of the masts and rigging was a general average, to be borne by the ship and cargo in the same manner as if they belonged to different owners. *Potter v. Providence Ins. Co.*, §§ 988-89.

§ 973. In such a case, if there be different owners of ship and cargo, the owner of the ship may recover the whole amount of his loss, without any deduction of the general average due on the cargo. But where the ship-owner is also owner of the cargo, the amount due from the cargo may be deducted from the total loss on the ship. *Ibid*.

§ 974. Where a loss occurs by an accidental collision with a foreign vessel, which by the law of the country where it occurs is to be borne and apportioned between the vessels, it is not by our law a general average. *Peters v. Warren Ins. Co.*, §§ 990-94.

§ 975. The mere fact that an apportionment is made of a loss between the different parties in interest, if the loss itself does not arise from some act done, or sacrifice or expense voluntarily incurred for the common benefit, does not necessarily make it a case of general average by our law. *Ibid*.

§ 976. Though salvage is often in the nature of general average, it is not universally true that by our law all salvage charges are so to be deemed; they are so only when incurred for the benefit of all concerned. *Ibid*.

§ 977. The items included and the sums apportioned and paid, according to the law of a foreign country, as a general average in an adjustment there made, are *quoad* the items and the rule of apportionment, conclusive upon and payable by the underwriters here as a general average, though not apportioned in the same manner, and not deemed items of general average by our law. *Ibid*.

§ 978. By the Boston policies no partial loss on a ship under five per cent. is to be borne by the underwriters. Assuming that a loss by such an accidental collision sustained by the ship

insured is a partial loss, and less than five per cent., still if the sum apportioned on her on account of the injury to the other vessel, together with her own loss, exceeds five per cent., the underwriters are liable for the whole loss borne by her. *Ibid.*

§ 979. The wages, provisions, and other expenses of the voyage to a port of necessity for the purpose of repairs, constitute a general average. *Potter v. Ocean Ins. Co.*, §§ 995-1003.

§ 980. It makes no difference in the application of the principle of average to policies of insurance that there may be no cargo on board, nor that the insurance is not for a particular voyage, but on time. *Ibid.*

§ 981. In cases of repairs of damage to a ship by perils insured against, the deduction of a third new for old is applicable only to the labor and materials employed in the repairs and to the new articles purchased in lieu of those lost or destroyed; it does not apply to incidental expenses having no connection with the repairs. *Ibid.*

§ 982. The fact that in an insurance upon a certain number of boxes of lemons the policy values them at so much a box does not conclusively indicate a distributive insurance upon the individual boxes. Nor is the case altered by the fact that the policy insures loss of the said goods "or any part thereof," where the memorandum clause says "free from average, unless general," and "free from particular average." *Hernandez v. Sun Ins. Co.*, §§ 1003-5.

§ 983. In an action upon a valued policy insuring goods and freight against jettison, *held*, that in ascertaining the sum to be paid for jettison of part of the goods, and the consequent loss of freight upon them, the computation was to be made on the basis of the valuation in the policy and not on the basis of the average adjustment. *Griswold v. Union Ins. Co.*, §§ 1006-10.

§ 984. The decision of a foreign admiralty court in a collision case, as to the amount of damages due from the vessel in the wrong, is not binding in an action by the owner of the other vessel against an underwriter; nor is satisfaction of the judgment in admiralty a bar to suit for the insurance unless it is full satisfaction, equal to the sum insured. *New England Ins. Co. v. Dunham*, §§ 1011-14.

§ 985. Rule of adjustment of repairs in insurance cases compared with that in collision cases. *Ibid.*

§ 986. The damages recovered in the admiralty in such a case should be deducted from the gross cost of the repairs upon the insured vessel, without deducting a third new for old. *Ibid.*; *S. C.*, 1 *Low.*, 253.

§ 987. The expenses of the suit in admiralty in such a case are a charge upon the underwriters. *Ibid.*

[NOTES.— See §§ 1015-1056.]

POTTER v. PROVIDENCE INSURANCE COMPANY.

(Circuit Court for Massachusetts: 4 Mason, 298-302. 1826.)

STATEMENT OF FACTS.— *Assumpsit* on a policy of insurance, dated 10th September, 1825, as follows: "\$5,000 on ship Jefferson and appurtenances, for and during the term of twelve months, in port and at sea, and at all times and places during that period, beginning the adventure on the 1st of September, at 12 o'clock at noon." Premium, eight per cent. The loss was averred in the declaration to be by perils of the seas. Plea, the general issue.

At the trial the facts were not disputed. It appeared that the ship sailed from Providence in August, on a voyage to New Orleans, with a cargo on board belonging to the plaintiff, who was also owner of the ship. On her passage she encountered a severe hurricane, and was so much wrecked and injured that she was obliged to put into New York for repairs. On a survey there, it was found that she was injured more than her whole value, and the plaintiff accordingly abandoned her to the defendants. The cargo was taken out and sold by the plaintiff, who had insured the same, and made a claim on the underwriters, but no loss had been paid by the latter. During the hurricane, the masts and rigging, etc., were voluntarily cut away by the master to avoid foundering.

The only questions made were, *first*, whether the cutting away the masts and rigging was a general average or not, to be borne by ship and cargo, for no freight was earned; *secondly*, if so, whether the defendants had a right to

deduct from the plaintiff's demand the amount which was due from him as owner of the cargo, or whether he was entitled to recover the total loss and leave the defendants to their remedy against the underwriters on the cargo for the general average. A verdict was taken for the plaintiff, subject to the opinion of the court on both points.

§ 988. *Cutting away masts and rigging a general average, to be apportioned between owner of ship and owner of cargo.*

Opinion by STORRY, J.

There is no question in this case but that there has been a total loss of the ship, for which the underwriters are liable. The injuries sustained by the hurricane were so great that, upon the ship's arrival in the port of New York, it was found that it would cost more to repair her than she would be worth after she was repaired. An abandonment, therefore, was rightfully and seasonably made. The question now in dispute arises from another circumstance. During the storm the masts and rigging were voluntarily cut away for the benefit of all concerned, and this sacrifice, beyond all doubt, constitutes, in ordinary cases, a claim for general average upon ship, cargo and freight. The owner of the ship is also owner of the cargo. The voyage being defeated, no freight was earned. The cargo was insured by another policy. No expenses were in fact incurred for repairs on account of the general average, and no loss has been paid by the underwriters of the cargo as the contributory share of the cargo to the average. Upon this posture of the facts, the defendants contend, *first*, that the plaintiff being owner of both ship and cargo, they are entitled to receive from him the amount of the contributory share of the cargo to this loss; *secondly*, that this amount may and ought to be deducted from the sum received in the present suit.

In respect to the first point, it does not appear to me that there is any reasonable ground for disallowing the general average. This case must be decided in the same manner as if a stranger were the owner of the cargo. The cargo has been preserved by a voluntary sacrifice, and the ship-owner, if there had been no abandonment, would be clearly entitled to demand from the owner of the cargo a contribution to the general average. It does not appear to me that the abandonment makes any difference in the case. A total loss of the ship, that is, total in construction of law, has arisen; but the cargo has been saved. Where, indeed, a partial loss or damage to the ship occurs in the course of a voyage, and afterwards, in the same voyage, a total loss of the ship, there the former is absorbed in the latter, unless expenses have, in the intermediate time, been incurred to repair it; and, in that event, those expenses are payable by the underwriters in addition to the total loss. *Tumel v. Mar. Ins. Co.*, 7 Johns., 412, 424, note (C). But here, though a total loss has occurred, the previous sacrifice constituted not a loss solely to be borne by the ship-owner, but a contributory loss to be borne by all the property at hazard. The ship-owner had a right to say, I subsequently lost my vessel, but your property was saved at my expense, and you must contribute to relieve me from this burthen. If the ship-owner may say so, it appears to me that the same claim belongs to the underwriters after the abandonment, for they succeed to the rights of the assured.

§ 989. *If assured own ship and cargo, the underwriter may deduct what owner would have had to pay on account of general average on cargo.*

Then as to the second point. If this were a suit to recover the amount of the loss of the masts and rigging, etc., sacrificed for the common benefit, I

am of opinion that the ship-owner would be entitled to recover the whole amount of the loss, without first seeking to recover against the owners of the cargo their contributory share; and the underwriters must be left to recover their recompense over. The ship-owner is entitled to receive his full loss by a peril insured against, without troubling himself with any remedies over against third persons. I follow, in this respect, the doctrine in *Maggrath v. Church*, 1 Caines, 196, and the other cases in New York, which have succeeded it (*Vanderhevel v. United Ins. Co.*, 1 Johns., 412; *Watson v. Mar. Ins. Co.*, 7 Johns., 57), in preference to that of *Lapsley v. U. S. Ins. Co.*, 4 Binn., 502. I speak here of a case where the ship and cargo are owned by different persons. Where they are owned by the same person, a different rule may well apply. There the same hand that loses, pays. As between himself and the underwriters on the ship, his real loss is only the contributory share of the ship to the loss. The other losses are borne by him as owner of freight and cargo, for which he directly is liable. If he actually repairs the loss, the expenses paid must be deemed expenses paid as well in his character of owner of the cargo as of the ship. To declare that he would in such a case be entitled to recover the whole expenses against the underwriters, would be to decide that he might recover a sum which he was bound to pay on his own account; to recover that which he was bound immediately to pay back to the underwriters. The law does not justify such a doctrine. And the authority of *Jumel v. Marine Ins. Co.*, 7 Johns., 412, is directly opposed to it; and *Williams v. The London Assur. Co.*, 1 M. & Selw., 321, goes with the latter.

In principle there ought to be no difference, whether the owner of the ship has repaired the loss or not. In either case, he can recover only the amount of his loss. This loss must be in either case no more than what he has incurred as ship-owner. In contemplation of law, as owner of freight and cargo, he is indemnified as to their portions of the loss.

My judgment accordingly is, that in this case there must be a deduction from the verdict of the amount of the contributory share of the cargo towards the loss, for to this extent the ship-owner has actually in his own hands an indemnity. The case is precisely the same as if he had received from a third person, who was the owner of the cargo, the amount of his contribution. *Pro tanto*, it would be an indemnity going to diminish the total loss. The district judge concurs in this opinion, and there must be judgment accordingly.

PETERS v. WARREN INSURANCE COMPANY.

(Circuit Court for Massachusetts: 1 Story, 468-478. 1841.)

STATEMENT OF FACTS.—This cause was formerly before this court, and the report thereof will be found in 3 Sumner's Reports, 389. It now came again before the court at this term, upon exceptions filed to the report of the auditor, to whom it had been referred to ascertain and adjust the loss, which the defendants were entitled to recover. The exceptions were as follows:

The defendants object to the report of the insurance broker, William Hales, Esq., to whom the case was referred. (1) To the amount of partial loss, and the proportion thereunto belonging, of the general expenses at Hamburg, on the ground that, by itself, it would not amount to five per cent. (2) To Hechsher's charge for indorsing Mr. Peters' draft, \$46.44. (3) To the charge of the interest included in Parish's account with Peters, which runs to the

26th of May, 1837, when the loss occurred November, 1836, and was demanded January 31, 1837, and payable March 31, 1837.

The plaintiffs filed the following exception: The plaintiff excepts to so much of the report as disallows the charge for a commission.

§ 990. *Loss by collision, apportioned upon both vessels, not a general average here.*

Opinion by STORY, J.

The first exception is founded upon the clause in the policy (which is the common clause in the Boston policies) that the underwriters shall not be liable "for any partial loss on other goods on the vessel, or on freight, unless it amount to five per cent., exclusive, in each case, of all charges and expenses incurred for the purpose of ascertaining and proving the loss; but the owners of such goods shall recover on a general average." The argument in support of the exception seems to rest on the ground that the damage done the *Paragon* itself was a partial loss only, less than five per cent.; and that it is not of the nature of a general average. In the opinion already expressed in this case, when it was formerly in judgment, I strongly inclined to think that the loss by the collision was not to be deemed a general average in the sense of our law, although it was apportioned upon both the vessels. *Peters v. Warren Ins. Co.*, 3 Sumn., 389, 393, 394. General average is commonly understood to arise from some voluntary act done, or sacrifice, or expense incurred, for the benefit of all concerned in the voyage or adventure; and then it is apportioned upon all the interests which partake of the benefit. But the mere fact that an apportionment is made of a loss between the different parties in interest, if the loss itself does not arise from some act done, or sacrifice or expense voluntarily incurred for the common benefit, does not make it necessarily a case of general average by our law. Salvage is properly a charge apportionable upon all the interests and property at risk in the voyage which derive any benefit therefrom. But, although it is often in the nature of a general average, it is far from being universally true that in the sense of our law all salvage charges are to be deemed a general average. On the contrary, these charges are sometimes a simple average or partial loss. We must, therefore, look to the particular circumstances of the case to ascertain whether it be the one or the other. So expenses incurred on capture are sometimes a general average, and sometimes not. Thus, if the expenses are incurred for the benefit of all concerned, they are a general average. But, if there should be a capture of a neutral ship solely on account of the cargo, which is owned by different persons, who are shippers, if no proceedings are had against the ship, but are against the cargo only, the expenses occasioned thereby will be apportioned upon the owners of the cargo, and are but a partial loss thereof, and not a general average; for such expenses are not for the benefit of the ship or freight, which, therefore, do not contribute thereto. See 2 Phillips on Insurance, ch. 15, § 1, pp. 71, 72, 73, 74, 2d edit., 1840; *id.*, § 5, p. 125; *id.*, ch. 16, § 3, p. 225; *Benecke & Stevens on Average*, by Phillips, pp. 101, 102, edit. 1833; *id.*, 139 to 141.

§ 991. *Foreign law of general average.*

It has been said in the argument for the plaintiff that whether this claim be a general average or not by our law, it is clearly a general average by the law of Hamburg; and that the foreign law must furnish the rule for the case under such circumstances. And in support of the argument reliance is placed upon the language of the adjustment of the *despacheur*, who states that the *Paragon*, her

cargo and freight, are to bear one-half of the expense of her own repairs and to pay one-half of the value of the Galliot, and the adjustment concludes by saying that this sum (the one-half) is to be borne by the ship, cargo, and freight, as "general average." The argument certainly has considerable apparent weight. It is met on the other side by the suggestion that what constitutes general average must be decided by our law, since the contract and its language must be interpreted by the laws of the place of the contract, and that when a case of general average under our law has arisen, then the foreign adjustment thereof may be conclusive of the amount of such general average, but it is not otherwise. But this argument does not solve the whole difficulty. The real question is, whether the underwriters, by the terms of the policy respecting general average, mean such losses and expenses only as are deemed general average by our law, or such losses and expenses as arise in the course of the voyage from any of the perils insured against, and are assessed upon and payable by the insured as a general average under and in virtue of any foreign law. Now, the contract of insurance is a contract of indemnity against risks and losses by the perils insured against, not only in the home port and on the ocean, but also in foreign ports. It naturally, therefore, looks to general averages which may be incurred and enforced abroad as well as at home. If by a peril insured against the insured is compelled in a foreign port by the local law to pay a sum as general average which by the law of his own country would not be so, why may not such a loss or charge be properly deemed a general average in the sense of the policy? What difference in principle is there between deciding that items or apportionments included in a foreign adjustment of a general average, although not belonging to a general average or a proper apportionment by the law of our own country, are, nevertheless, to be here paid for as a general average, and deciding that a loss not a general average by our law, but a general average by the foreign law, and enforced there, is to be deemed and paid for here as a general average? In each case the loss sought to be recovered is, *pro tanto*, not a general average, according to our law; and the principle which is to govern must be the same; whether the loss be greater or less, whether it apply to the totality of the claims or to any item thereof. Now, certainly, the weight of authority, both in England and America, is that the items included and the sums apportioned and paid according to the law of a foreign country, as a general average, in an adjustment thereof, made there (and, *a fortiori*, if enforced by the public tribunals there), are *quoad* the items and the rule of apportionment, conclusive upon and payable by the underwriters here, as a general average, although not apportioned in the same manner, and not deemed items of general average by our law. This is certainly the doctrine in *Simonds v. White*, 2 Barn. & Cress., 805; *Loring v. Neptune Ins. Co.*, 20 Pick., 411; *Strong v. Fireman's Ins. Co.*, 11 Johns., 322; and *Depau v. Ocean Ins. Co.*, 5 Cowen, 63. The most important case the other way is *Shiff v. Louisiana Ins. Co.*, 18 Mart., 629. But there is great difficulty in holding that this case ought to overcome the rule established in *Simonds v. White*, 2 Barn. & Cress., 805, which puts the doctrine upon grounds of public convenience and policy, and the apparent intention of the parties. There is nothing unreasonable in construing the engagement of the underwriters in a policy to be that they will pay whatever the insured is compelled to pay as a general average, arising from the risks insured against.

§ 992. *The case one of partial loss, at all events, to be borne by insurer.*

But I wish to be understood as not absolutely deciding this point, and it is

the less necessary to consider it, because, assuming the sum claimed not to be a general average, it is nevertheless, as a partial loss, to be borne by the underwriters. The infirmity of the argument for the exception consists in separating the loss incurred by the damage done to the Paragon itself from the damage done to the other vessel, which was apportioned on the Paragon, and in considering them as independent losses. Now, they are not so separable. The loss by the collision was an entirety; and the whole damage assessed upon and payable by the Paragon was a direct damage or partial loss occasioned by the collision, and the items are not to be separated. The whole loss was a charge *in rem* upon the Paragon, and the collision was the proximate cause thereof. This was the doctrine entertained by the supreme court, upon the hearing of this cause upon the writ of error. *Peters v. Warren Ins. Co.*, 14 Pet., 99 (§§ 522-26, *supra*). We must treat the loss, then, as an aggregate partial loss, composed of two items, the one the direct damage done to the Paragon, the other the direct damage done to the other vessel, and assessed and charged upon the Paragon. These items, when united, far exceed five per cent. This exception is, therefore, overruled.

§ 993. *Taking up bottomry bond by bill of exchange, and charge of commission for indorsing same. Underwriter liable for commission.*

The next exception turns upon a very different consideration. It seems that a bottomry bond was given to defray the amount of the sum awarded against the Paragon and charges; and that the bottomry holder was willing to waive the twelve and a half per cent. interest payable upon the bond, if he was promptly paid the amount, and certain other conditions were complied with. The agent of the bottomry holder at New York received from Mr. Peters (one of the plaintiffs) a draft on Hamburg for the amount, and charged a commission for indorsing that draft to his principal and thereby becoming a guarantor of the draft. The bottomry bond was thus taken up; and a less sum than the twelve and a half per cent. was actually paid to the agent. The charge of this commission is now objected to. But I think it is without any just ground. If the underwriters seek to avail themselves of a diminished payment of interest upon the bottomry bond, they must take it *cum onere*. Mr. Peters acted with entire good faith in this part of the transaction, and it has been for the benefit of the underwriters. The charge seems to me entirely reasonable and proper in itself, and the underwriters have no just cause to complain that a less sum has been paid upon the bond than might have been required under its terms. If they adopt Mr. Peters' agency in taking up the bond, they must adopt it throughout. If they do not adopt it, they ought to pay the whole twelve and one-half per cent. bottomry interest due on the bond. I therefore overrule this exception also.

The same considerations will apply to the third exception. The interest therein objected to was a part of the agreement upon which the payment of the twelve and one-half per cent. was surrendered by the bondholder. And besides, it is in itself most reasonable that the bondholder should be paid the interest upon his advances, not merely up to the time when the draft was received, but up to the time when it would arrive at maturity and be paid.

§ 994. *Joint owner who gave the bill and took up the bond as agent of all the owners, not entitled to commission.*

As to the exception by the plaintiff of the disallowance by the auditor of the claim of Mr. Peters for a commission for settling and paying the bottomry bond, it appears to me that it was rightly rejected by the auditor for the

reason stated by him. It was the primary duty of the plaintiffs to pay the bottomry bond in order to entitle themselves to recover the amount thereof from the underwriters. If the owner pays money to repair damages to his ship, he is not entitled to claim from the underwriters any commission on his disbursements, and the present case is not distinguishable from that in principle. On the whole, my judgment is that the report ought to be confirmed. (a)

POTTER v. OCEAN INSURANCE COMPANY.

(Circuit Court for Massachusetts: 8 Sumner, 27-50. 1837.)

STATEMENT OF FACTS.—This was an action on a policy of insurance dated March 3, 1836, at noon, for the term of one year. The policy contained the usual risks and the usual provisions in Boston policies, and among others was a clause that "the company are not liable for wages or provisions, except for general average." At the trial it appeared that the bark "Hannah," on which the above policy was issued protecting her while at sea and in port, sailed from New Orleans on 4th November, 1836, with a cargo destined and to be landed at Tampico. In course of the voyage, on the 9th of November, the vessel encountered a severe squall and lost both masts, and on 11th November, in a heavy gale, a heavy sea struck her stern boat from the stern and stove it to pieces. The Hannah, on the 5th December, 1836, arrived at Tampico and delivered her cargo. The necessary repairs could not be obtained there and hence she could prosecute no further voyage. She returned to New Orleans and was there repaired. The amount of those repairs and the incidental expenses of her return to New Orleans and loss of her boat were claimed by her owners from the insurance company. The company excepted to the findings in the report of the auditor appointed to ascertain the amount of the losses. These exceptions are to be argued now, and the particulars are given in the opinion.

Opinion by STORY, J.

Upon most of the exceptions which have been argued, I do not think it necessary to make any particular remarks, as the reasons given by the auditor for his allowance and disallowance of items are entirely satisfactory to me. Indeed, considering his acknowledged professional learning and great experience in this branch of the law, it would be difficult not to give his opinion great weight as to the practical adjustment of losses.

§ 995. *Wages, provisions and expenses, a general average.*

In respect to the leading objection which has been taken to the report, that it allows the expenses of wages, provisions, etc., of the voyage back to New Orleans, as in the nature of a general average, the jury have found that the voyage was a voyage of necessity for repairs to a proper and convenient port. According to the established doctrine in the Massachusetts courts, the wages and provisions of the crew and other expenses on such a voyage of necessity constitute a general average. It was so held in *Padelford v. Boardman*, 4 Mass., 548, and *Clark v. United States Fire & Marine Ins. Co.*, 7 Mass., 365. See, also, 1 Phillips on Insurance, 348, 349; 2 Phillips on Insurance, 241, 242.

But the argument is that there was no cargo on board, and that there can be no contribution by freight or cargo, but the whole is to be borne by the ship; and that, therefore, it is a particular average on the ship, and not a general average. The argument proceeds upon the ground that what is and

(a) See *Peters v. Warren Ins. Co.*, *ante*.

what is not a general average does not depend upon the nature and objects of the thing done, or sacrifice made, for the general good, but solely upon the point whether there are in fact different contributory subjects. I do not so understand the law.

§ 996. *Rule as to what constitutes "a general average."*

As I understand it, the rule as to what constitutes a general average or not is founded upon the consideration whether it is for the benefit of all who are, or may be, interested in the accomplishment of the voyage, or only for the benefit of a particular party. Suppose a person to be owner of the ship and cargo, and of course ultimately of the freight also, and he should insure the ship, cargo and freight in three different policies, by different offices; if a jettison should be made, or a mast be cut away, or any other sacrifice be made for the common benefit of all concerned in the voyage, there can be no doubt that this would be a case of general average; and the underwriters on ship, cargo and freight must all contribute as far as general average. What possible difference in such a case could it make, that the same underwriters were underwriters in one policy on the ship, cargo and freight? or that the owner singly had no insurance at all, or an insurance upon one only of the subjects put at hazard? Must not the loss still be treated, in the contemplation of law, as a general average, or in the nature of a general average? As I understand it, the phrase "general average," as found in our policies of insurance, is used in contradistinction to particular average. It means a voluntary sacrifice for the benefit of the voyage, and not merely an involuntary encounter of a loss without action or design. It looks to the efficient cause of the loss, and not to the effects of it. It looks to the consideration whether the act is intended for the benefit of all concerned in the voyage, and not in particular to the consideration who are to contribute towards the indemnity. To be sure, if the owner stands as his own insurer throughout, the question degenerates into a mere distinction; for it is a pure speculative inquiry. Not so when there is an insurance; for in such a case, the underwriters are, *pro tanto*, benefited by the sacrifice or other act done, and they are, in a just sense, bound to contribute toward it.

§ 997. *Principle of general average applied.*

In the present case the insurance was not upon any particular voyage, but it was on time. Unless the owner had a right to repair the bark so as to perform other voyages within the year, at the expense of the underwriters, he must have had a right to abandon to the underwriters for a total loss; for in her crippled condition the bark was incapable of any further employment. The going to New Orleans, therefore, was not an act solely for the benefit of the ship-owner, but was for the benefit of the underwriters, also, to save them from a total loss. The plaintiff was bound to repair, if he could, and to seek some convenient port for that purpose; and the expenses of going thither were properly incidental expenses to the repairs, in the nature of a general average, to replace the bark in the condition in which she was before the accident. If the plaintiff was not fully insured, he must contribute his proportion toward the common expenditure in going to New Orleans. If he was fully insured, he has only shifted the whole loss upon the underwriters. The expenses of going to New Orleans are just as much a matter of general average as would have been the expenses of towing the bark into port, if she had become water-logged, or incapable of getting to a place of repairs, without the employment of an additional crew. Suppose,

after the disaster and arrival at Tampico, it had been necessary to employ a steamboat to tow the bark to New Orleans to repair, would not the underwriters have been liable to pay the expenses as in the nature of salvage? If, in order to constitute a case of general average, it be necessary that there should be some cargo on board, or some other things besides the ship at hazard, what is to become of the case of an insurance on an empty ship, whose masts are cut away in a storm, or which, after losing her masts, is compelled to be brought into port by salvors, in consequence of the disabled state of the ship and the crew? Are not the underwriters bound to pay the loss and the salvage? If so, are not these emphatically charges in the nature of a general average? Suppose an empty ship, which is insured, is dismasted in a storm, and is compelled to put away into a port of necessity, in order to repair, or otherwise she must be abandoned at sea; are not the expenses of the voyage in such a case to the port of necessity of the nature of a general average? Are they not incurred as much for the benefit of the underwriters as for the ship-owner?

I put these cases because it seems to me that they bring the principle of the argument to its true test. And it seems to me that it would be an entire novelty in cases of insurance, not to hold that, under such circumstances, the underwriters were liable for the charges, as in the nature of a general average. If so, the clause in the policy, that the company are not liable for wages and provisions, "except in general average," is wholly inapplicable, for the present case is brought within the meaning of the exception. I have no difficulty, therefore, in overruling this objection.

§ 998. *Causa proxima. Loss of boat.*

In relation to the next point of objection, as to the payment for the loss of the boat, it seems to me to be disposed of by the verdict of the jury. They have found that it was a direct consequence attributable to the preceding storm, so that the principle, in case of loss, that *causa proxima, non remota, spectatur*, is not at all interfered with. If the bark had become wholly unmanageable and innavigable from the immediate effects of the storm, I do not well see how the direct results from that unmanageableness and innavigability are to be treated otherwise than as a part of the loss. The storm is still the *causa proxima*. In causes of this sort it will not do to refine too much upon metaphysical subtleties. If a vessel is insured against fire only, and is burnt to the water's edge, and then fills with water and sinks, it would be difficult, in common sense, to attribute the loss to any other proximate cause than the fire, and yet the water was the principal cause of the submersion. If a vessel be insured against barratry of the master and crew, and they fraudulently bore holes in her bottom, and thereby she sinks, in one sense she sinks from the flowing in of the water, but in a just sense the proximate cause is the barratrous boring of the holes in her bottom.

§ 999. *Survey need not be ordered in admiralty.*

In relation to the item for the survey at Tampico, there are three objections stated in the exceptions to its allowance. First, that the consul had no jurisdiction to order a survey, and that it should have been ordered by a maritime court. It is certainly the usual practice of courts of admiralty, and I deem it a very useful and beneficial practice, to order surveys, in cases of this sort, as a matter of admiralty and maritime jurisdiction within their cognizance, and, in my judgment, rightfully within their cognizance. (This jurisdiction seems incidentally affirmed in the case of *Dorr v. Pacific Ins. Co.*, 7 Wheat.,

612, 613, and of *Janney v. Columbian Ins. Co.*, 10 Wheat., 411, 418. Among my own MSS. is a copy of a decree of the admiralty court at Boston, in 1745, before Judge Auchmuty, in which, upon petition of the master to survey a vessel (the *Three Marys*), she was condemned, and ordered to be sold as unseaworthy.

But I am not aware that it has ever been held to be indispensable to the validity of a survey, that it should emanate from such a source. The object of a survey is to assist the judgment of the master, as to his proceeding to repair damage, or to sell the ship. It is designed to protect him in the fair discharge of his difficult and often critically responsible duty in great emergencies by giving him the aid of the opinion of other men of sound judgment, intelligence and skill in naval affairs. Indeed, this course is so universally adopted in practice, that a master who should venture to deviate from it would be treated as guilty of some improvidence, if not of gross rashness and neglect of duty. A survey is a common public document, looked to both by underwriters and owners as affording the means of ascertaining upon the very spot, at the very time, the state and condition of the ship, and other property at hazard. In some policies, as, for example, when what is technically called the "rotten clause" is inserted, such a document seems indispensable, as the survey may amount to a discharge of the underwriters. See cases on this clause. *Dorr v. Pacific Ins. Co.*, 7 Wheat., 582; *Janney v. Columbian Ins. Co.*, 10 Wheat., 411, 416 to 418; 1 Phillips on Insurance, 154, 158.

But although surveys are and may be thus ordered by courts of admiralty, I am not aware, as I have already said, that this is an indispensable requisite. On the contrary, a survey may be made upon the mere private application of the master directly to the surveyors; and there does not seem any good reason why, if an American consul should interpose in behalf of the master, and, with a view to assist him, should appoint the surveyors at his request, and thereby sanction their competency to the task, such an appointment should be deemed objectionable. As a known public officer, the act of a consul would, even if he had no express or implied authority to make the appointment *ex officio*, be deemed an act of higher authority, and more entitled to public confidence, than that of the master himself, and might be an inducement to the surveyors to undertake the duty with more promptitude and responsibility.

But I am not aware that the issuing of a commission for a survey is, in truth, beyond the rightful authority of a consul in cases of this sort. That depends upon the course of trade and the common functions established by the general consent and customs of nations in regard to consuls. Our own statutes do not pretend to ascertain or establish their rights, or their duties generally, but have merely given them certain authorities. One of these statutes has declared "that the specification of certain powers and duties, etc., etc., shall not be construed to the exclusion of others, resulting from the nature of their appointments, or any treaty or connection under which they may act." Act of 1792, ch. 26, sec. 9. Whether acts of this nature are usually done by consuls is more than I know. But in the absence of all controlling proof, the fact that the consul did make the appointment in this case affords some presumption that it was a rightful exercise of authority.

Be this as it may, there is no ground to say that it is indispensable that surveys of this sort are absolutely required to be made under the authority of any maritime court. On the contrary, I am strongly impressed that they are often made under the authority of other magistrates, and often at the mere

private request of the master. See *Wesket on Insurance, etc.*, title Certificate, p. 89; *id.*, Damage, p. 162, sec. 5; *id.*, Estimate

§ 1000. *Surveyors need not be sworn.*

The other objection to the survey, that the surveyors do not appear to have been sworn, is equally untenable. There is no law positively requiring it to be done. The remaining point under this head as to the fees charged by the consul is unmaintainable, for there is no law fixing his fees in a case of this sort.

§ 1001. *Survey at New Orleans proper.*

In regard to the survey at New Orleans, the reasons given by the auditor for the allowance seem to me entirely satisfactory. It was a proper precaution to guard against any future difficulty in adjusting the loss; it might be important to the underwriters, as well as the ship-owner, as one of the appropriate documentary proofs to establish and limit the extent of the loss. See *Benecke and Stevens on Average*, by Phillips (1833), p. 384.

§ 1002. *Deduction of one-third new for old.*

In regard to the deduction of one-third new for old, the true interpretation of that rule has always appeared to me to be that it is strictly applicable only to the labor and materials employed in the repairs and to the new articles purchased in lieu of those which were lost or injured by the disaster. It would be strange to apply it to other independent expenses which were merely incidental to the loss, for in no just sense can it be said that the owner is benefited thereby or that he receives an enhanced value therefrom beyond his indemnity. I am not aware that any different exposition of the rule has ever been judicially established. The case of *Sewall v. United States Ins. Co.*, 11 Pick., 90, so far as it goes, is confirmatory of it, as indeed is the text of the best elementary writers on the subject. 1 Phillips on Insurance, 371, 372; *Benecke and Stevens on Average*, by Phillips, 167; note, *id.*, 238, 374, 384, 385. For this reason, and upon principle, I think that the deduction allowed by the auditor of one-third from the amount of the expense of towing the schooner across the Mississippi (\$15), and that of assistance in getting her across and boat hire (\$19.50), and that of towing her back (\$20), ought not to stand. It is true that, from the report, it seems to have been the more general practice, though not a universal practice, in Boston, to make the deduction; and the auditor has stated that this was his sole reason for allowing it, he having no reference to the principles of maritime law on the subject. But though the sum is trifling, I think the practice of making the deduction is inconsistent with principle and ought not to be permitted to stand. It has a tendency to introduce confusion and to perpetuate perplexing questions as to what items are or are not within the reach of the rule. If we stand by the purport of the rule in its simple form, as applicable merely to the labor and materials used in the repairs or in the replacing of lost or injured articles, very little difficulty can arise in its practical application.

Upon the whole, my judgment is that the auditor's report ought to stand confirmed, except as to the deductions allowed upon these three small items, and as to them it ought to be reformed and the verdict awarded and entered for the plaintiff accordingly.

HERNANDEZ v. SUN MUTUAL INSURANCE COMPANY.

(Circuit Court for New York: 6 Blatchford, 817-825. 1869.)

STATEMENT OF FACTS.—Action on a policy of insurance on six thousand boxes of lemons from Malaga to New York “free from particular average.” The vessel was stranded and some four thousand boxes of the lemons were saved; the remainder lost. There was a verdict for the plaintiff, subject to the opinion of the court on a case stated.

Opinion by BLATCHFORD, J.

No claim is made in this suit as to the raisins. The sole question is as to the two thousand one hundred and seventy-nine boxes of lemons. It is contended on the part of the plaintiffs that the body of the policy is not a single contract of insurance on six thousand boxes of lemons, and that the indorsement is not a single contract of insurance on two hundred and fifty boxes of lemons, but that the body of the policy contains a separate insurance on each box of the six thousand boxes named in it, and that the indorsement contains a separate insurance on each box of the two hundred and fifty boxes named in it. Under the printed memorandum clause in the policy, these lemons, being fruits, and being warranted by the assured, by such clause, free from average, unless general, if the six thousand boxes were insured in gross by the body of the policy, and the two hundred and fifty boxes were insured in gross by the indorsement, the defendants would not be liable for the two several lots of two thousand and twenty-four boxes and one hundred and fifty-five boxes, physically totally lost, others of each of the two lots having been saved. But the plaintiffs rely on the written portions of the policy and of the indorsement, to take the case out of the general rule of law, and to show that the insurance was not of the six thousand boxes in gross, and of the two hundred and fifty boxes in gross. So much of the written portion of the body of the policy as describes the subject insured, and the amount of risk taken, states nothing except that \$14,800 is insured on six thousand boxes of lemons, with the words added, “free of particular average, but liable for loss of part by jettison.” So much of the written portion of the indorsement as describes the subject insured, and the amount of risk taken, states nothing except that \$1,062 is insured on two hundred and fifty boxes of lemons, with the words added, “free of particular average; otherwise, conditions as within.” These insurances can mean only that six thousand boxes of lemons are insured in one lot, and two hundred and fifty boxes of lemons are insured in another lot, each lot free of particular average, except that if any part of either lot, that is, any number of boxes in either lot, is lost by jettison, the insurer is to be liable therefor. The words “free of particular average,” written in, in both the body of the policy and the indorsement, as to the lemons, mean the same thing, and are to the same effect as the words “free from average, unless general,” in the printed memorandum clause, in regard to the lemons, as fruits, and import that the contract is, that the insurer is to be liable for no loss of any part of the six thousand boxes less than the whole, or any part of the two hundred and fifty boxes less than the whole. It is specially provided, however, that the insurer shall be liable for a loss by jettison of a less number of the six thousand boxes than the whole, and of a less number of the two hundred and fifty boxes than the whole. But for such special provision, the words, “free of particular average,” would apply as well to a loss by jettison as to any other loss. Thus far, then, there would seem to be no room for controversy as to the terms of the contract,

and nothing to indicate an intention, by either party, to have an insurance made on any portion of the six thousand boxes less than the whole, or any portion of the two hundred and fifty boxes less than the whole, in regard to any loss, except a loss by jettison.

§ 1003. *Valuation of lemons at price per box, not an implication of insurance of each box.*

What, then, is there in any other part of the contract to indicate any different intention? The clause solely relied on by the plaintiffs, to show such different intention, is the written valuation clause, in the body of the policy, and also in the indorsement, valuing the lemons at \$4.25 per box. They claim that such valuation clause indicates that the insurance was distributive, and on each box of lemons, while they do not contend that the fact that the lemons were contained in separate boxes was alone sufficient to create a separate insurance on each box. Reasoning on principle, it would hardly answer to admit the valuation of each box in this case as conclusive evidence of an intention to insure each box separately, and that is what must be done if the claim of the plaintiffs is allowed. Other reasons occur why a valuation of each box of lemons, as well as a valuation of each box, each half box, and each quarter box of raisins, and of each bale of almonds, may have been inserted. The property was shipped on the 13th of September, at Malaga; the vessel sailed from Malaga on the 22d of September, and the insurances were effected on the 7th and 10th of October. The valuation of each separate package may very well have been inserted with a view to calculating the return premium, in case it should turn out that less than six thousand two hundred and fifty boxes of lemons, or less than the specified number of packages of raisins and almonds, had been shipped, or the return premium provided for in case of the existence of a prior insurance on the property, and which prior insurance, as appears from the evidence, in fact existed in this case. So, also, in case of a loss by jettison of some of the boxes of lemons, the valuation of each box of lemons was important to fix the measure of the insurer's liability. The valuation did not correspond with the sum insured, as to the body of the policy, in respect to either of the articles insured; and, therefore, the valuation per box of the lemons and the raisins insured by the body of the policy could not be arrived at by dividing the sum insured by the total number of boxes. The valuation of the six thousand boxes of lemons, at \$4.25 per box, was \$25,500, while the sum insured thereon was \$14,300; and if the sum so insured had been taken as the valuation, in the absence of the valuation at \$4.25 per box, it would have given a valuation of \$2.38 per box. The valuation of the four thousand boxes of raisins, at \$1.90 per box, was \$7,600, while the sum insured thereon was \$3,800, which sum, if taken as the valuation, would, in the absence of the valuation at \$1.90 per box, have given a valuation of ninety-five cents per box.

Moreover, the view urged on the part of the plaintiffs leads to some results which it is impossible to believe could have been contemplated by the parties. The insurance, if distributive, and on each package, must have been made on each quarter box of raisins; that is, on each forty-seven and a half cents' worth of raisins. The insurance on the raisins is made "subject to ten per cent. average." By that the insurer was not liable for any partial loss of any *quantum* of raisins insured, unless such loss should amount to ten per cent. of the value of such *quantum*, but the insurer was to be liable for such partial loss, if it should amount to such ten per cent. Now, if forty-seven and a half

cents' worth of raisins was separately insured, the insurer was made liable for a loss amounting to as little as four cents and three-quarters. With a printed memorandum clause, such as is found in this policy, it requires clear and definite language to make a contract which shall take these fruits so wholly out of that clause, and out of the freedom from particular average therein stipulated, as to require a separate average on each one of a quantity of small packages, each valued at not more than forty-seven and a half cents. In regard to a loss of lemons by jettison, where the entire package would be thrown overboard, and presumably lost as a totality, the contract is clear; and the expression of a liability for a loss of part by jettison excludes the idea that the insurer was to be liable for a loss of part by any other peril, especially in connection with the written clause, "free of particular average," and the like clause in the printed memorandum in regard to the lemons.

Again, if each box of lemons was separately insured, there would necessarily be a liability of the insurer for each box jettisoned, without the insertion of the written clause, "but liable for loss of part by jettison." Such words would in that case be wholly useless, unless, indeed, each box being insured, the jettison of a part means the throwing overboard of some lemons out of a box—a construction hardly worthy of being advanced in a court of justice.

By the policy the premiums on the lemons and the raisins severally would seem to have been adjusted with reference to the risk taken. The premium is one and one-quarter per cent. on lemons, and one and one-half per cent. on raisins, both being fruits and both in boxes. Thus a higher premium was charged on raisins. This was natural on the view urged by the defendants. They insured the lemons, free from particular average or partial loss, except that they were to pay for the loss of part by jettison; but, in regard to the raisins, they were to pay for a partial loss, provided it amounted to ten per cent. of the value of the raisins insured. This warranted a higher premium on the raisins, the risk being greater. On the view urged by the plaintiffs, however, the risk as to the lemons would be greater than the risk as to the raisins; for, while each box of each article would be insured separately, the raisins would be subject to ten per cent. average, while the lemons would not be, and yet the raisins would have paid one-quarter of one per cent. more premium.

The case of *Newlin v. Insurance Company*, 20 Penn., 312, is directly in point against the plaintiffs, and no case directly in their favor has been referred to. On principle, the reasoning of the supreme court of Pennsylvania in that case is sound and shows that such a valuation as is found in the policy in this case cannot be construed as creating a separate insurance on each package so valued, in view of the language of the other portions of the policy. I have no doubt that this is the view generally held by assurers and assured in practical business, and acted on daily, and it is so far a rule of property that I am not willing to disturb it until so directed by superior authority.

§ 1004. *Written words control printed; portions of the contract repugnant to the general sense to be struck out.*

The fact urged, that the printed portion of the policy insures against loss "of the said goods and merchandise, or any part thereof," cannot control the case. The whole policy, written words and printed words, must be taken together; and, where there is a contradiction between the written words and the printed words, the former must control. 2 *Parsons' Maritime Law*, book 2, ch. 1, p. 53. It is the settled law of this court under a policy like the present one, containing, respecting the lemons, the printed words, in the

memorandum clause, "free from average, unless general," and also the written words, "free of particular average," that the insurer is free from all partial losses of every kind which do not arise from a contribution towards a general average. *Biays v. Chesapeake Ins. Co.*, 7 Cranch, 415 (§§ 893-94, *supra*); *Morean v. U. S. Ins. Co.*, 1 Wheat., 219 (§§ 891-92, *supra*). Yet the claim on the part of the plaintiffs is, that by the printed words, "or any part thereof," the insurer is made liable for all partial losses of every kind. This is wholly contradictory of the written words as to the lemons, "free of particular average," and the latter must control. These words, "or any part thereof," are equally applicable, if capable of the construction on by the plaintiffs, to the insurance, which they insist was made of each separate box of the lemons; and then these words would effect an insurance of each separate lemon, which the plaintiffs would hardly contend for. These words, "or any part thereof," in the printed blank form of a marine policy, have co-existed for a long time with the printed words in the memorandum clause, "free from average unless general" (1 Arnould on Insurance, 2d ed., by Perkins, p. 21), and yet it has never been supposed that the former control the latter. Under the rule as to the construction of contracts, that where one portion of the contract is wholly repugnant to the rest of it, and is irreconcilable with the manifest intention of the parties, as apparent upon a consideration of the whole instrument, it will be stricken out (*Story on Contracts*, ch. 20, § 660), the former words would, in the present policy, be stricken out.

§ 1005. *Marine policies informal contracts, loosely drawn.*

It was said by Chief Justice Marshall, in *Yeaton v. Fry*, 5 Cranch, 335, 342, in regard to policies of marine insurance, that they "are generally the most informal instruments which are brought into courts of justice;" and in regard to a marine policy, he also said, in *Maryland Ins. Co. v. Woods*, 6 Cranch, 29, 45: "The contract of insurance is certainly very loosely drawn, and a settled construction different from the natural import of the words is given, by the commercial world, to many of its stipulations, which construction has been sanctioned by the decisions of courts." The remark of Mr. Justice Buller, made in 1791, in *Brough v. Whitmore*, 4 T. R., 206, 210, in regard to a policy of insurance, that it "has at all times been considered, in courts of law, as an absurd and incoherent instrument, but it is founded on usage, and must be governed and construed by usage," is as true now as it was then. It cannot be seriously contended that any such construction is given, by the commercial world, or by assurers or assured, or in usage, or by courts of justice, to these ancient, formal, printed words, "or any part thereof," as is contended for by the plaintiffs. There must be a judgment for the defendants. (a)

(a) In *Hernandez v. New York Mutual Insurance Company*, 6 Blatch., 326, 327 (1869), the facts were the same in substance as those in the above case.

BLATCHFORD, J., delivered the following opinion:

"The written words in this case, 'liable for any portion thrown overboard,' have no legal meaning or effect different from the words, 'liable for loss of part by jettison;' and the mode of describing the valuation of the lemons and raisins in the policy in this case is not different in substance from that found in the policy in the other case. All the considerations commented on in the opinion in that case have equal application in this case, except the one as to the provision for a return of premium in case of a prior insurance, the insurance in this case being the prior one. The valuation in the policy in this case, after naming the valuation per box, carries out the total valuation, which was not done in the other case, but such total valuation, and such valuation per box, are equally parts of the valuation, and the putting in of

GRISWOLD v. UNION MUTUAL INSURANCE COMPANY.

(Circuit Court for New York: 3 Blatchford, 231-240. 1854.)

STATEMENT OF FACTS.—Action on policy of insurance on freight from China to New York. Insurance against jettison. Goods were jettisoned, and upon general average insured were charged for contribution. A verdict for \$1,500 was agreed upon, subject to the opinion of the court upon facts stated. Further facts appear in the opinion of the court.

Opinion by BETTS, J.

The merits of this case depend upon the question whether the recompense demanded by the plaintiffs for the loss of freight is to be determined by the adjustment stated on the determination of the voyage, or by the valuation fixed in the policy.

§ 1006. *Valued policy settles value of property.*

The general rule of commercial law is, that, as between insurers and insured, a valued policy is to be taken as setting the true value of the subject insured, unless the valuation is shown to be fraudulent or enormously excessive. This doctrine is laid down by text-writers of the highest authority, and is sanctioned by adjudged cases in the United States and in England. 1 Marshall on Ins., 200, Condry's ed., 228; 1 Arnould on Ins., 18, 309; 3 Kent's Comm., 8th ed., 272, 344; Phillips on Ins. (3d ed.), ch. 14, arts. 1178, 1183; Lewis v. Rucker, 2 Burr., 1171, 1172; Marine Ins. Co. of Alexandria v. Hodgson, 6 Cranch, 206; Watson v. Ins. Co. of North America, 3 Wash., 1; Snell v. Delaware Ins. Co., 1 id., 509; De Longuemere v. Phoenix Ins. Co., 10 Johns., 127; De Longuemere v. New York Fire Ins. Co., id., 201.

If the demand in controversy in this case rested upon a total loss of the freight insured by direct perils of the sea, the amount recoverable by the plaintiffs would be determined by the valuation in the policy, the goods having been shipped and earning freight without regard to the actual worth of the freight at the port of departure or discharge. That position is conceded upon both sides. But the defense is placed upon what is regarded by some authorities as a radical distinction between a loss of freight by means of a jettison of the goods during transportation at sea, and a loss by destruction of the goods through sea perils acting directly on them—a distinction supposed to demand a different rule of compensation as between insurers and insured. Our examination of this case will be chiefly directed to that particular point.

§ 1007. *Whether loss by jettison is compensated by general average, quære.*

The rule supposed by the defendants to govern this case is stated, in many text-writers on insurance law, to be, in substance, that a loss by jettison is one compensated by general average, in the first instance, and not by the underwriters; their liability under such loss being to compensate the insured for his average contribution, and not primarily to recompense him for his direct loss from the sea peril. Arnould on Ins., 948-950; Abbott on Shipping, 354; 3 Kent's Comm., 232. This proposition is by no means universally accepted by text-writers, to the extent of excluding the direct liability of the insurers for the jettison loss. 2 Phillips on Ins., 3d ed., arts. 1348, 1617. And the con-

the total valuation can make no difference as to the effect of the valuation per box on the question of a separate insurance of each box.

"The defendants, at the trial, offered in evidence the written applications made by the plaintiffs to the defendants for the insurance made in this case, but they were excluded by the court. As the judgment will be for the defendants the point is unimportant. Judgment for defendants."

trary doctrine is established by the decisions of the courts of this state (*Maggrath v. Church*, 1 Caines, 196; *Vandenheuvel v. United Ins. Co.*, 1 Johns., 406), and of the circuit court of the United States in the first circuit. *Potter v. Providence-Washington Ins. Co.*, 4 Mason, 298 (§§ 988-89, *supra*). It is not our purpose to enter into this topic, upon which there is a conflict of decisions between the supreme courts of New York and Pennsylvania (*Maggrath v. Church*, *ut supra*; *Lapsley v. United States Ins. Co.*, 4 Binn., 502), because it is essentially one of remedy concerning the method of enforcing remuneration, and does not involve the question of the responsibility of the defendants, or the amount of their liability. Conceding that they stand chargeable to the insured for the loss sustained by the jettison, it is unimportant to the ascertainment of the amount they are subject to pay, whether the action for its recovery be secondarily against them, for an indemnity, because of the average contribution to which the insured have been subjected, or primarily, upon the stipulations of the policy. We regard the defense in this case as resting on the position that the plaintiffs are entitled to charge the defendants with no more than the contributory amount paid by the plaintiffs in discharge of the average adjustment; and, accordingly, in fixing the rule of recovery, it is essentially immaterial whether that adjustment and contribution be looked to as the foundation of the action, or be applied, in a suit on the policy, as the measure of the loss sustained by the plaintiffs.

§ 1008. *Measure of damages of loss by jettison when there is an open policy.*

We have not been referred to any case in which the facts presented the point for judgment in the aspect in which it comes before us. In *Lapsley v. The United States Ins. Co.* (*ut supra*), chiefly relied upon by the defendants, the reasoning of the court may be claimed to embrace the principles of this defense. But the insurance in that case was by an open policy, and the decisions and *dicta* referred to in its support had relation also to open policies. And it is to be further observed that the specific question presented in this case did not arise in that. The controlling point there settled was that the insured were not entitled to abandon the goods saved and charge the insurers with a total loss. It was also ruled, as to the mode of recovery, that the insured must first apply for the average contribution allotted him, and, in case it was not paid, that he would, after that, have his action against the underwriters for that amount. One consideration applies to that case and affords ground for upholding it, which does not touch the cardinal feature of this. The amount of loss sustained by the insured, whether it consists in the destruction of a part or of the whole of his goods, must necessarily, on an open policy, be ascertained by means *aliunde* the policy. A standard of value is, in such case, furnished by an average adjustment. It matters not that the adjustment may not be universally made upon a common principle of valuation, and that, under one jurisdiction, the prime cost, and under another, the current price at the time of loss, or the price at the time and place of shipment or of discharge, may govern the valuation. *Jacobson's Sea Laws*, 350, 351; *Benecke*, London ed., 296; 3 *Kent's Comm.*, 335. Still, the adjustment, when fixed, determines the rate of allowance upon which the contribution is to be made. And, doubtless, it also affords the rule upon which the underwriter is chargeable, in satisfaction of that contribution. 2 *Arnould on Ins.*, 929. That liability, however, would be the result of an implied and not an express engagement in respect to the amount of recompense to the insured. The action in the Pennsylvania court did not assume to make the underwriters liable for a sum fixed by posi-

tive stipulation, nor did the question as to the effect of a valuation in the policy, in diminishing or increasing the liability of an underwriter, when differing from the adjustment valuation, enter into the discussion or decision of the cause. It is not perceived that there is any distinction, in principle, between that case and the New York case of *Maggrath v. Church* (*ut supra*), from which it formally dissents, except on the point as to whether resort must, in the first instance, be had by the insured to the average contributors or their insurers, or whether the remedy may be primarily against the underwriters to the plaintiff, for the totality of the contribution due the plaintiff. This, as already suggested, partakes rather of a question of process than of right. In other respects the two cases are substantially alike. In each the plaintiff claimed a right to abandon and to recover for a total loss; and in each the court decided that the case did not authorize an abandonment; and the compensation awarded in each was the sum fixed by general average.

§ 1009. *Contract of insurance not to be construed according to law of the place where executed.*

As, in our opinion, it cannot be justly held to be an ingredient of the contract of insurance that it shall be enforced conformably to the law of the place where it was executed, it is enough, in this instance, that the action brought conforms to the law of the forum in which it is prosecuted; and we are not called upon to determine whether it would be sustainable in the tribunals of Pennsylvania. The defendants having entered their appearance, and put in pleas of *non assumpsit* and payment in the cause, we are to assume that the suit has been regularly instituted in this court, and that the plaintiffs are entitled to the same remedy under it as if the action was *in rem*, or against non-residents of the state, duly served within this district.

§ 1010. *Loss of freight by jettison made subject of general average, a loss within valued policies.*

The point upon the merits, then, is, Does the fact that the loss of freight was occasioned by a jettison of the goods, and was made a subject of general average, supersede or suspend the title of the plaintiffs to recompense upon the contract of insurance itself, or supplant that contract by a different obligation of the insurers, to be responsible only for the amount contributed by the insured on such general average? The affirmative of this position is maintained by the defendants on what is assumed to be the settled law respecting losses resulting from jettison. No case, however, is produced in which that doctrine is directly adjudged in respect to claims under *valued* policies; and the question is to be answered upon general principles governing the application of the law merchant.

The reasoning in support of the defense is grounded upon the decision in *Lapsley v. The United States Ins. Co.* (*ut supra*), and the cases there referred to. But, as has been already remarked, the decision in that case is limited to its own facts, and determines no more than the method of recompense to be pursued by the insured under an open policy; and, unless that carries a legal implication that the same doctrine governs in cases of valued policies, the Pennsylvania court has not met the question now raised.

An able opinion by the counsel who argued the case for the insurance company in the Pennsylvania court in support of the decision rendered therein, and of its applicability to the present case, has been produced on this argument and submitted to us for perusal. He adds to the citations found in the reported case a reference to 2 Valin, 654, and to 2 Boulay Paty on Emerigon.

The latter authority is not now accessible to us; but Valin, in the place cited, sheds no light on the present inquiry, because he is discussing the general rule as to the place where the valuation of freight on goods jettisoned is to be ascertained. He evidently regards the rule indicated by him as one to be applied where no method of fixing the value is established between the parties. 2 Valin, lib. 3, tit. 8, art. 6. We find no intimation, in any part of his Commentaries, that a fixed rule of adjustment was determined by any form of positive law, or that it would be incompetent for the ship-owner and the freighters to appoint a different mode of valuation than the worth of the freight, if it should all be made at the port of destination. Nor do we understand the sixty-second note of Roccus, relied upon in that argument, and cited in the Pennsylvania decision, to exact the interpretation put upon it in that relation. The question proposed and solved by the note touches the scope of the obligations of underwriters. By asking if their liability is to secure an indemnity to the assured, and denying it that extent, the writer necessarily assumes that the query applies to open policies, under which usage supplies a measure of damages for want of one ascertained and determined between the parties. This is manifest from the provisions of notes 31 and 32. Roccus there marks the distinction when the goods are not valued in the policy, and when they are so valued. In the latter case he says: *Where the goods have been estimated at a certain value, the estimated value must undoubtedly be paid.* This view of the distinction is supported by Marshall (book 1, ch. 15). Neither writer asserts that a loss by jettison is taken out of that plain and simple principle, and made subject to an arbitrary rule adverse to the agreement and stipulation of the parties.

We feel persuaded that no adjudged case will be found in which an adjustment of general average is held to nullify the stipulation of the policy in regard to the indemnity of the insured. The law only recognizes the adjustment as a rule of compensation in case the parties are silent. It does not inhibit their adopting a rule by mutual agreement.

In case of a deterioration or partial loss of property insured there might be reason for resorting to the estimates in an adjustment, as a proper measure of that loss or damage, although the policy was a valued one, on the ground that the valuation had relation to the totality of the articles, and that, the loss not being total, the usage governing the allowance under general average might very properly supply the rule of damages. This seems to have been the point of view in which the supreme court of Massachusetts accepted the rule under a valued policy. *Clark v. United Fire & Marine Ins. Co.*, 7 Mass., 365. And that qualification would seem to apply only where a portion of the thing insured at a fixed valuation is preserved. It does not necessarily include distinct things totally lost, which compose part of a policy. Even this concession of the rule, however, is discountenanced by elementary writers of commanding authority (3 Kent's Comm., 274, and cases cited); and, in the English courts it has been settled that the valuation in a policy is to be considered the correct value in settling losses, total or partial. *Irving v. Manning*, 1 Clark & Fin., 287; 6 Mann., G. & Scott, 391.

We answer, then, to the question raised in this case, whether the computation, in ascertaining the recompense to be made for the destruction of part of the goods, and the consequent loss of freight upon them, is to be on the basis of the average adjustment or of the valuation in the policy, that the latter furnishes the rule which the plaintiffs are entitled to have applied to this case.

The advantage acquired by the plaintiffs is fortuitous. It might have resulted wholly to the benefit of the defendants. In forming the compact both parties must be understood to have contemplated that, if a loss of freight occurred, it might greatly exceed the sum stated or fall largely below it. They contracted upon that chance; and, as each expected the contingency might result in his favor, the one against whom it turns cannot, with any show of equity, insist upon the court's reframing the bargain by its authority, and, after he has been allowed to enjoy the probability of reaping an advantage from it, coming to his rescue, when the matter closes unpropitiously to his expectations, by adjudging the case as if the agreement had never been made by the parties.

In our opinion the plaintiffs have a clear legal right to judgment for the amount of their loss, estimated upon the valuation fixed in the policy. The computations on this principle, submitted to the court, have not been objected to by the defendants; and judgment will be entered for the sum therein stated, unless they ask a reference to a commissioner to restate the allowance.

NEW ENGLAND MUTUAL MARINE INSURANCE COMPANY v. DUNHAM.

(Circuit Court for Massachusetts: 3 Clifford, 332-338. 1871.)

STATEMENT OF FACTS.—The libellant, owner of the barque Albina, contracted with the respondents to insure her against the perils of the seas for one year. She collided with the ship Donald McKay, and was greatly injured by the collision, and put back to the port of London, where she was repaired at a cost of £5,564 13s. 2d. as alleged. She recovered in an English admiralty court £4,634 7s. 5d. against the ship. The suit was brought by the owner of the barque against the insurance company as for a partial loss, claiming the difference between the actual cost of repairs and the amount of the judgment against the ship. Further facts appear in the opinion of the court.

Opinion by CLIFFORD, J.

Amounts, it seems, were not in controversy, but the respondents differed widely from the libellant as to the correct rule of adjustment. They insisted that the partial loss should be first adjusted between them as the underwriters and the libellant, deducting one-third new for old, and that the libellant could recover nothing of them in this case, as the loss, when so adjusted, did not exceed the amount paid by the colliding vessel or her owners. Suppose that to be the correct mode of adjusting the partial loss, then it is clear that the libel should have been dismissed, as the libellant was fully paid by the amount recovered in the collision case; but the district judge adopted the rule of adjustment presented by the libellant, and entered a decree in his favor for the balance therein shown, and the respondents appealed to this court.

§ 1011. *Admiralty has jurisdiction of causes of marine insurance.*

Apart from the merits, when the cause came to be argued in this court, the respondents insisted that the district court had no jurisdiction of the cause of action set forth in the libel. Both parties were heard upon the question of jurisdiction as well as upon the merits, and the presiding justice entertaining doubts whether the district court, sitting in admiralty, had jurisdiction of the case, it was ordered that the question should be re-argued, and the parties were heard a second time upon the question, the circuit judge sitting with the presiding justice. Difficulties attending the solution of the question, and the opinions of the judges being opposed, the question was certified to the supreme

court, where it was held that the contract of marine insurance is a maritime contract, and that libels of the kind exhibited in the record are properly cognizable in the district courts under the ninth section of the judiciary act, which provides that such courts shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction. *Ins. Co. v. Dunham*, 11 Wall., 21.

[Here the court considered further the question of jurisdiction, and then proceeded.]

§ 1012. *The rule of adjustment of repairs in insurance cases compared with that in collision cases.*

Determined as the question of jurisdiction has been by the supreme court, nothing remains open here but the single question as to the proper mode of adjustment. Other questions on the merits might have been raised, but the record does not exhibit any exception as to the amount allowed save what appears in the objection of the respondents to the rule of adjustment adopted by the court. Undoubtedly in insurance adjustments, where timbers or other materials are replaced by new, the vessel when repaired is, in general, considered to be better than she was before the repairs were made, and the rule of adjustment is that the assured must himself bear one-third part of the expense of the labor and materials for the repairs, for the reason that new timbers and materials are substituted for the old, which are supposed to have been of less value. 1 Phil. on Ins. (4th ed.), 50; 2 Phil. on Ins., 1431; *Peele v. Merchants' Ins. Co.*, 3 Mas., 27; *Bradlie v. Ins. Co.*, 12 Pet., 399 (§§ 822-29, *supra*). Much discussion of that topic, however, is unnecessary, as the general rule is everywhere acknowledged in the federal courts; but it is equally well settled that the rule in collision cases is that the damages assessed against the respondent shall be sufficient to restore the insured vessel to the condition in which she was at the time the collision occurred; that there shall not in insurance cases be any deduction for the new materials furnished in the place of the old. *The Baltimore*, 8 Wall., 385; *Williamson v. Barrett*, 13 How., 110; *Sedgw. on Dam.* (4th ed.), 541.

§ 1013. *Decision of foreign admiralty court in collision case, not conclusive in suit on insurance policy.*

Attempt was made in the court below to set up the decree in the foreign court as rendered in the collision case, and the payment of the amount recovered, as a bar to any further claim by the libelants upon the respondents for any damages, costs or expenses occasioned by the collision; but that defense is not urged in this court, as it clearly could not be with any hope that it would be successful. Judgments and decrees bind parties and privies, but it is clear that the decree in the foreign court was *res inter alios*, and that it cannot have any effect here except as evidence to show the amount recovered by the libellant in that proceeding. *Murray v. Lovejoy*, 2 Cliff., 195; *Same Case*, 3 Wall., 17. (a) Where a party receives damage, and several are responsible for the injury, the plaintiff is entitled to but one satisfaction, and if he proceeds against one, and recovers judgment, and the same is fully satisfied, or if he without suit accepts satisfaction of one of those liable for the injury, no doubt is entertained that such satisfaction discharges all the other parties. Grant that, still it is clear that that rule has no application in the case before

(a) See Bigelow, *Estoppel*, 214, 4th. ed., showing that there is some conflict of authority upon this point. But the decision in this case is probably sound law.

the court, as the respondents are liable in contract as set forth in the policy of insurance, and the owners of the colliding vessel were liable as wrong-doers for a marine tort. *Randal v. Cockran*, 1 Ves., 98; *Yates v. Whyte*, 4 Bing. N. C., 272; *White v. Dobinson*, 14 Simons, 273.

§ 1014. *Double remedy of owner of insured vessel damaged wrongfully by collision.*

Full satisfaction, though received from a wrong-doer as in this case, would doubtless operate as a discharge of the claim upon the underwriters; but it is equally certain that nothing short of a full satisfaction would have that effect in the absence of fraud or proof of collusion or negligence. *Atlantic Ins. Co. v. Storrow*, 5 Paige, 285. Persons insured are at liberty in such a case to sue the wrong-doer first, or they may claim compensation from the underwriters, and leave them to their remedy against the wrong-doer, which must be prosecuted in the name of the injured party. When the underwriters pay the loss they are subrogated to all the rights of the insured, but until they do make satisfaction they have no claim on any such wrong-doers. They have a right to expect that the insured will act with due diligence and in good faith, but they cannot be regarded as subrogated to the rights of the insured until they have made such satisfaction. Prior to such satisfaction being made by the underwriters, the insured may, if he sees fit, pursue his remedy against the wrong-doer, and if he acts with due diligence and in good faith, he is only obliged to account in his adjustment with the underwriters for what he receives from the wrong-doer. Such is the settled law in cases of fire insurance, and the same rule, in the opinion of the court, must be applied in marine insurance in cases where the suit against the wrong-doers is prosecuted by the insured. Where property in the city of New York, which was insured, was destroyed by order of the mayor and aldermen to prevent the spreading of the fire, and the assured afterwards obtained an assessment of his damages for the destruction of his property, by a jury in conformity to the law of the state, it was held by the chancellor that such assessment was not evidence, as between the assured and the underwriters, of the amount of the loss, and that the assured was entitled to recover of the insurers the whole amount of his loss in consequence of the fire, after deducting therefrom the net proceeds of what had been recovered from the corporation of the city, provided such balance did not exceed the sum for which the insurers were liable under the policy. *Pentz et al. v. Ins. Co.*, 9 Paige, Ch., 569.

Apply that rule to the case before the court, and it is clear that the decree of the district court was correct, and for the reasons assigned by the district judge. (a) He adopted the adjustment presented by the libellant, by which it appears that the amount paid by the owners of the colliding vessel was deducted from the whole expenses of the repairs, and that two-thirds of the balance, that is, deducting one-third new for old, were claimed of the underwriters. Certain other topics are discussed in the brief of the respondents, but it is not necessary to enter that field of discussion, as there are no exceptions raising any such questions. Decree affirmed, with costs. (b)

§ 1015. *Total loss — Stranding.*— In case of total loss of the ship voluntarily stranded for the safety of the cargo, all the property exposed to the risk must contribute and be contributed for its value when the sacrifice was made. *Mutual Ins. Co. v. Cargo of the Ship George, Olc.*, 157.

(a) *Dunham v. New England Ins. Co.*, 1 Lowell, 258.

(b) Appeal of the Equitable Safety Ins. Co. v. *Dunham*,* on the same point, dismissed. 3 Cliff., 871.

§ 1016. Where a vessel, having dragged her cables in a storm, brought up on the shoals of a bank, broadside to the sea, and as the sole means of saving vessel, cargo, and lives of the crew, the master slipped her cables and ran her on shore, where the whole cargo was saved, and the vessel was sold for \$256, *held*, that the insurers of the cargo were liable for a general average. *Columbian Ins. Co. v. Ashby*, 18 Pet., 331.

§ 1017. *Same*—*Contribution*.—It is the deliverance from an immediate impending peril, by a common sacrifice, which constitutes the essence of the claim for contribution, in the case of voluntary stranding. The safety of the property, and not the voyage, is the foundation of general average. *Ibid*.

§ 1018. *Stranding*—*Acts of master*.—A consultation, by the captain, with the officers of the vessel, before running her on shore with a view to her preservation and that of the passengers and cargo, may be highly proper in cases which admit of delay and deliberation, to prevent the imputation of rashness and unnecessary stranding by the master. But if the propriety and necessity of the act are otherwise sufficiently made out, no objection can be made to it. *Ibid*.

§ 1019. *Same*—*Freight*.—The freight of a vessel totally lost by voluntary stranding ought to be allowed to the owners of the vessel as the subject of general average, the cargo having been saved by the stranding. *Ibid*.

§ 1020. *Amount of recovery*.—A ship bought, under a forced sale, at a depreciated value, may nevertheless be insured at the real value. *Snell v. Delaware Ins. Co.*, 4 Dal., 430.

§ 1021. *Contributory valuation of ship*.—As a general rule, the valuation of the ship for general average, where she has received no extraordinary injuries during the voyage, and has not been repaired on that account, is her value at the termination of the voyage. But if she has met with damage before such arrival, by perils of the sea, and has been repaired, then the value to be assumed in the adjustment is her worth before such repairs were made. In the absence of other evidence, evidence of that value may well appear from the policy of insurance, just and reasonable deduction being made for deterioration. Ships are seldom insured beyond their actual value. *Star of Hope*, 9 Wall., 203.

§ 1022. *Bottomry*.—The plaintiffs insured \$12,000 on the *Anna Maria* from Cadiz to Antwerp by a valued policy; and the vessel having put into Gibraltar in distress, the captain executed a bottomry bond dated a few days before the policy was made. The jury found the real value of the *Anna Maria* to be \$15,000. *Held*, that the amount of the bottomry bond should be deducted from the real value of the ship and not from the agreed value. *Watson v. Insurance Co.*,* 3 Wash., 1.

§ 1023. A valued policy is in general conclusive both as to the value of the property and of the interest that valuation is sufficient to cover, the agreed value being a fixed standard by which to ascertain the measure of the promised indemnity. But this fails to apply when the loss is partial, or where by design or accident there has been a great overvaluation. *Ibid*.

§ 1023a. The foundation of all insurances, unless of the wager kind, is the real value of the thing insured; and the only difference between a valued and an open policy is, that in the first the parties agree upon the value, and in the latter the assured is bound to prove it. *Snell v. The Delaware Ins. Co.*,* 1 Wash., 510.

§ 1023b. The prime cost, or invoice price, may in most cases be a proper criterion of the real value, but it is not conclusive. *Ibid*.

§ 1024. *Contributory interest of ship*.—In the adjustment and settling of general average, the contributory interest of the ship is to be estimated at her value at her port of departure, making reasonable allowance for wear and tear on the voyage, up to the time of the disaster. *Mutual Ins. Co. v. Cargo of Ship George, Olc.*, 157.

§ 1025. *Valuation*—*Evidence*.—Between assurers and assured, the valuation agreed in the policy may be taken, on general average, as the value of the property at risk. *Ibid*.

§ 1026. But the valuation, in the policy, of the ship, is no more than *prima facie* evidence of her value, as against owners of the cargo; her value must be established in the ordinary modes of proof, in respect to their interests. *Ibid*.

§ 1027. Invoices and bills of lading are admissible evidence of the value of the cargo at the place of shipment. *Ibid*.

§ 1028. *Invoices*.—It is not always necessary for the assured, to recover an average loss, to produce the invoice or prove the prime cost of the damaged goods. *Bentaloe v. Pratt*,* Wall. C. C., 58.

§ 1029. The value of a cargo is to be governed by the market of the port from which the vessel last sailed before her wreck, and freight earned and not paid is an addition to the original cargo. *Catlett v. Columbian Ins. Co.*,* 3 Cr. C. C., 192.

§ 1030. *Jettison*.—General average on loss by jettison is allotted on the principle that the property pays and receives in contribution upon the basis of loss and value at the time of the sacrifice. *Mutual Safety Insurance Co. v. Cargo of the Ship George, Olc.*, 157.

§ 1031. Same.— In case of jettison, the goods are to be valued at the prime cost or original value, or, if the vessel arrives at her port of destination, and the article, at the time of its jettison, was in the perfect state in which it was to be carried to such port, then at their value at such port. *Rogers v. Mechanics' Ins. Co.*, 2 Story, 178.

§ 1032. Valuation of freight.— The more ancient method of estimating freight at its gross value, both when contributed to and contributory, held to be preferable to the modern practice of estimating its full value in the first instance, and, in the second, diminishing the value at discretion. *Mutual Insurance Co. v. Cargo of Ship George, Olc.*, 157.

§ 1033. Amount payable — Loss of goods.— In case of total loss of goods insured by an open policy, the underwriter pays the value of the goods when shipped, including the expense of lading. *Carson v. Marine Ins. Co.*, * 2 Wash., 468.

§ 1034. Construction of clauses in an "open uniform canal cargo policy," with reference to the question how much the assured was entitled to recover on a policy for \$8,000 covering goods worth \$20,000, the loss having been over the sum assured but not total. *Breed v. Providence Ins. Co.*, * 17 Blatch., 287.

§ 1035. When a cargo is insured by different policies, in some of which the rate of exchange is fixed at which the prime cost of the cargo shall be valued, in ascertaining the amount of the interest of the assured, upon settlement of those policies in which the rate of exchange is fixed, the whole cargo is to be valued at that rate of exchange without regard to the rate of exchange by which the value may have been ascertained in the other policies. *Pleasants v. Maryland Ins. Co.*, * 8 Cr., 55.

§ 1036. If a party insure property expected to be on board ship, to a large amount, upon a valued policy, and much less is in fact shipped, he is entitled to recover, in case of loss, only *pro rata*, notwithstanding the valuation. *Alsop v. Commercial Ins. Co.*, * 1 Sumn., 451.

§ 1037. The contributory value of freight to a general average is ascertained by a deduction of one-third the gross freight. *Humphreys v. Union Ins. Co.*, 3 Mason, 429 (§§ 845-50).

§ 1038. An alleged custom in Philadelphia to strike off one-third the gross freight for charges, and pay two-thirds only to the assured, in a policy on freight where a total loss has occurred, is unreasonable. *McGregor v. Insurance Co.*, * 1 Wash., 39.

§ 1039. *Quere*, if such a custom were known to those interested what would have been its effect. *Ibid.*

§ 1040. A usage in regard to average losses, known to the assured at the time the contract was made, binds him. *Saunderson v. Columbian Ins. Co.*, * 2 Cr. C. C., 218.

§ 1041. Prior insurance — Partial loss.— Plaintiffs effected insurance on the Hope for \$4,000, valued at the same; they afterwards effected insurance on her with the defendants in the same amount, valued at \$6,000, without notice of the prior insurance. A partial loss happened, and the plaintiffs sought to charge a partial loss upon the whole amount insured by the second policy. *Held*, that the defendants were liable for so much of the agreed value of the Hope as was not covered by the prior insurance, to wit, \$2,000. *Murray v. Insurance Co.*, * 2 Wash., 186.

§ 1042. Double insurance.— Upon a double insurance the insured is not entitled to two satisfactions, yet, upon the first action, he may recover the whole sum insured, and may leave the defendant therein to recover a ratable satisfaction from the insurers. *Thurston v. Koch*, 4 Dal., 348.

§ 1043. And if the same man, really, and for his own proper account, insures the same goods doubly, though both insurances be not made in his own name, but one or both of them in the name of another person, yet that is just the same thing. *Ibid.*

§ 1044. Partial loss of articles valued per box.— In a case of partial loss of certain boxes of lemons, the carrying out in the policy of insurance of the total valuation, after naming the valuation per box, makes no difference as to the effect of valuation per box on the question of a separate insurance of each box. *Hernandez v. N. Y. Mutual Insurance Co.*, 6 Blatch., 326.

§ 1045. Particular average.— The printed clause of a policy exempted the underwriters from particular average to any amount on perishable articles, and on other articles where the loss was less than five per cent. A written clause exempted them from *all* liability for average losses, general or particular, under ten per cent. *Held*, that the clauses were contradictory, and that the written clause must prevail over the printed. *Coster v. Phoenix Ins. Co.*, * 2 Wash., 51.

§ 1046. Examples of general average.— Every expense necessarily incurred during the detention, for the benefit of all concerned, is a proper subject of general average. Such are: Repairs reasonably necessary to remove the inability of the ship to proceed on her voyage; the wages and provisions of the master, officers and crew, from the time the disaster occurs until the ship resumes her voyage, if proper diligence is employed in making the repairs; towing the ship into port, and extra expenses necessarily incurred in pumping to keep her

afloat until the leaks can be stopped; surveys, port charges, hire of anchors, cables, boats, and other necessary apparatus for temporary purposes in making the repairs; expenses of unloading, warehousing and reloading the cargo after the repairs are completed; sacrifices, by sale of part of the cargo, or by payment of maritime interest, necessary in order to procure means of payment for repairs, in cases where the master has neither sufficient money nor credit, and cannot communicate with the owners. *Star of Hope*, 9 Wall., 203.

§ 1046a. Where a vessel is insured for a voyage out and home, and the outward voyage is broken up, but the vessel earns freight on her return voyage, the underwriters have no claim on the earned freight after the voyage was broken up. *Simonds v. Union Ins. Co.*, * 1 Wash., 443.

§ 1046b. If, however, the return cargo was purchased with the proceeds of the outward cargo, it seems the underwriters should have credit for the profits, if any. *Ibid.*

§ 1046c. In case the vessel has never been heard from, the court found that it was a uniform custom to compute interest after twelve months and thirty days from the time when the vessel was last heard from. *Hallet v. Phoenix Ins. Co.*, * 2 Wash., 279.

§ 1046d. The policy contained the clause "to add an additional premium if by vessels rating lower than A2," and the cargo was shipped on a vessel rating below A2, without any agreement as to the additional premium. *Held*, that the plaintiff was entitled to recover the value of the property lost, at the rate agreed upon, less such additional premium as in the opinion of underwriters may be deemed an adequate compensation for the increased risk. *Wright v. Insurance Companies*, * 6 Am. L. Reg. (O. S.), 485.

§ 1047. Wages — Deviation. — Allowance for wages and provisions, in the adjustment of general average, commences from the time when a vessel in distress alters her course to seek a place of safety. No allowance on that account is to be made for the time of detention caused by the cutting away of masts, etc., up to the date of deviation, though the deviation was rendered necessary in consequence of such action. *The Brig Mary*, 1 Spr., 17.

§ 1048. Damage to cargo by fire, after storage. — Where, in a port of safety, the cargo is landed and stored, in order to repair the ship, and is damaged by fire, contribution in general average for such damage will be allowed. But not if the new risk was incurred only for the benefit of the cargo. If the two causes concur, the cargo being so damaged by perils of the sea as to render its removal from the vessel indispensable, it is not to be paid for in general average. *Ibid.*

§ 1049. Freight. — Where, by charter-party, a gross sum was to be paid for the round voyage, and the principal object of the voyage was to obtain a return cargo, and there was but a trifling cargo at the time of a disaster upon the outward voyage, calling for general average, the whole freight upon the round voyage should contribute. *Ibid.*

§ 1050. Cutting away masts. — *Semble*, that if by the cutting away of the masts to save a vessel the deck is ripped up, and thereby water is let in, which injures the cargo, such damage should be paid for in general average. *Ibid.*

§ 1051. Blubber. — Under particular circumstances, where a quantity of blubber was thrown overboard to save the ship in a violent tempest, *held* to be a subject of general average. *Rogers v. Mechanics' Ins. Co.*, 1 Story, 603 (§§ 490-92).

§ 1052. The charges of entering a harbor for repairs, the surveyor's bill and port charges, are items of general average and are the subject of general contribution. *Vowell v. Columbian Ins. Co.*, 3 Cr. C. C., 88.

§ 1053. Seizure — Release of average loss. — Where a vessel containing an insured cargo was stopped by a privateer, taken into a harbor where an average loss was suffered, and released, the amount of the average loss was to be deducted from the amount of the premium due the insurers. *Pollock v. Donaldson*, 3 Dal., 510.

§ 1054. Adjustment — Set-off. — An agent gave his own note for premium on insurance of a ship. *Held*, that the amount due thereon might be set off against his principal in a suit by the latter for the loss of another ship of the principal, insured by the same underwriter by a policy for which the premium had been provided in the same way by the agent. *Leeds v. Marine Ins. Co.*, * 6 Wheat., 565.

§ 1055. Adjustment of loss — Open policy — Waiver of abandonment. — A policy was underwritten by the Philadelphia Insurance Company, on goods on board the *Ann*, at and from Baltimore to Jeremie, and at and from thence to Baltimore, \$12,000, valued. After the arrival of the *Ann* in the West Indies, the owner was informed, by a letter from the captain, that the return cargo would be one hundred and twelve thousand pounds of coffee; and insurance was made by the defendants, stating the cargo at one hundred and twenty-five thousand pounds of coffee, valued at twenty-two cents per pound, from which was to be deducted \$12,000, insured in the Philadelphia Insurance Company. A total loss took place, and the Philadelphia Insurance Company paid the loss, by compromise, waiving an abandonment. *Held*, that the policy underwritten by the Philadelphia Insurance Company must be considered as open on the

homeward cargo. *Held*, also, that the policy underwritten by the defendants does not bind them to cover the whole cargo, valued at twenty-two cents per pound, deducting the sum previously insured. The defendants were not bound to resort to the insurance office in which the first policy was made, to ascertain the precise nature of the same. By the policy made with the Philadelphia Insurance Company, the underwriters had, in case of loss, a right to as much of the cargo as would, at prime cost, amount to \$12,000; and the second policy, in respect thereto, was void. The waiver of an abandonment by the Philadelphia Insurance Company did not affect the relations between the plaintiff and the defendants. *McKim v. Phoenix Ins. Co.*, * 2 Wash., 89.

§ 1056. Construction of clauses in an "open uniform canal cargo policy," with reference to the question how much the insured was entitled to recover on a policy for \$8,000, covering goods worth \$20,000, the loss having been over the sum insured, but not total. *Breed v. Provident Ins. Co.*, * 17 Blatch., 287.

XI. MASTER'S POWERS.

§ 1057. In cases of necessity or calamity during a voyage, the master is by law created agent for all concerned; and his acts, done under such circumstances, in the exercise of sound discretion, are binding upon all. *Jordan v. Warren Ins. Co.*, 1 Story, 342 (§§ 480-87).

§ 1058. The master has authority to sell the ship only in cases of extreme necessity, though this necessity need not be physical,—enough that there is a strong and vehement exigency. It may be determined by considering whether under the circumstances a sale would have been made by a considerate owner for himself and all concerned. *Ibid.*

§ 1059. Rescuing vessel.—The owner of a vessel dispatched her on a long and hazardous voyage, in charge of a master of his own selecting. *Held*, that in a matter of rescuing a vessel from peril the master was agent of the owner, so as to bind the latter by his acts and conduct. *Copeland v. Phoenix Ins. Co.*, 1 Woolw., 278 (§§ 812-17).

§ 1060. Master presumed to do his duty.—A master may be presumed, in ordering a sale of the ship, to have done his duty, in the absence of evidence to the contrary. *Jordan v. Warren Ins. Co.*, 1 Story, 342 (§§ 480-87).

§ 1061. Sale of stranded vessel.—The right of the master to sell a vessel stranded depends on the circumstances. He must act in good faith, and exercise his best discretion for all concerned; and a sale can only be made on the compulsion of a necessity, to be determined in each case by the actual peril to which the vessel is exposed, and from which it is probable, in the opinion of persons competent to judge, the vessel cannot be saved. This is an extreme necessity. The true criterion of the authority of the master to sell is the distance of the owners or insurers from the scene of the stranding. If by the use of the ordinary means the master can obtain directions as to what he should do, he should resort to those means. But if the peril is such that there is a probability of loss, and it is made more hazardous by delay, he may act promptly to save what he can. There is no more effectual way of doing so than by sale. *New England Ins. Co. v. The Sarah Ann*, 13 Pet., 387.

§ 1062. The power of the master to sell the hull of the stranded vessel exists also as to her rigging and sails separately. *Ibid.*

§ 1063. If the master sells without good faith, or without a sound discretion, the owner may, against the purchaser, assert his right of property in the sails and rigging, as he may in the case of a stranded vessel which has been sold without good faith in the master. *Ibid.*

§ 1064. The case of *Smith v. Bridle*, 2 Wash., 150, sound law, but expressed in terms too broad. *Ibid.*

XII. SUBROGATION.

§ 1065. Payment of loss, partial or total, gives the insurer an equitable title to what may afterwards be recovered from other parties on account of the loss. *Ocean Wave*, * 5 Biss., 378.

§ 1066. Underwriters, having insured a vessel, are fully subrogated to the rights of its owners for damages, even though they have not paid the loss, provided it was the *bona fide* intention of such owners thus to abandon their rights to such underwriters. *The Manistee*, 7 Biss., 85.

§ 1067. An insurer who has paid the loss can maintain an action in admiralty in his own name against a carrier whose wrongful act has caused such loss. *Amazon Ins. Co. v. The Iron Mountain*, * 1 Flip., 616; *Insurance Co. v. C. D.*, * 1 Woods, 72; *The Planter*, 2 Woods, 490. See *The Liberty*, 2 Fed. R., 229.

§ 1068. The carrier in such a case is liable to the insurer though the latter voluntarily paid the loss. *Amazon Ins. Co. v. The Iron Mountain*, * 1 Flmp., 616.

§ 1069. *Equities.*—In an action in admiralty by re-insurer against a carrier in whose hands the goods insured were lost, the carrier cannot set up as a defense equities between the original insurer and the insured, unless he has made full satisfaction to the proper party in interest as the owner or the shipper. *Ocean Wave*,* 5 Biss., 378.

§ 1070. *Notice of total loss vests the property in the marine underwriter, subrogating it to the rights of the assured.* *The Manistee*,* 5 Biss., 381.

§ 1071. An insurance company, on payment of loss to the owner of a cargo insured, may be subrogated to the rights of the shipper under a bill of lading and maintain a suit in equity against the owner of the vessel. *Garrison v. Memphis Ins. Co.*, 19 How., 312 (§§ 537-39).

§ 1072. *Insurer's right of action for loss of vessel in military service.*—Where a vessel was impressed into the military service of the United States, and she was destroyed, her insurers may, upon proof of payment of the insurance, prosecute a suit in the owner's name for the amount so paid. *Shaw's Case*,* 8 Ct. Cl., 488.

§ 1073. Where a steamboat, previously insured by her owners, was lost in the military service of the government, and the insurance was paid to the owners, and the owners subsequently filed a claim against the United States for the value of the steamboat, under the act of March 3, 1849, as amended by the act of March 3, 1863, and were allowed and paid the value thereof less the amount received by them from the underwriters, *held*, that (the loss being such as, had there been no insurance on the steamboat, would have rendered the United States liable to pay the full value to the owners) the contract of insurance between the owners and the underwriters did not affect or diminish the liability of the government, and that, as against the government, the underwriters are entitled to be subrogated to the rights of the owners for the amount paid on their policies. *Subrogation*,* 13 Op. Att'y Gen'l, 182.

§ 1074. *Proof of negligence.*—An insurance company cannot recover from a common carrier losses which it has been compelled to pay for insured goods transported by the carrier, without proof that the losses occurred through the carrier's negligence or default. *Kentucky Ins. Co. v. Nashville R. R. Co.*,* 3 Am. L. T., 79.

§ 1075. *Libel — Laches — Apportionment of damages — Special case stated.*—The owner of the canal boat *Montana* filed, for himself and an insurance company which he averred to be the insurer of the cargo of the boat, a libel against the steamer *City of Paris*, for damage by a collision. The district court found that both vessels were in fault, and divided the damages between the two. It not being averred or proved that the owner of the boat was not the owner of the cargo, or that the insurance company had paid the loss, the cargo was not relieved from the fault of the *Montana*. The decree of the district court was affirmed. The insurance company then moved (1) that it might be allowed to prosecute the suit for its own interest; (2) that it might be made a party libelant, and allowed to prove that the cargo of the *Montana* was owned by an innocent party; that it was insured against loss by the company, and that the loss had been paid in full; (3) that the record brought up on appeal might be amended by inserting in the apostles the minutes of the commissioner, on the reference in the district court, to ascertain the amount of damages; and (4) that a decree might be entered against the *City of Paris*, in favor of the insurance company, for the full amount of damages to the cargo. *Held*, (1) that if the libelants could not agree as to their respective interests in the amount of the recovery, the insurance company might appear and prosecute the suit to that extent, for its own interest; (2) that the *Montana* having, between the time of the collision and the decree in the district court, been sold three times, and all remedy of the *City of Paris* over against the *Montana* having been lost by delay, the insurance company could not now make proof of the innocent ownership of the cargo, so as to make a new case against the *City of Paris*, and recover for the whole loss; (3) that no exceptions having been taken to the report of the commissioner, and no question being raised upon the report, his minutes need not be brought up unless such question should arise; (4) that the only question for determination which the insurance company could now raise was the ascertainment of its share of the recovery from the *City of Paris*, upon the principle of an equal division of the damages between the two vessels. *City of Paris*, 14 Blatch., 581.

§ 1076. *Parties.*—The libel may be brought by the assured parties to the use of the insurance company which has paid the loss to them. *Fretz v. Bull*, 12 How., 466.

§ 1077. *Dominus litis.*—An insurance company which has paid the loss or accepted an abandonment becomes the *dominus litis* in a suit *in rem*. *The Keokuk*, 1 Biss., 522.

XIII. PLEADING, PRACTICE AND EVIDENCE (INCLUDING USAGE).

§ 1078. *Admiralty has jurisdiction to enforce payment of a policy of marine insurance.* *Gloucester Ins. Co. v. Younger*, 2 Curt., 822; *De Lovio v. Boit*,* 2 Gall. 398; *Hale v. Washington Ins. Co.*,* 5 Law Rep., 200.

§ 1079. The court of admiralty has jurisdiction over policies as maritime contracts, but not over contracts leading to policies. It cannot reform a policy by the antecedent contract. *Andrews v. Essex Ins. Co.*, 3 Mason, 6 (§§ 589-98).

§ 1080. In whose name suit may be brought.—Suit on a policy of insurance is properly brought in the name of the owner of the property insured. *Ruan v. Gardner*,* 1 Wash., 145.

§ 1081. A libel in favor of the insurer who has paid the loss to the insured is properly filed in the name of the insurer. *Amazon Ins. Co. v. Steamboat Iron Mountain*,* 4 Cent. L. J., 103; 23 Int. Rev. Rec., 49; *Mutual Ins. Co. v. Cargo of the George, Olc.*, 98.

§ 1082. Evidence.—The interest of a copartnership cannot be given in evidence on an averment of individual interest, nor an averment of the interest of a company be supported by a special contract relating to the interest of an individual. *Graves v. Boston Insurance Co.*,* 2 Cr., 419; *Catlett v. Pacific Ins. Co.*,* 1 Paine, 594.

§ 1083. Parol evidence.—A policy was underwritten on the entirety of a ship, and the ship's papers on the voyage showed a joint ownership of the master and the assured. *Held*, that parol evidence was not admissible to contradict the ship's papers and prove a sole ownership in the assured. *Ohl v. Eagle Ins. Co.*, 4 Mason, 390 (§§ 409-11); affirming S. C., *id.*, 172.

§ 1084. Rating—Registers.—Where a policy on goods provided that the premium should be increased if the goods insured should be shipped in a vessel rated below A2, and the vessel in which they were shipped, owing to absence, had not been rated for many years, *held*, that it was proper for the jury to determine her rating from evidence other than the registers of insurance companies at the place of insurance, and that evidence of a custom to take the rating from the books of the insurer has no bearing upon such a case. *Insurance Co. v. Wright*,* 1 Wall., 456.

§ 1085. The acknowledgment in a policy of insurance that the premium has been paid is not the best evidence of that fact. *Millick v. Peterson*, 2 Wash., 31.

§ 1085a. Pleading.—Evidence of overvaluation is admissible only under the allegation of fraud. *Gardner v. Ins. Co.*,* 2 Cr. C. C., 550.

§ 1086. Usage.—Where a policy is made upon a particular voyage, the usages relating to such voyage are impliedly made part of the contract, though the policy contain no provision on the subject. But such usage ought to be so certain and uniform as to warrant the presumption that it is generally known as the law of that trade. *Bulkley v. Protection Ins. Co.*, 2 Paine, 82 (§§ 735-38).

§ 1087. The usage of a particular port in a particular trade is not such a usage as will in law limit, control or qualify the language of contracts of insurance. It must be some known general usage in the trade, applicable and applied to all ports of the state, and so notorious as to afford a presumption that all contracts of insurance in that trade are made with reference to it as part of the policy. *Rogers v. Mechanics' Ins. Co.*, 1 Story, 603 (§§ 490-92).

§ 1088. Insurance was effected in Boston on a ship through a letter written by the owner from New York, where he lived, in which letter the vessel was represented to be a "coppered ship." There was evidence that the term used had a different meaning in the two places. *Held*, that the assured was bound by the meaning in New York. *Hazard v. New England Ins. Co.*, 8 Pet., 557 (§§ 527-31).

§ 1089. The decision of a foreign admiralty court is not conclusive in an action upon a policy of insurance upon the question of the nationality of property, under a clause permitting or requiring the assured to prove the character of the property in a court of the United States; but it may be read in evidence. *Calbreath v. Gracy*,* 1 Wash., 219; S. C., *id.*, 198; *Maryland Ins. Co. v. Woods*,* 6 Cr., 29.

§ 1090. The sentence and proceedings of a foreign court of vice-admiralty, condemning the goods as enemy property, are not conclusive evidence of that fact in a suit upon a policy of insurance. But it is competent and *prima facie*, although not, in itself, sufficient evidence to prove that fact. *Lambert v. Smith*, 1 Cr. C. C., 361.

§ 1091. The sentence may be invalidated by the evidence contained in the record of the proceedings. *Ibid.*; *Graves v. Boston Ins. Co.*,* 2 Cr., 419. See *Croudson v. Leonard*, 4 Cr., 484.

§ 1092. The record of a court of admiralty is always evidence to prove a condemnation; but in cases between the insurer and insured, it is, according to the general rule, only evidence to prove, in addition, the cause of condemnation. The fact of its having, in a particular case at bar, been read to the jury without opposition, was decided to form an exception to the rule and the record was admitted as proof of facts, so far as it exhibited documents which, if otherwise produced, would be evidence in the cause; and under this ruling, papers, authenticated from other sources, were admitted to show the extent of the plaintiff's advances, the nature of his engagements and the lien which he acquired upon a ship and cargo. *Russel v. Union Ins. Co.*, 4 Dal., 421.

§ 1093. The fact that the application of the record to this purpose (after it had been read) was opposed as soon as attempted, *held*, not to avail against the admission of the evidence, and

the ruling further sustained upon the ground of the corroborative evidence arising from the sameness of the documents found in the ship and recited in the record with those described in the communications to the insurers at the time of effecting the insurance. *Ibid.*, note, p. 425.

XIV. CRIMINAL LAW.

§ 1094. Conspiracy to destroy a vessel with intent to defraud underwriters.—The twenty-third section of the act of congress of March 3, 1825, which punishes a conspiracy to destroy a vessel or cargo, with intent to defraud the underwriters, is constitutional. The object of the act is to protect commerce, and the protection to underwriters is incidental. It applies to our internal as well as to our foreign commerce. *United States v. Cole*, 5 McL., 513.

§ 1095. To consummate the offense, it is not necessary that the boat should have been burned, or the insurance companies injured; it is enough that two or more of the defendants conspired to destroy the vessel or cargo, with intent to injure the insurers. *Ibid.*

§ 1096. The destruction of the vessel by the defendants, or by any one identified with the defendants as conspirators, would be conclusive against them. *Ibid.*

§ 1097. The burning of the vessel is not punishable under the act of congress, but it operates as evidence against the defendants. *Ibid.*

§ 1098. The testimony to show the unlawful combination does not end at the destruction of the boat; after that, as well as before, the acts of the confederates may be examined to show their guilt. Their entire acts in relation to the subject-matter of the indictment which conduce to show a guilty purpose may be proved. *Ibid.*

§ 1099. Evidence of guilt.—In forming a verdict, in such a case, the rules of evidence familiar in criminal cases are to be observed, and the jury will not convict unless clearly convinced of the guilt of the accused, beyond a reasonable doubt. *Ibid.*

§ 1100. "High seas."—It is held that the felonious destruction of a ship to defraud the underwriters, committed in Mango bay, in the island of Bermuda, which bay is entirely landlocked, and inclosed by a reef and island from the sea, is not committed on the high seas, and therefore not punishable by the act of March 26, 1804. *United States v. Robinson*, 4 Mason, 307.

§ 1101. To make out the offense of destroying a vessel, by the owner, with intent to prejudice the underwriters thereon, a valid insurance must be shown, and the legal authority of the insurance corporation to act must also be established. *United States v. Johns*, 1 Wash., 363.

§ 1102. Cargo.—The act of congress declaring that "if any owner of a ship or vessel shall wilfully cast away, burn, or otherwise destroy said ship or vessel with intent to prejudice any person who hath underwrote or shall underwrite any policy thereon; or of any owner or owners of goods laden therein; or of any other owner or owners of the said vessel, he shall suffer death," etc., does not make it an offense for the owner to destroy his vessel to the prejudice of the underwriters on the cargo. *Ibid.*

§ 1103. Under the act of congress of March 26, 1804, it is an offense for the owner to wilfully cast away a vessel, where there are insurers on the vessel and cargo, and a cargo on board belonging in part to others. Any one not the owner, concerned in the casting away, is also guilty. *United States v. Vanranst*, 3 Wash., 146.

§ 1104. Evidence of incorporation.—On an indictment for destroying a vessel, with intent to defraud an insurance company, it is sufficient to show that the company existed *de facto*, and did business, and strict proof of its incorporation is unnecessary. *United States v. Amedy*, 11 Wheat., 392.

§ 1105. It is sufficient to show that the policy of insurance was executed by the known officers of the company *de facto*, and strict proof of their authority is unnecessary. It is immaterial whether or not the policy of insurance was valid; the law punishes the act done with the intention to defraud, whether successful or otherwise. *Ibid.*

C. FIRE INSURANCE.

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| <p>I. CREATION, NATURE AND REQUISITES OF THE CONTRACT, §§ 1106-1158.</p> <p>II. PARTIES ENTITLED TO BENEFIT OF THE CONTRACT, §§ 1159-1178.</p> <p>III. WARRANTY, REPRESENTATION AND CONCEALMENT, §§ 1179-1265.</p> <p>IV. SUBJECT OF INSURANCE, §§ 1266-1277.</p> <p>V. RISK INSURED, §§ 1278-1287.</p> <p>VI. WORDS OF EXCEPTION, §§ 1288-1318.</p> <p>VII. ARSON, §§ 1319-1329.</p> | <p>VIII. INCREASE OF RISK, §§ 1330-1350.</p> <p>IX. OTHER INSURANCE, §§ 1351-1385.</p> <p>X. ALIENATION AND ASSIGNMENT, §§ 1386-1419.</p> <p>XI. PROOFS OF LOSS, §§ 1420-1479.</p> <p>XII. ADJUSTMENT OF LOSS, §§ 1480-1498.</p> <p>XIII. REBUILDING, §§ 1499-1502.</p> <p>XIV. PLEADING, § 1503.</p> <p>XV. SUBROGATION, §§ 1504-1506.</p> |
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I. CREATION, NATURE AND REQUISITES OF THE CONTRACT.

SUMMARY—*Creation of contract*, §§ 1106, 1107.—*Payment of premium*, § 1108.—*Oral contract*, § 1109.—*Insurable interest*, §§ 1110-1112.—*Payment of premium*, §§ 1113, 1114.

§ 1106. Certain detailed correspondence between parties *held* to have created a contract for insurance upon a mill. And this though the correspondence did not show the period of time for which the risk was to continue; an application of the underwriter having been used, and it being "the almost universal practice of taking ordinary insurance against fire for a year." *Eames v. Home Ins. Co.*, §§ 1115-16.

§ 1107. Slight acts on the part of an underwriter are sufficient to work a ratification of a contract of insurance made by an agent of his; silence, when good faith requires the underwriter to speak, is sufficient. Thus, H., agent of an underwriter, issued a policy to the plaintiff upon payment of premium to a broker, whose responsibility was accepted by H. The underwriter, knowing the fact that a policy had been issued, declined to take the risk, and so informed H., but H. did not inform the assured. The assured afterwards, desiring to make some change in the property, applied for consent to be indorsed on the policy. H. sent the policy to the underwriter for the purpose, who retained the same without reply. *Held*, that the action of H. in issuing the policy was ratified. *Bennett v. Maryland Ins. Co.*, §§ 1117-21.

§ 1108. Where a policy of insurance did not require payment of the premium in money, and the underwriter's agent accepted the promise of a third person to pay it, in lieu of the money of the assured, the premium was held paid. *Ibid*.

§ 1109. A contract for insurance need not be written. If an oral agreement otherwise good is proved to have been made, the assured can recover at law the same damages he would be entitled to receive if suing upon a policy issued in conformity with the oral agreement. *Humphry v. Hartford Ins. Co.*, §§ 1122-23. See § 1140.

§ 1110. L. had an executory contract with H. for the purchase of real estate, the terms of which had not been complied with, in which event the contract purported on its face to be void. L. was in possession. *Held*, that he had an insurable interest in the property. "No time of performance is fixed, and if H. is content with what has been done by L. and does not choose to annul the contract, the underwriters of this policy cannot treat it as a nullity." *Columbian Ins. Co. v. Lawrence*, §§ 1124-30.

§ 1111. A party in actual possession of an estate, having no other title than mere naked possession, has an absolute interest therein, within the meaning of a policy requiring a statement of the facts, "if the interest or property insured be not absolute." But such interest is not insurable unless communicated. *Porter v. Aetna Ins. Co.*, § 1131.

§ 1112. The proprietors of a grain elevator, who receive wheat from various persons, giving each a receipt saying, "Wheat in store subject to our charges. Fire at owner's risk," and who are engaged in buying and selling grain, constantly changing the contents of their elevator, and accounting on sales to the depositors, or delivering wheat equal in amount and grade to that deposited, have an interest therein entitling them to insure its full value; and this, too, though there be an averment that the wheat was deposited under an agreement with the plaintiffs that it was not to be insured. *Baxter v. Hartford Ins. Co.*, § 1132.

§ 1113. A policy provided that insurance should not be binding until the actual payment of the premium. The policy had been obtained from and payment made to D., who did not turn the money over to the underwriter. D. was not a regularly appointed agent of the insurance company, but had applications of the company and acted through the company's local agent. D. had placed other risks with the company in the same way, which had been accepted. In an action upon the policy in question, the defense to which was that the premium had not been

paid, the court instructed the jury that if they found that, by delivering the policy to D., the underwriter made him its agent for the purpose of delivering the policy, and that the delivery of the policy to him for the plaintiff authorized D. to receive the premium, payment thereof to D. was payment to the underwriter. *Cahill v. Andes Ins. Co.*, §§ 1133-1135.

§ 1114. Insurance premium is "actually paid," within the requirement of a policy, when an insurance broker is, with his knowledge and without objection, charged with the amount by the underwriter's agent in the transaction. Nor is the case affected by the fact that the policy provides that "the use of general terms, or anything less than a distinct, specific agreement clearly expressed and indorsed on the policy, shall not be construed as a waiver of any" of its requirements. *Bang v. Farmville Ins. Co.*, §§ 1136-37.

[NOTES.—See §§ 1138-1158.]

EAMES v. HOME INSURANCE COMPANY.

(4 Otto, 621-631. 1876.)

APPEAL from U. S. Circuit Court, Southern District of Illinois.

Opinion by MR. JUSTICE BRADLEY.

STATEMENT OF FACTS.—This is a bill in equity filed in the court below by Eames and Cooley, the appellants, against the Home Insurance Company of New York, the appellees, to require said company to issue to the complainants a policy of insurance against loss or damage by fire, in pursuance of a contract for that purpose alleged to have been made with their agents in Illinois, and for such other and further relief as shall be just and equitable. The court below, upon hearing, dismissed the bill.

The contract referred to is alleged to have been made by means of certain parol communications and written correspondence, which are detailed and set forth in the record. The subject on which insurance was desired by the complainants was a flouring-mill and its machinery, situated at Staunton, in Macoupin county, Illinois, which was destroyed by fire on the night of 28th of October, 1872. Cooley, one of the complainants, had previously procured insurance on the same property from the defendant in February, 1870, which had run for two years and had then been permitted to expire. The amount of insurance at that time was \$3,500 and the rate five per cent. per annum. The policy was issued on the 28th of February, 1870, but ran one year from the 14th of that month, and was renewed for a second year by the payment of a second premium in 1871.

Cooley having taken Eames into partnership and sold him half of the property, the application for the insurance in question was made in their joint names. The negotiations were commenced on the 12th day of October, 1872, at Bunker Hill, in Macoupin county, between Eames and James A. Beach, the company's local agent at that place. They had a general agent, A. C. Ducat, at Chicago, and it seems that local agents were not authorized to take extra-hazardous risks, to which class the property in question belonged, without referring to the general agent.

At the interview referred to, Eames, there being then no insurance on the mill, applied to Beach, who was agent for the Home Insurance Company of New York, and of the Hartford and Phoenix companies of Hartford, Conn., for \$9,000 insurance, and an application to the Home Insurance was made out on a printed blank of the company for \$4,000, at five and a half per cent. The application, numbered 105, was duly filled up with answers to the various questions, and signed by Eames, in the name of "Eames & Cooley," and dated the 12th day of October, 1872. From an agreement as to certain facts made by the attorneys in the cause, it appears that said Beach forwarded said appli-

cation by mail to Arthur C. Ducat, the general agent, in a letter, of which the following is a copy:

"[Office of James A. Beach, notary public and insurance agent. Represents Home Insurance Company of New York, Hartford of Hartford, Phoenix of Hartford, Andes of Cincinnati.]

"BUNKER HILL, Ill., October 12, 1872.

"A. C. DUCAT, Esq., General Agent:

"*Dear Sir* — I inclose app. for ins. which you have carried for two years, and was not renewed in February because I asked five and one-half (you were carrying it at five per cent.). They now want to insure again. The other large mill in Staunton has lately burned, which is, I suppose, the reason. I have not learned the particulars, but some think the owners burned it.

"Yours truly, JAS. A. BEACH."

That, on the 14th October, 1872, said Ducat received said letter of Beach and its inclosure, and wrote to said Beach in respect thereto a letter, whereof the following is a copy:

"[Home Insurance Company of New York. General agency for states of Illinois, Indiana, Wisconsin and Minnesota. Arthur C. Ducat, general agent.]

"CHICAGO, October 14, 1872.

"JAS. A. BEACH, Agent, Bunker Hill, Ill.:

"*Dear Sir* — We have yours of the 12th, and application of Eames & Cooley on flour-mill at Staunton. Our present rate on this risk will not be less than six and one-half per cent., which is probably more than they will pay. If they wish a Home policy at that rate, let us know, and we will send you ticket.

"Truly yours, ARTHUR C. DUCAT, General Agent."

Which letter was returned to said Ducat by mail by said Beach October 18, 1872, with the indorsement in the handwriting of said Beach:

"The Phoenix will carry \$3,000 at six per cent.; will you not do the same?"

"Yours truly, JAMES A. BEACH."

Across which is indorsed, in pencil, October 18, 1872, in the handwriting of said A. C. Ducat:

"No; six and one-half per cent. is our rate."

On October 18, 1872, said Ducat mailed to said Beach a letter, of which the following is a copy:

"[Letter-head of Chicago general agency.]

"CHICAGO, ILL., October 18, 1872.

"JAMES A. BEACH, Agent, Bunker Hill, Ill.:

"*Dear Sir* — Yours received. We cannot go under six and one-half per cent. on Eames & Cooley flour-mill.

"Truly yours, ARTHUR C. DUCAT, General Agent."

At this point Eames testifies that he received a letter from Beach on or about the 22d day of October, 1872 (which was destroyed by the fire in the mill, and therefore could not be produced), in which Beach stated that he had received an answer from the Home Company, and that they would not take the risk for less than six and a half per cent. He further testifies that this letter inclosed an application to the Hartford Insurance Company, partly filled up by Beach, and sent to him (Eames) to answer some of the questions, and to be signed by him; that, in a previous conversation between him and Beach, his complement of insurance not being made up by the four thousand that the Home would take, and the three thousand that Phoenix would take, Beach told him that he was agent for the Hartford, but did not know whether

they would take any risk, but that he would write them, and, if they would, he would send him (Eames) an application to fill out; that, in a day or two after, the letter referred to came, inclosing the said application to the Hartford, filled up for \$2,000, at the rate of six per cent.; that the letter added that he (Beach) had not heard from the Hartford Company, but as he was going to write to him (Eames) in regard to the Home proposition, he inclosed the Hartford application, partly filled up, for Eames to finish and return, so that, if the Hartford Company would take the risk, he would have the application ready to send right on. In answer to this letter of Beach, Eames says he wrote his next letter, inclosing the application to the Hartford Company, and accepting the proposition of the Home Company.

It is admitted that he wrote, and that Beach received, the following letter on or about Friday, the 25th of October, 1872, inclosing the application referred to, filled up and signed, namely:

"STAUNTON, ILL., October 25, 1872.

"Mr. JAMES A. BEACH, Bunker Hill, Ill.:

"*Dear Sir* — I believe I have answered all the questions necessary, and to the best of my knowledge. Six and one-half per cent. is pretty heavy, but I guess we will have to stand it, as I do not know where we can do better at present. Yours, etc., EAMES & COOLEY."

On Monday, the 28th of October, 1872, Beach mailed a letter to Ducat, the general agent, of which the following is a copy:

"BUNKER HILL, October 28, 1872.

"Hon. A. C. DUCAT.

"No. 105, Staunton Mill, @ 6½.

"*Dear Sir* — Please send me a ticket for \$4,000, insurance on application. Yours truly, JAMES A. BEACH."

October 29, 1872, Beach sent telegraphic message to Ducat, of which the following is a copy:

"[Dated Bunker Hill, Ill., 29, 1872; received at Chicago, October 29, 11:20 A. M.]

"To A. C. DUCAT, Home Ins. Co.:

"Do not return ticket for mill insurance; it is burned.

"JAS. A. BEACH."

October 29, 1872, Ducat mailed to said Beach a letter, of which the following is a copy:

"[Home Insurance Company of New York, general agency for states of Illinois, Indiana, Wisconsin and Minnesota. Arthur C. Ducat, general agent.]

"CHICAGO, ILL., October 29, 1872.

"JAS. A. BEACH, Agent, Bunker Hill, Ill.:

"*Dear Sir* — Yours of the 28th, requesting ticket on the Staunton Mill, came duly this morning, and in a few minutes your telegram arrived announcing the burning of the mill. We came very near being caught, but are glad it is no worse. If we had not demanded the additional one-half per cent., we should have had \$4,000 to pay. Yours truly,

"ARTHUR C. DUCAT."

This is all the correspondence bearing upon the alleged contract, and the first question is, whether the clause in Eames' letter of October 25, in these words, "Six and a half per cent. is pretty heavy, but I guess we will have to stand it, as I do not know where we can do better at present," refers to the

negotiation with the Home Insurance Company, and was an acceptance of their terms. Eames insists that that was what he meant by it; and if he did, on or about the 22d of October, receive a letter from Beach of the purport which he states, it would seem that there could be little doubt on the subject. Mr. Beach, in giving his testimony, was at first uncertain whether he wrote a letter or not; he had no recollection of sending such a letter, and his final conclusion was that he handed the application to the Hartford Company to Eames at Bunker Hill. Eames, on the contrary, testifies that he did not see Beach after being informed of the general agent's letter of October 18, stating that the Home Company could not go under six and a half per cent., until after the fire. The presumptions which apply in such cases are in favor of Eames' account. His testimony as to receiving the letter is affirmative, and his recollection of its contents circumstantial. Beach's is negative; he does not recollect writing it; and the interview in which he supposes he gave Eames the application to the Hartford may well be confounded with the interview they had when an application to the Hartford was first talked of. And Beach evidently understood the clause referred to in Eames' letter of the 25th as referring to the Home insurance negotiation, or he would not have written to Ducat for a ticket. He explains this by saying that he understood the clause as referring to the Hartford application inclosed in the letter, but as also meaning generally that Eames was willing to give six and a half per cent., and, therefore, he sent for the ticket for the Home insurance. This is, in effect, an acknowledgment that he understood it as referring to the one as well as to the other. Taking the evidence all together, we think that Eames' statement is correct,— that he did receive the letter which he says he did on the 22d; and that his own letter of the 25th was in answer to it. The form of language used by him, "I guess we will have to stand it," is not so ambiguous and uncertain as the appellees' counsel suppose. It is a form of expression often used in common speech, in this country, to indicate an affirmative statement. It was so understood and acted on by Mr. Beach. It is equivalent to saying, "We will take the insurance at that rate." And Ducat evidently understood the negotiation as closed, because he was on the point of sending the ticket when he received the telegram announcing the fire.

§ 1115. *Correspondence between parties held to create a valid contract of insurance.*

Supposing this to be the meaning of the correspondence, the next question is, whether it had the effect of creating a contract. Eames had put in an application for insurance. It was made out in the regular form. The property was fully described, the amount of insurance was named, and the rate of premium at five and a half per cent. was proposed to be paid. Everything was satisfactory to the general agent except the rate of premium. No question was made about anything else. The whole subsequent correspondence related to that alone. The agent required six and a half per cent. instead of five and a half; and finally, as we construe the letter of Eames, he (Eames) agreed to and accepted this modification. Supposing all the parties to be acting in good faith, as they were bound to act, had he not a right to suppose that the agreement was concluded, and that the risk was taken by the defendant? We do not well see how this conclusion can be avoided. He had not paid the premium, it is true; but it is shown that this was not required until the policy was made out and delivered. It had not been required of Cooley in 1870; and yet the

policy in that case, when issued, was made to run from the date of the application, some two weeks prior to its issue, and, of course, covered the risk during that antecedent period.

If parties could not be made secure until all the formal documents were executed and delivered, especially where the insuring company is situated in a different state, the beneficial effect of this benign contract of insurance would often be defeated and rendered unavailable. As said by Mr. Justice Field in the case of *The Insurance Company v. Colt*, 20 Wall., 567, "it would be impracticable [for a company] to carry on its business in other cities and states, or at least the business would be attended with great embarrassment and inconvenience, if such preliminary arrangements required for their validity and efficacy the formalities essential to the executed contract. The law," he continues, "distinguishes between the preliminary contract to make insurance or issue a policy, and the executed contract or policy. And we are not aware in any case, either by usage or the by-law of any company, or by any judicial decision, it has ever been held essential to the validity of these initial contracts that they should be attested by the officers and seal of the company. Any usage or decision to that effect would break up or greatly impair the business of insurance as transacted by agents of insurance companies."

But it is objected, in the next place, that the contract, if one was made, was not complete and precise in its terms; that it did not state the period of time during which the risk was to continue, and did not state what kind of a policy (of two or three different kinds which the Home Company used) Eames wished to have. It does appear that the application, which was signed on the 12th of October, did not (as is usually done) call for a statement of the period of insurance. It was one of the company's own printed blanks, and the probability is that the reason this item was not inserted was the almost universal practice of taking ordinary insurance against fire for a year. Nothing else seems to have been in the minds of the parties. The former insurance on the property had been for that period. The bill states that Eames applied to Beach for a contract of insurance and policy on the mill for a year; and this is not denied in the answer; the application to the other companies, the Phoenix and the Hartford, seem to have been for a year. Mr. Beach, in his testimony, when asked by the counsel of defendant whether anything had been said as to the length of time the complainants wanted insurance in the Home, promptly answered, "If I mistake not, the application states 'for one year;'" and was only convinced to the contrary after an inspection of the document. The premium is constantly spoken of by the witnesses and in the letters as so much per cent. absolutely,—six and a half per cent.,—without adding "per annum;" and yet we know that a year's premium was meant. It may be said that this is the usual mode of speaking when rate per annum is intended. This is undoubtedly true when an ordinary policy for a year is the subject of discussion. But when insurance for a fractional part of a year, or any unusual period, is proposed or spoken of, it is not the customary mode of speaking. It is then usual to add the words "per annum," in order to avoid mistake. We think it perfectly manifest, from all the evidence taken together, that the parties meant and intended an insurance for a year, and had nothing else in their minds. This is the inference to be drawn from all their conduct, conversations and correspondence; and we should be sticking in the bark to ignore it.

The plea that no time for the continuance of the insurance was stipulated

for is evidently a mere afterthought. There is no difficulty as to the time when the risk was to commence. It was the practice of the defendant, as it is of most, if not all, other companies, to antedate the policy to the time of making the application; which, in this case, was on the 12th day of October, 1872. This practice is more beneficial to the companies than to the insured. They are not liable until the contract is completed, and if a loss occurs before its completion they have nothing to pay; and yet they get the benefit of the premium for this period whenever the contract is completed.

As to the plea that the contract does not specify what kind of a policy was desired, it does not appear that the complainants had any knowledge or notice that the defendant issued different kinds of policies. As Eames justly said, he supposed (as he had a right to suppose) that they would get the same kind of policy which had been issued on the property before. If no preliminary contract would be valid unless it specified minutely the terms to be contained in the policy to be issued, no such contract could ever be made or would ever be of any use. The very reason for sustaining such contracts is, that the parties may have the benefit of them during that incipient period when the papers are being perfected and transmitted. It is sufficient if one party proposes to be insured and the other party agrees to insure, and the subject, the period, the amount, and the rate of insurance is ascertained or understood, and the premium paid if demanded. It will be presumed that they contemplate such form of policy, containing such conditions and limitations as are usual in such cases, or have been used before between the parties. This is the sense and reason of the thing, and any contrary requirement should be expressly notified to the party to be affected by it.

§ 1116. *Communication of facts to solicitor of underwriter, who writes them out according to his own view of them.*

As to the objection that the application in this case does not truly set forth the title of the complainants and the amount and nature of the incumbrances on the property, and the amount of insurance in other companies, it is sufficient to say that the evidence abundantly shows that all the facts were fully and frankly communicated to Beach, the agent of the company, and were indeed known to him before; and that he wrote down the answers according to his view of their bearing and legal effect, Eames relying entirely on his experience in such matters. There is no reason to suppose that either Eames or Beach did not act in entire good faith in the transaction. And, indeed, it cannot be pretended that the facts were not substantially as represented in the application. The complainants are represented to be the owners of the property, which is stated to be subject to a mortgage for \$6,000. The fact was that they had purchased the property for \$12,000, and had paid \$6,200 of the purchase money, the vendor having a lien for the balance of \$5,800; but no deed had ever been given. So that, in truth, the complainants did not hold the legal title, although they had an equitable one; and had not given a mortgage, although the vendor's lien was equivalent to one. In another answer, however, explaining the mortgagee's interest, it is stated expressly to be a "lien on mill to secure payment of sale." As the exact facts were communicated to the agent, and he took the responsibility of stating them in the way he did, leading the applicant to suppose that it was all right, we think it would be great injustice to turn him out of court now for this inexact method of statement. According to the views expressed by this court in *Insurance Company v. Wilkinson*, 13 Wall., 222, and other more recent cases, the de-

fendant was concluded by the act of its agent. The reference to collateral insurances in other companies is subject to the same consideration. The insurances were being applied for through this very agent who wrote the answers, and who knew the whole facts, and between whom and the general agent they had been referred to in their correspondence. The defense on this ground is utterly destitute of equitable consideration.

After giving due attention to the pleadings and evidence in this case we are forced to the conclusion that a contract for a policy of insurance was fairly made, and that a decree should have been rendered for the complainants, declaring them entitled to a policy of insurance to be issued by the defendant, in the usual form in such cases, for \$4,000 on the mill and machinery of the complainants, situated at Staunton, in the county of Macoupin, Ill., to run and be in operation for one year from the 12th day of October, 1872, at the rate of six and a half per cent. premium; and, as it appears that the said property was destroyed by fire on the 29th day of October, 1872, whereby loss and damage accrued to the complainants to the whole amount of the said insurance, and that due proof and notice of such loss was given, and that the premium for said insurance was tendered and refused, it should be further decreed that the defendant pay to the said complainants the said sum of \$4,000 (less the amount of said premium), with interest and costs. See *Taylor v. Merchants' Ins. Co.*, 9 How., 405; *Perkins v. Washington Ins. Co.*, 4 Cow., 666; *Carpenter v. Mutual Safety Ins. Co.*, 4 Sandf. Ch., 410. Decree reversed, and cause remanded with directions to enter a decree in conformity with this opinion, and to take such further proceedings as law and equity may require.

BENNETT v. MARYLAND FIRE INSURANCE COMPANY.

(Circuit Court for New York: 14 Blatchford, 422-426. 1878.)

Opinion by WALLACE, J.

STATEMENT OF FACTS.—This is a motion for a new trial by the defendant. None of the objections urged to the recovery are tenable.

§ 1117. *Liability of underwriter for agent's acts. Ratification.*

First. Hamlin was the agent of the defendant, authorized to make insurance and deliver policies. The assured paid the premium to a broker, and Hamlin, knowing of the payment, accepted the responsibility of the broker, by an agreement with him, in lieu of the money paid by the insured. The assured subsequently desiring to build an addition, which would increase the risk, applied to Hamlin to indorse a consent. Hamlin informed the assured that he would have to forward the policy to the company, but the consent would be given, and the assured might rely upon it and go on with his addition. The company knew that the policy had been issued and declined to take the risk, and so notified Hamlin. Notwithstanding this Hamlin did not inform the assured. Some time after this Hamlin forwarded the policy to the company to obtain the consent of its officers to the building of the addition, at the same time informing them of the whole transaction relative to the premium. The company retained the policy and did not notify Hamlin that consent would not be allowed or that the policy would be deemed canceled. It thus appears that the company knew that the policy had not been recalled by Hamlin and that the assured supposed it to be in force and was acting in reliance upon that assumption. By silence the defendant ratified the act of its agent in accepting the responsibility of Nichols in lieu of the money of the

assured. Slight acts are sufficient to constitute a ratification, and silence, when good faith requires the principal to speak, is sufficient.

§ 1118. *When a policy cannot be canceled without repayment of the premium.*

Again, the policy did not require payment of the premium in money; and, when the agent of the defendant accepted the promise of Nichols in lieu of the money of the assured, the premium was paid. The agent became liable to the defendant for the premium to the same extent as though he had received the money of the assured, and the assured were protected to the same extent as though they had paid their money to Hamlin. If they had paid Hamlin the money and he had failed to remit it to the defendant, the defendant, nevertheless, would have been bound by the policy. It is equally liable now. *Hotchkiss v. Germania Fire Ins. Co.*, 5 Hun, 90; *Goit v. Protection Ins. Co.*, 25 Barb., 189; *Church v. Brooklyn Fire Ins. Co.*, 19 N. Y., 305, 311; *Bodine v. Exchange Fire Ins. Co.*, 51 N. Y., 117. Under these circumstances the defendant could not cancel the policy without repayment of the premium to the assured. Instead of doing this, the defendant, with full knowledge of all the facts, retained the policy when it came into its possession for another purpose, without expressing any intention of repudiating the transaction.

§ 1119. *Waiver of notice of loss by disclaimer of liability.*

Second. The policy required the assured, in case of loss, to give notice in writing to the company forthwith, and as soon after as possible to serve proofs of loss. As soon as the fire occurred the assured notified Hamlin, and he wrote to the company. Shortly thereafter the assured heard that the defendant disclaimed liability, and one of them went to the office of the company and was informed by its officers that the policy had been canceled and was not in force at the time of the loss. Then the assured gave written notice of the loss to the company and served proofs of loss, both of which were shortly after returned by the defendant upon the ground that the defendant had no policy on the property and nothing to do with the loss. When Hamlin wrote to the company, his act inured to the assured and satisfied the condition requiring written notice forthwith. The proofs of loss were served as soon as practicable under the circumstances, as appears by the testimony. But both of these conditions were made a part of the policy for the benefit of the defendant and could be waived by the defendant. The defendant received notice of the loss forthwith, but not notice in writing. Notice by the assured to Hamlin, whom the defendant had held out as its agent, was, in the absence of knowledge on the part of the assured that Hamlin's agency had been revoked, notice to the defendant; and when after this had been given and one of the assured saw personally the officers of the defendant, and they, instead of objecting to the formality of the notice, told him that the defendant repudiated the policy, they acquiesced in the sufficiency of the notice.

No objection can be heard to the sufficiency of the service of the proofs of loss. If they had been served immediately after the interview between one of the assured and the officers of the defendant, they would have been in time, clearly. When, in that interview, the defendant repudiated all liability for the loss, the assured were absolved from making proofs of loss. The proofs, however, were forwarded, and were returned by the defendant as of no interest to it. The defendant waived the condition in this regard. *Norwich & N. Y. Trans. Co. v. Western Mass. Ins. Co.*, 6 Blatch., 241, and cases there cited (§§ 1280-83, *infra*).

§ 1120. *Assignment by parol of right of action on a policy.*

Third. After the fire the assured transferred, by an oral agreement, his right of action to the plaintiffs' intestate, and the other individuals to whom the loss was payable by the policy, as their interests might appear at the time of the loss, assigned their interest to the plaintiffs' intestate. The assignment by parol was sufficient to transfer the cause of action. *Kessel v. Albetis*, 56 Barb., 362. It operated as an appointment of the assignee as trustee, within section 113 of the Code of Procedure, and authorized him to maintain the action.

§ 1121. *Pleading. Denial of allegations of complaint. Defense of breach of conditions, lost.*

Fourth. The defenses presented by these various objections urged to the plaintiffs' right to recover are the only ones of which the defendant can avail itself under the pleadings in this action. The complaint does not set out the policy, but describes it sufficiently to permit it to be put in evidence, and alleges that the assured and the plaintiffs have duly performed all of the conditions of the policy. The issue tendered by the answer is, in substance, a denial of the averments of the complaint. The rights of the parties are to be ascertained, not by the rules of pleading at common law, but by those adopted by the code.

Under this issue it was incumbent on the plaintiffs to prove the execution and delivery of the policy, the plaintiffs' interest and title to sue, the loss by fire of the property described, the amount of the loss, and notice and proof of loss in due form given to the defendant. The defendant was at liberty to controvert all the facts which it was incumbent on the plaintiff to prove, including the performance of any condition precedent to the plaintiffs' right to recover (Code, sec. 162; New Code, sec. 533), but it could not avail itself of any defense based on a breach of any other conditions in the policy, because no such defense was set up in its answer.

The defendant is, therefore, precluded from relying upon the breach of any condition in the policy, except of such as the plaintiffs were bound to show affirmatively had been complied with, as a condition precedent to their right to recover. No issue is tendered by the answer, to the effect that the policy became void because the risk was increased by the act of the assured; and the same may be said of the other defenses not hitherto discussed. While, it is true, evidence appeared on the trial from which breaches of these conditions might be inferred, the plaintiffs were not required to meet that evidence, because not notified by the answer that such issues were to be tried. Judgment is ordered for the plaintiffs, upon the verdict.

HUMPHRY v. HARTFORD FIRE INSURANCE COMPANY.

(Circuit Court for New York: 15 Blatchford, 35-37. 1878.)

Opinion by BLATCHFORD, J.

STATEMENT OF FACTS.—At the trial the defendant's counsel asked the court to rule and decide that the plaintiff could not give evidence to sustain the first cause of action stated in the complaint, upon the ground that the same was an equitable cause of action and could not be brought on the law side of the court; that the same could not be united with the second cause of action; and that it could not be tried before a jury. The court so ruled and decided. The plaintiff then offered testimony to prove such first cause of action. The de-

fendant objected to the allowance of any evidence to prove such first cause of action, for the reasons above stated, and the court sustained the objection, to which decision the plaintiff excepted.

The first count of the complaint sets forth, in substance, that the plaintiff was the owner of a mortgage on a mill for \$1,000, and was personally liable to pay two other mortgage liens on the same property, held by other parties, amounting in all to over \$4,000; that the defendants agreed with him to issue to him a policy of insurance against loss by fire, on the mill, to the amount of \$1,500 for one year, both on account of his said mortgage lien and of his said personal liability; that, in part fulfillment of said agreement, the defendants issued a policy insuring William M. Calvert for \$1,500 for one year, against loss by fire, on the mill, loss payable to the plaintiff, as mortgagee of the premises; that such policy was not delivered to the plaintiff, but was held by the agents of the defendants in trust for the plaintiff, till after the insured property was totally destroyed by fire; that due notice and proof of loss was given by the plaintiff to the defendants; that the policy so issued was not in accordance with the agreement of the parties, in that it did not insure the plaintiff against loss on account of his interest, both as a mortgagee of the premises and on account of his personal liability for the payment of other mortgages which were a lien on the premises, and were owned by other parties; that the plaintiff had no knowledge, until after the fire, that the policy did not conform to the terms of the agreement so made; and that by reason of the failure of the defendants to fulfill said contract, the plaintiff has sustained damages in the sum of \$1,500, with interest.

The second count is founded on the policy as issued, and alleges that the plaintiff had an interest in the property insured, as a mortgagee thereof, and also on account of mortgages held by third parties thereon, for the payment of which the plaintiff was personally liable, to more than \$4,000, and claims judgment for \$1,500 and interest.

§ 1122. *Breach of contract to insure, equivalent to breach of terms of policy.*

The first count sets up, I think, a legal cause of action. It claims damages for the breach of the alleged contract to insure. If a valid contract in the form set up is proved, the plaintiff can recover at law the same damages as if he were suing on a policy issued in the form in which it was agreed to be issued. *Pratt v. Hudson River R. R. Co.*, 21 N. Y., 305; *Taylor v. The Merchants' Fire Ins. Co.*, 9 How., 390, 405 (CONTRACTS, §§ 167-74); *Commercial Mutual Marine Ins. Co. v. Union Mutual Ins. Co.*, 19 How., 318, 323.

§ 1123. *Change of title or possession; deed acknowledged but not delivered.*

In respect to the count on the policy as issued, the answer sets up as a defense that the policy provided that, if there should be any change in the title or possession of the property without the consent of the defendants indorsed on the policy, the policy should be void; that a change in the title of the property took place, in that Calvert conveyed it by deed to one Reynolds; that such change was made without the consent of the defendants indorsed on the policy, and that thereby the policy became void. To sustain this defense the defendants offered in evidence a deed from Calvert to Reynolds, covering the premises. The plaintiff objected that there was no evidence of delivery or possession under the deed. The court overruled the objection, and the plaintiff excepted. The deed was received in evidence and a verdict was directed for the defendants, to which direction the plaintiff excepted. The deed was

acknowledged on the day it bore date, but there was no evidence that it had been recorded.

The question on the policy was, whether a change of title or possession had taken place. Proof of the execution of the deed, without delivery of it, was not sufficient. It not having been recorded, there was no presumption it had been delivered, and nothing appeared as to delivery except execution and acknowledgment. *Fisher v. Hall*, 41 N. Y., 416, 423; *Younge v. Guilbeau*, 3 Wall., 636, 641. An instrument is not a conveyance within the meaning of 1 R. S. of N. Y., 756, § 16, so as to entitle it to be read in evidence, when acknowledged and certified as prescribed, unless it has been delivered, so as to take effect as a grant, vesting the estate or interest intended to be conveyed as prescribed by 1 R. S. of N. Y., 738, § 138.

For the foregoing reasons there must be a new trial, the costs to abide the event.

COLUMBIAN INSURANCE COMPANY v. LAWRENCE.

(2 Peters, 25-57. 1829.)

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This writ of error is brought to a judgment of the court of the United States for the District of Columbia, sitting in the county of Alexandria, which was rendered in a cause in which Joseph Lawrence, survivor of Lawrence & Poindexter, was plaintiff, and the Columbian Insurance Company of Alexandria were defendants.

The suit was brought on a policy insuring a mill, stated in the representation and in the policy to belong to Lawrence & Poindexter, the assured. Pending the suit Poindexter died, and the suit was continued and tried in the name of Lawrence, the survivor. The verdict and judgment were in favor of the plaintiff below. At the trial, the court, on the motion of the defendants' counsel, instructed the jury on several questions of law which were made in the case, to which instructions the counsel for the defendants in the circuit court excepted, and the cause is now before this court on those exceptions.

The plaintiff in the circuit court had exhibited his policy, the representation on which the contract of insurance was founded, his proofs of title and of loss, the notice which he gave of that loss, together with the documents which accompanied it, as preparatory to the assertion of his claim against the company, and the proceedings of the company in consequence of that claim, which terminated in a refusal to pay it. The counsel for the plaintiff in the circuit court, having thus concluded his case, the counsel for the defendants made three objections to his right of action.

1. That the interest claimed by the plaintiff in the property insured, as disclosed by the evidence, was not, at the respective times of effecting the insurance and of the happening of the loss, an insurable interest and property. 2. That it was not such an interest as is described in the original offer of the plaintiff's agent for insurance, and in the policy, nor such as is averred in the declaration. 3. That the said documents, produced as preliminary proof of loss, do not import a fulfillment, on the part of the plaintiff, of the terms and conditions upon which the loss is declared to be payable, by the ninth of the said printed rules annexed to the policy.

And the counsel for the defendants thereupon prayed the opinion and direction of the court to the jury, that the said evidence was not admissible, com-

petent, and sufficient to be left to the jury as proof of the plaintiffs' title to recover for such loss in this action. The court refused to give this instruction, being of opinion, 1. That the interest of the plaintiffs in the property insured, as disclosed by the said evidence, is a sufficient insurable interest to support the policy and the averment of interest in the plaintiffs' declaration in this action. 2. That it is such an interest as is described in the original offer for insurance, and in the policy, and in the declaration. 3. That although the said certificate of Murray Forbes is not such a certificate as is required by the said ninth rule annexed to the said policy, yet the evidence aforesaid is admissible, competent and sufficient to be left to the jury, and from which they may infer that the defendants waived the objection to the said certificate, and to the other preliminary proof aforesaid.

The counsel for the defendants in error have made some preliminary objections to the terms in which the opinion of the circuit court was asked. The counsel prayed the opinion and direction of the court to the jury, that the evidence offered by the plaintiff was not admissible, competent and sufficient to be left to the jury as proof of the plaintiff's title to recover. This blending of an objection to the admissibility of evidence in the same application which questions its sufficiency is said to be not only unusual, but to confound propositions distinct in themselves, and to be calculated to embarrass the court and the questions to be decided.

§ 1124. *Admissibility and sufficiency of evidence distinct matters.*

It is undoubtedly true that questions respecting the admissibility of evidence are entirely distinct from those which respect its sufficiency or effect. They arise in different stages of the trial, and cannot with strict propriety be propounded at the same time. If, therefore, the circuit court had proceeded no further than to refuse the instruction which was asked, this court might have considered the refusal as proper, unless the entire prayer, as made, ought to have been granted. But the circuit court proceeded to give its opinion on the different points made by counsel, and these opinions must be examined.

§ 1125. *Contract for purchase of premises an insurable interest.*

1. The first is, that the interest of the assured in the property insured is a sufficient insurable interest to support the policy and the averment of interest in the declaration. The mill insured was built on an island in the Rappahannock, which was demised by Charles Mortimer to Stephen Winchester, for three lives, renewable forever, at the yearly rent of £80 (\$266.66), with a condition of re-entry for rent in arrear, etc.

1801, December 19. S. W. conveyed one undivided third part to Richard Winchester, and another undivided third part to Joshua Howard.

1806, May 9. R. and S. Winchester conveyed to Joshua Howard, by deed of mortgage in fee, their two thirds of the said island, with other property to a considerable amount, in order to secure the said Howard to the amount of \$40,000.

1813, January 27. Joshua Howard conveyed the whole island to William and George Winchester.

1813, September 23. William and George Winchester conveyed the island to Joseph Howard and Joseph W. Lawrence.

1818, July 22. Joseph Howard entered into an agreement with Joseph W. Lawrence, by which the said Lawrence was to take the island, etc., at the price of \$30,000; for which amount, in debts due for Howard and Lawrence, he was to procure a release; on his doing which, Howard was to execute a

deed for the property. On the failure or inability of Lawrence to procure this release, the contract was to be void.

1822, November 28. Joseph W. Lawrence enters into an agreement with Thomas Poindexter, Jr., for the sale of one-half of the island, mills, etc., for which the said Poindexter agrees to assume and take upon himself one-half the debts due from Howard and Lawrence to the banks in Fredericksburg, which were secured by a deed of trust.

November 29. On agreement between Howard and Lawrence, to work the mills in partnership.

By the deeds of January 27 and September 23, 1813, all the title of Joshua Howard to the island on which the mills insured were erected passed to Joseph Howard and Joseph W. Lawrence. What was that title? He held one-third part in his own right, and the remaining two-thirds as mortgagee.

The agreement of July 22, 1818, between Howard and Lawrence does not appear to have been performed on the part of Lawrence, nor is there any evidence of his ability to perform it; but it does not appear that Howard has taken any step to avoid it, or has asserted any title in himself. The agreement of November 28, 1822, between Lawrence and Poindexter admits Poindexter to an undivided moiety of any interest Lawrence might have in the property.

Lawrence and Poindexter then, when the insurance was made, were entitled to one-third of the property under the deed made by Charles Mortimer, and to the remaining two-thirds as mortgagees; but one moiety of the whole, which moiety was derived from Joseph Howard, under the agreement of July 22, 1818, was held under an agreement which had not been complied with, and which purported on its face to be void if not complied with; but the other contracting party had not declared it void, nor called for a compliance with it. It cannot be doubted, we think, that the assured had an interest in the property insured. Lawrence had an unquestionable title to a moiety of one-third, subject to the rent reserved in the original lease, and to a moiety of the remaining two-thirds as mortgagee. He had such title to the other moiety as could be acquired by an agreement for a purchase, the terms of which had not been complied with.

The title is thus stated because those words which declare the contract to be void, if Lawrence should fail to comply with it, do not, we think, render it absolutely void, but only voidable. No time for performance is fixed; and if Howard is content with what has been done by Lawrence, and does not choose to annul the contract, the underwriters of this policy cannot treat it as a nullity. Lawrence, having this title under an executory contract, sells to Poindexter one undivided moiety of the property. These two persons, being both in possession, partly under legal conveyances and partly under executory contracts, require an insurance on it against loss by fire. Had they an insurable interest?

That an equitable interest may be insured is admitted. We can perceive no reason which excludes an interest held under an executory contract. While the contract subsists the person claiming under it has undoubtedly a substantial interest in the property. If it be destroyed, the loss, in contemplation of law, is his. If the purchase money be paid it is his in fact. If he owes the purchase money the property is its equivalent, and is still valuable to him. The embarrassment of his affairs may be such that his debts may absorb all his property, but this circumstance has never been considered as proving a

want of interest in it. The destruction of the property is a real loss to the person in possession, who claims title under an executory contract, and the contingency that his title may be defeated by subsequent events does not prevent this loss. We perceive no reason why he should not be permitted to insure against it. The cases cited in argument, and those summed up in Phillips on Insurance, 26, on insurable interest, and in 1 Marshall, 104, ch. 4, and 2 Marshall, 787, ch. 11, prove, we think, that any actual interest, legal or equitable, is insurable.

§ 1126. *Contract for purchase not ownership.*

2. Having declared the interest of Lawrence and Poindexter to be insurable, the circuit court instructed the jury that "it is such an interest as is described in the original offer for insurance, and in the policy and in the declaration."

The original offer for insurance was in these words: "What premium will you ask to insure the following property, belonging to Lawrence and Poindexter, for one year, against loss or damage by fire? On their stone mill, four stories high, covered with wood, on an island about one mile from Fredericksburg, in the county of Stafford, the mill called Elba Mill. Seven thousand dollars are wanted. Not within thirty yards of any other building, except a corn-house, which is about twenty yards off." The policy states that the underwriters insure Lawrence and Poindexter against loss or damage by fire, to the amount of \$7,000, on their stone mill, etc.

The declaration charges that the defendants insured the plaintiffs \$7,000, against loss or damage by fire on their stone mill, etc., and avers that they were interested in and the equitable owners of the premises insured as aforesaid, at the time the insurance was made as aforesaid, etc. The material inquiry is, does the offer for insurance state truly the interest of the assured in the property to be insured? The offer describes the property as belonging to Lawrence and Poindexter, and states it afterwards to be their stone mill. It contains no qualifying terms which would lead the mind to suspect that their title was not complete and absolute. The plaintiffs in error contend that the terms import an absolute legal estate in the property; and that the insurers entered into the contract having a right to believe that the interest of the assured was of this character.

Instead of such an estate in the property as the representation justified the insurers in expecting, the proof shows that the insured held only one-half of one-third, under a lease for three lives, renewable forever, and one-half of the other two-thirds, as mortgagees; that the other moiety was held under a contract, the terms of which had not been complied with; and which, if complied with, would give them a title to two-thirds of that moiety only, as mortgagees. The defendants insist that the representation is satisfied by an equitable title under an executory contract, and that, in truth and in fact, the mill did, at the time of its insurance and loss, belong to Lawrence and Poindexter.

It may be true that a mill occupied by Lawrence and Poindexter, and held under a lease or an executory contract, would be generally spoken of by themselves and others as their mill. The property alluded to would be well understood, and no inconvenience could arise from this mode of designating it. But if Lawrence and Poindexter should proceed to sell the property as theirs, should describe it in the contract as belonging to them, no court would compel the purchaser to take the title they could make.

The assured then have not proved "such an interest as is described in the original offer for insurance;" and the circuit court, in this respect, misdirected the jury. It may be proper to take some notice of the materiality of this misdirection.

The contract for insurance is one in which the underwriters, generally, act on the representation of the assured, and that representation ought consequently to be fair, and to omit nothing which it is material for the underwriters to know. It may not be necessary that the person requiring insurance should state every incumbrance on his property which it might be required of him to state if it was offered for sale; but fair dealing requires that he should state everything which might influence, and probably would influence, the mind of the underwriter in forming or declining the contract. A building held under a lease for years, about to expire, might be generally spoken of as the building of the tenant; but no underwriter would be willing to insure it as if it was his; and an offer for insurance, stating it to belong to him, would be a gross imposition.

Generally speaking, insurances against fire are made in the confidence that the assured will use all the precautions to avoid the calamity insured against which would be suggested by his interest. The extent of this interest must always influence the underwriter in taking or rejecting the risk, and in estimating the premium. So far as it may influence him, in these respects, it ought to be communicated to him. Underwriters do not rely so much upon the principles as on the interest of the assured; and it would seem, therefore, to be always material that they should know how far this interest is engaged in guarding the property from loss. Marshall, in treating on insurance against fire (p. 789, b. 4, ch. 2), says: "It is not necessary, however, in order to constitute an insurable interest, that the insured shall, in every instance, have the absolute and unqualified property of the effects insured. A trustee, a mortgagee, a reversioner, a factor or agent, with the custody of goods to be sold, upon commission, may insure; but with this caution, that the nature of the property be distinctly specified."

In all the treatises on insurances, and in all the cases in which the question has arisen, the principle is, that a misrepresentation which is material to the risk avoids the policy. In this case the circuit court has decided that there is no misrepresentation; that the interest of the assured was truly described in the offer for insurance; and consequently, no question on the materiality of the supposed variance was submitted to the jury. As this court is of opinion that a precarious title, depending for its continuance on events which might or might not happen, is not such a title as is described in the offer for insurance, construing the words of that offer as they are fairly to be understood, the circuit court has, in this respect, misdirected the jury.

§ 1127. *Waiver of objection to proofs not made by omission to specify defects.*

3. The third opinion given to the jury is, that the evidence given by the plaintiff in the circuit court was admissible, competent and sufficient to be left to the jury, and from which they may infer that the defendants waived the objection to the said certificate, and to the other preliminary proof aforesaid. The certificate to which this instruction refers is, by one of the rules which form conditions of the policy, declared to be an indispensable requisite, without the production of which the loss claimed "shall not be payable." A certificate intended by the assured to satisfy this condition accompanied the proof of loss; but it is not such a certificate as the condition requires; and

such was the opinion of the circuit court. The testimony which the court left to the jury, as being sufficient to authorize them to infer a waiver on the part of the insurers of this certificate, consisted of entries on the minutes of the board, with some parol proof.

On the 20th of February, 1824, the claim of Lawrence and Poindexter was submitted to the board with the policy and certificate of loss.

On the 13th of March an order was made requiring the title papers of Lawrence and Poindexter to the Elba Mill. On the 1st of April, copies of the deed from William and George Winchester to Joseph Howard and Joseph Lawrence, of the agreement between Howard and Lawrence, and of the agreement between Lawrence and Poindexter, were laid before the board. On the 16th of April further proof respecting the title was required, which was produced on the 22d of the same month.

The opinion of Mr. Jones was taken on the case, which was submitted to the board on the 28th of June, when it was resolved "that the claim of Lawrence and Poindexter be resisted, and that the secretary furnish them with a copy of this resolution." The opinion of Mr. Jones turns on the interest of the assured, and on the question whether the loss was fair or fraudulent. On the 11th of November, inquiry was made whether the board would enter into a compromise, "it being understood that the agreement" "is not to be considered as an admission of the claim?" Answered, "yes." On the 18th of November, the board passed a resolution declining a compromise, which was communicated to the agent of Lawrence and Poindexter. On the 11th of December, a further and more specific proposition for a compromise was made by the agent of the assured, which was rejected by the company.

The secretary of the company was examined to prove the communications between him and the agent of the assured. When the documentary evidence was exhibited, he informed the agent that he would call a board to decide on the claim. After the board had met and adjourned, he informed the agent that the claim would probably be resisted; that the company thought the interest of the assured was not insurable; that the representation was not faithful, and that Poindexter had set fire to the mill. No objection was made to the preliminary papers. The custom of the board was, if the claim for indemnity was thought just, to refer the preliminary papers to their secretary, to see if they were regular. In this case no such reference was made.

From the first presentation of the papers in February, till the passing of the final resolution in June, the claim was pending undetermined before the board, waiting for the advice of counsel. This advice being delayed by the absence and other engagements of counsel, an agreement was entered into with the agent of the assured that, if the final resolution should be to resist the claim, the suit should be put as forward on the docket as if brought to the intervening April term. This agreement was complied with. All the orders and resolutions of the board which have been stated were communicated by the witness to the agent of the assured, and are the only communications which he was authorized to make.

According to the invariable usage of the board, the sufficiency of the documents offered by way of preliminary proof of loss, as required by the ninth article of the rules annexed to the policy, was not to be considered by the board till the principle of the claim should have been admitted, and then the course was to submit such documents to the secretary for a special report thereon; in this case, the sufficiency of the documents was never discussed or consid-

ered by the board, nor referred to the secretary. It never was contemplated by the witness, nor to his knowledge by the board, to waive any compliance with this ninth article. The consideration of the documents offered under it did not regularly come on till the claim should be admitted in principle.

The agent of the assured was present at some of the meetings of the board when the witness was absent. He has understood that on these occasions the communications between them turned entirely on questions respecting the fundamental objections to the claim. The regularity or irregularity of the preliminary proof was never mentioned. The opinion given by counsel was never communicated to the assured or their agent. To have done so would have been contrary to the rules and to usage. This evidence was left to the jury as testimony from which they might infer that the preliminary proof, required by the ninth rule annexed to the policy, as indispensable to entitle the assured to demand payment for a loss, had been waived by the underwriters.

It will not be pretended that any expression is to be found, either in the resolutions of the board or in the conversations held by their secretary with the agent of the assured, having the slightest allusion to this preliminary proof or to the waiver of it. If then the jury might infer a waiver, the inference must be founded on the opinion that the board was bound to specify this particular objection; or that they have taken some step or made some communication which presupposes an acquiescence in the certificate which was offered.

The resolution of the board to resist the claim is expressed in general terms, and consequently applies to every part of the testimony offered in support of it. We know of no principle or usage which requires underwriters to specify their objections, or which justifies the inference that any objection is waived. We know of no principle by which this preliminary proof should be separated from the other proofs which were required to sustain the claim, and its insufficiency be remarked to the assured. The general resolution of the board was notice to the assured, that, if they intended to assert their claim in a court of justice, they must come into court prepared to support it.

§ 1128. *No waiver of proofs by examination of title.*

2. Did the examination of the title and the proceedings of the board respecting it presuppose an examination of the preliminary proofs, and an acquiescence in its sufficiency? We think not. The proof of interest, and the certificate which was to precede payment if the claim should be admitted, are distinct parts of the case to be made out by the assured. Neither of those parts depends on the other. The one or the other may be first considered without violating propriety or convenience. The consideration of the one does not imply a previous consideration and approval of the other. The language of the ninth rule does not imply that the proof it requires is first in order for consideration. After stating what shall be done by the assured, the rule requires the affidavit and certificate in question, and adds, that "until such affidavit and certificate are produced, the loss claimed shall not be payable." The affidavit and certificate must precede the payment, but need not precede the consideration for the claim.

The testimony of the secretary, if not conclusive on this point, is, we think, entitled to great weight. He states the invariable usage of the office to have been to consider the merits of the claim before looking into the preliminary proof, which, after deciding favorably on the claim, was always referred to

him for examination and report. In this case, the decision having been unfavorable to the claimant, no reference was made to him. We do not think the assured can be presumed ignorant of the standing usage of the office to which he applied for insurance; or be admitted to found upon that ignorance a claim to exemption from the necessity of producing a document required by the policy as indispensable to his demand of payment for his loss.

We think the case exhibits no evidence of waiver, no evidence from which the jury could infer it, and consequently that this instruction of the court is erroneous. It would have been a subject of much regret, had the merits of the case been clearly in favor of the defendants in error, to reverse the judgment of the circuit court on account of the non-production of a document which may perhaps be so readily supplied. But the cause must go back on the opinion expressed by the circuit court to the jury, that the title proved at the trial agrees with that stated in the offer for insurance.

§ 1129. *Insolvency of one in possession under contract for purchase not a termination of insurable interest.*

After the opinions which have been stated had been delivered to the jury, the defendants offered evidence to prove the insolvency of the plaintiffs, so as to disable them from obtaining a legal title, and additional embarrassments on the property; and again moved the court to instruct the jury that the assured had not such an interest in the property as entitled them or either of them to recover. This instruction the court refused to give, being still of opinion that the assured held an insurable interest in the mill. An exception was taken to this opinion.

The additional incumbrances to the title, and the circumstances of Lawrence and Poindexter, might constitute additional objections to the representation contained in the offer for assurance; but do not, we think, disprove an insurable interest in those who were still in possession of the property, and claimed title to it under executory contracts.

§ 1130. *Misdescription. Terms of policy construed.*

The defendants in the circuit court then proved that the mill was a square building, built of stone to the eaves; that the roof was framed and covered entirely of wood; and that the two gable ends, running up perpendicularly from the stone wall to the top of the roof, were also constructed of wood. They also offered evidence to prove the general understanding that the description of a stone house covered with wood was not verified or supported by a house whose gable ends were of wood; that the gable ends were understood to be a part of the wall, not of the roof or covering. They then moved the court to instruct the jury that if two of the exterior walls terminated in upright gable ends, such gable ends not properly forming, according to ordinary rules and terms of architecture, a part of the covering or roof, it was necessary, in order to verify the said description, that such gable ends should have been of stone; and if, in point of fact, such gable ends, as well as the covering or roof, were of wood, which, under any circumstances of actual conflagration, might have increased either the risk of catching fire, or the difficulty of extinguishing it, it amounted to a material misrepresentation, and avoids the policy; and it is not material whether the said misrepresentation was wilful and fraudulent, or from ignorance and without design, nor whether that actual loss was produced by such misrepresentation, or by having gable ends of wood instead of stone.

The court refused to give this instruction, being "of opinion that it was

competent to the jury, from all the facts given in evidence, to decide whether, in order to verify the said description in the said policy, it was necessary that the whole of the exterior walls, from the foundation to the top of the roof, should be of stone. And being also of opinion that under the first of the rules annexed to the said policy, and referred to therein, no variation in the description of property insured, from the true description thereof, not made fraudulently, would vitiate the policy unless by reason of such variation the insurance was made at a lower premium than would otherwise have been demanded."

To this opinion also an exception was taken. The rule referred to in the opinion requires that "Persons desirous of making insurance on buildings should state in writing the following particulars, to wit: of what materials the walls and roof of each building are constructed," etc. "And if any person shall cause the same to be described in the policy otherwise than as they really are, so as the same be charged at a lower premium than would otherwise be demanded, such insurance shall be of no force."

If the court was correct in the construction of this rule, and of its effect upon the policy, it will become unnecessary to examine their opinion, leaving the question whether the property insured was truly described entirely to the jury.

This rule takes up the subject of describing the property and provides for it. It requires that the materials of which the walls and roof are constructed shall be truly stated, and prescribes the penalty for a misstatement. The penalty is that the insurance shall be void if the assured shall cause the building to be described in the policy otherwise than it really is, so as the same be charged at a lower premium than would otherwise be demanded. The rule does not place the invalidity of the policy on an untrue description of the building, but on such a description as shall reduce the premium which would otherwise have been demanded. This was a question of fact which the jury alone could decide.

The rule having provided for the case, and prescribed the precise state of things in which the penalty shall be incurred, we do not think that it could be applied in any other state of things. The jury was of opinion that if the building was untruly described, still, the misrepresentation was not such as to cause the same "to be charged at a lower premium than would otherwise have been demanded." If this verdict was against evidence, the remedy was a new trial.

This court is of opinion that the circuit court erred in instructing the jury that the interest of the assured in the property insured is such as is described in the original offer for insurance and in the policy, and also in the opinion given to the jury that the evidence was sufficient to be left to them, from which they might infer that the defendants waived the objections to the certificate and other preliminary proof required by the ninth rule annexed to the policy.

The judgment is to be reversed and the cause remanded to the circuit court, that a *venire facias de novo* may be awarded.

PORTER v. ÆTNA INSURANCE COMPANY.

(Circuit Court for Michigan: 2 Flippin, 100-105. 1877.)

STATEMENT OF FACTS.— Action on a fire insurance policy on a hotel building claimed by insured as his, the property having been bought by Vaughn un-

der a mechanic's lien sale and title placed in the name of Porter, the party insured. Vaughn afterwards obtained a title under execution sale. The mechanic's lien sale proved to be void.

Opinion by WITHEY, J.

Some questions have been discussed which I shall not now dispose of, or review the positions taken by counsel in reference to them. There are two questions beyond the one disposed of yesterday, which I deem material, to which I shall allude.

The policy, in paragraph number six, under "Conditions of Insurance," uses this language: "If the interest of property insured be leasehold, or that of mortgage, or any other interest not absolute, such must be made known to this company and expressed in the policy." The risk is written "on his three-story brick hotel building."

Now I understand the conceded facts are, that at the time of writing the insurance the insured did not make known that his interest was other than absolute. If, then, his interest was not an absolute one in the property, the plaintiff cannot recover.

§ 1181. *Possession under a void title not enough to justify representation of ownership.*

We have had discussion this morning upon this topic: What was the interest and title of the plaintiff Porter? Under the view which we took yesterday, that the mechanic's lien proceeding was absolutely void, because the court obtained no jurisdiction, and, as Porter claimed, under nothing but that lien proceeding, he had a mere possession at best. It may be questionable whether it can properly be said that he had even possession, in view of the testimony of Mr. Vaughn and Vaughn's previous relations to the property.

Vaughn, as president of the company that built the hotel, had been managing the property for it, and while thus acting, of his own motion he makes what he calls a purchase under the lien proceeding in the name of Porter, constituting himself the agent of Porter for the purchase, advancing the purchase money, and then making himself the agent of Porter to take possession of the Property. But assuming that Porter had a mere naked possession and that that was his title and interest, the question occurs whether it was an absolute interest. This naked possession is the lowest degree of title, and arises where one disseizes another. In this instance it would seem to be the view to take that it was a disseizin by intrusion.

If Porter obtained no right under the lien proceeding, then his possession was a usurpation and intrusion — an exercise of the powers and privileges of ownership against the rightful owner, whoever that might be, or the rightful possessor. There can be, however, no disseizin without entry and an actual dispossession of the rightful party. But, as we say, assuming that Porter had a mere possession, so far as possession is an interest insurable it was an absolute interest, because it was not conditional or dependent upon condition.

An absolute estate is one that is free from all manner of condition or incumbrance. Now we suppose a party in actual possession, and having no other title than mere naked possession, may be said, so far as his right goes, to have an absolute interest. The terms of the policy, as we have said, are, "if the interest or property insured be not absolute." We should, therefore, be disposed to say that whatever interest or whatever property he had was not conditional but absolute. We do not mean that he had an absolute property in the building, for that implies the exclusive right and possession.

But when we turn to the other question, whether there was an insurable interest, we find it is a principle in insurance that the underwriter is entitled to know in whom the interest insured is; for he is entitled to know how far the person insured is interested in guarding the property from loss. If in law and in fact Porter had no interest other than mere naked possession, and the real interest was in another, had he the interest in the property that was insured?

The interest insured was the hotel property. It was not a special or partial interest. There is a distinction between having an interest and having the property. A man may have an interest because he may have a mere right less than the entire property. But if he has the property, he has the entire property interest and not a partial interest in the property; he has ownership. A lien would give an interest, but it would not necessarily carry the right to the property, as would ownership.

The interest insured, then, was the property, and was it Porter's property? Was the hotel owned by him? Not unless naked possession, with property in another, makes ownership. The company insured "his three-story brick hotel building," in the language of the policy. Was it his hotel building when his greatest interest was a mere possession, without right of possession, and without right of property?

The company was not informed that Porter was not the owner of the property. So far as the case at present appears, they were not informed that his interest was not the entire property; they were not informed in whom the interest insured was. What did the company insure? They insured the hotel property. Now if the company were not informed in whom the interest insured was, and if it was not in Porter, can the policy be sustained, or this suit be sustained upon the policy by Porter? If the company insured to Porter the entire interest in this hotel property, it insured to him an interest which he did not own in the present condition of the case.

The nature of Porter's interest should have been communicated to the company; if it was not, the contract of indemnity should not be held valid. And while it may be true that naked possession, so far as it gives an interest, is an absolute interest, still we are of opinion that Porter did not own the property or interest which was insured, according to the testimony of this case. He had, at best, a nominal interest. If a party who has a mere possession is answerable over to the party who is entitled to the rightful possession of the property, in case the building upon the property should be destroyed by fire, then it might be said that the party who has the mere possession has an insurable interest to the extent of the value of the property; but such is not the law.

Porter, if he was a mere trespasser or disseizor of that property, and it should burn while it was in his possession, unless it was by his fault or negligence, or by some act of his, would not be responsible for the value of the building, and therefore could not be said to have an insurable interest to the extent of the value of the property. His insurable interest, then, was merely the nominal possessory interest, which was liable to be defeated at any moment.

The insurance is but a contract of indemnity; the indemnity can go no further than the interest of the party who is indemnified, and if that interest is partial and not entire, the indemnity does not cover a value incident to ownership. We think, as the case stands, there was neither legal nor equitable.

ownership in Porter of this hotel property, to the extent which he was represented to have, or to the extent which is insured, to wit: "His three-story brick hotel building." He was not the owner of the entire property, or of any part or interest in it save a mere naked possession, and that was not such an interest as was insured. If there is no different phase to this case to be shown by further evidence, we hold that the plaintiff cannot recover.

BAXTER v. HARTFORD FIRE INSURANCE COMPANY.

(Circuit Court for Indiana: 12 Federal Reporter, 481, 492. 1882.)

Opinion by GRESHAM, J.

STATEMENT OF FACTS.—This is a suit on a fire policy issued by the defendant to the plaintiffs on grain, seeds and sacks, their own or held by them in trust or on commission, or sold but not delivered, contained in their elevator at Rochester, Indiana. The elevator and its contents were destroyed by fire. As to two thousand two hundred and thirty-eight bushels of wheat in the elevator at the time of the fire, it is averred in the third paragraph of the answer that this wheat was delivered to the plaintiffs by farmers after the insurance was taken, every one of whom, at the time of such delivery, received and accepted from the plaintiffs a written instrument or contract specifying and describing the amount and character of wheat by him delivered, and concluding as follows: "Wheat in store subject to our charges. Fire at owner's risk." It is also averred that it was not the intention of those depositing the wheat, or the plaintiffs, that it should be covered by the policy sued on, and that at the time of the fire the plaintiffs had in the elevator wheat of their own. These facts are pleaded against a recovery for more than the plaintiffs' lien for charges on the two thousand two hundred and thirty-eight bushels of wheat.

The plaintiffs demur to the third paragraph of the answer.

§ 1132. *An elevator owner has an insurable interest in goods in store to their full value.*

It is urged by the defendant's counsel that the wheat described in the paragraph demurred to was held on deposit, under an agreement between the depositors and the plaintiffs that it was not to be insured, and that therefore the plaintiffs, who were bailees, had no authority to put it under their policy and charge the depositors for insurance. The plaintiffs were commission merchants, engaged in buying and selling grain, and in connection with their business they owned and operated an elevator in the usual way. Those who deposited wheat in this elevator took receipts for the same, knowing that it could never be distinguished from the mass with which it was mingled, and that the plaintiffs could and would sell and ship it as their own in the course of their business. It is not claimed that this two thousand two hundred and thirty-eight bushels of wheat was to be kept separate from other wheat in the elevator of the same grade. The title to this and other wheat deposited in the elevator, as it was, remained in the depositors, or it passed to the plaintiffs. The contract between the plaintiffs and the depositors was not that the latter should on demand receive the identical wheat stored in the elevator, but that the plaintiffs should deliver wheat equal in amount and grade to that deposited or account for its value. Being authorized to sell the wheat on their own account as fast as it was deposited in the elevator, I think the plaintiffs had such an interest in it as authorized them to insure it for its full value. They were under no obligation to return the identical wheat stored in their elevator, and

no one expected them to do so. *Carlisle v. Wallace*, 12 Ind., 252; *Johnson v. Brown*, 36 Ia., 200.

But on the theory that the title to the wheat described in the paragraph demurred to remained in the depositors, and that they took the risk of loss by fire, under their contract with the plaintiffs, still the latter were liable for its value if fire should result from carelessness on the part of their employees, and they had a right to protect themselves from this liability by insuring the wheat for its full value; and, further, if this wheat remained the property of the depositors, as bailors, there was nothing in their contract with the plaintiffs which prohibited them, as bailees, from insuring it for its full value. The defendant was not a party to these agreements. It is true there is an averment in the paragraph demurred to, that it was not the intention of the depositors or the plaintiffs that the wheat should be covered by the policy sued on; but that is only the pleader's construction of the instruments or contracts which the depositors received from the plaintiffs. Demurrer sustained.

CAHILL v. ANDES INSURANCE COMPANY.

(Circuit Court for Illinois: 5 Bissell, 211-216. 1872.)

STATEMENT OF FACTS.—Action upon a policy of insurance. It appeared that one Doud, an insurance solicitor, not in the employ of defendant, but who had procured the privilege of "placing" insurances, had secured this risk of plaintiffs, and that the latter had paid the premium to Doud, who had never turned it over to the company. Further, see the opinion.

Charge by **BLODGETT, J.**

The only question that is made by counsel upon which any stress is laid is as to whether this contract, in fact, ever went into force—as to whether it ever became operative between the parties. It appears from the evidence that Mr. Doud's manner of doing business was to call upon parties having insurable property and solicit from them the business of placing it in some company, and obtaining a policy, and upon their acquiescing in his request, he would make an application to one of the companies with which he was operating, perhaps giving the insured the privilege of selecting from the list of companies he claimed to represent; and taking the application of the insured to the agent of the company, he would obtain from the company a policy, and pass it over to the insured, at some times collecting the money when he delivered the policy, at other times leaving it for the company to collect, or collect it himself within the period of thirty days. It is also in testimony here from the defendant that this company did not employ this man as its agent, but that he had placed some risks with that company in the manner described, that he had made the solicitation himself, and the company had accepted the risks which he had offered, and issued policies in accordance with the applications.

It seems that in this case Doud applied to the agents sometime in the early part of the month to insure this stock of goods in this saloon and the fixtures. Doud represented to the plaintiffs that he could place the insurance in one of two companies, the Republic or Andes, but after some conversation plaintiff concluded to accept a policy in the Andes. An application was made out,—whether at that time or at some subsequent time is not clearly disclosed by the testimony,—according to the due course of business, for an insurance in the Andes, and was presented to that company, a policy being issued and given to Doud, who brought it to the plaintiff and left it with him, stating that he

would want the money within thirty days; and as the testimony of Cahill shows, some short time afterwards, and before the expiration of the thirty days, Doud again called upon the plaintiff and stated that he must have the money upon that policy, the amount of the premium being \$20, and stating that if it was not paid the policy would be canceled. The plaintiff handed Doud the money and retained the policy. Some weeks afterward the plaintiff, meeting the general agent of the defendant on the street, was notified that this premium had not been paid, whereupon he narrated the circumstance of having paid it to Doud. The agent refused to recognize that as a payment, but said that Doud had died or run away, and he could not treat it as a payment, but should cancel the policy, and subsequently, on the 27th of April, 1871, Mr. Ryan, the Chicago agent of the company, addressed this note to Cahill, which seems to have been received by him:

"THOMAS CAHILL, Esq., 176 Washington Street:

"Dear Sir — Owing to the non-payment of the premium of your policy in the Andes Insurance Company of Cincinnati, No. 5,829 is hereby canceled and void. We are sorry to be compelled to do so, but we cannot wait any longer for the money. Respectfully yours, etc.,

"E. E. RYAN, Agent."

The policy which was issued, being in the ordinary form then in use by that company, contained this clause:

"If, during this insurance, any subsequent insurance should be made upon the property insured, . . . or if the company shall so elect, it shall be optional with the company to cancel this policy, which shall cease on notice being given to the assured, or his or their representative, of its decision to do so, in which case the company will become responsible to refund the premium for the unexpired time on demand, and pay the same on the surrender of policy.

"No insurance or renewal thereof shall be considered binding until the actual payment of the premium."

§ 1133. *Underwriter cannot arbitrarily cancel policy.*

The question then resolves itself back into the original issue. Was the premium in this case properly paid? If it was, then the policy was in force, and defendant had no right to cancel it for the non-payment of the premium, and if they did seek to cancel it for any other reason than the non-payment, they should have notified the policy-holder. They had no right to claim the right of cancellation broadly, and assign any reason they saw fit afterward. They should put him on his guard, and must be bound by the reason they assigned, which was that, the premium not being paid, they refused to be held any longer by the policy.

If the assumption contained in this letter was false, then the policy still remains in force, and this claim of cancellation goes for naught. If the assumption was true that this premium had not been paid properly so as to bind the company, then the claim of cancellation on that ground was well taken.

§ 1134. *The question of D.'s agency in the case one of fact.*

It is claimed that this policy was issued on the application of Doud, and handed to Doud, who delivered it to the plaintiff. I instruct you, as matter of law, that if you shall find that by delivering the policy to Doud the company made Doud its representative and agent for the purpose of delivering the policy, and that the delivery of the policy to him to deliver to Cahill authorized Doud to receive the premium on the policy, and if Doud subsequently

acted dishonestly with the company and failed to pay over the money to them, they must suffer the loss rather than the party who has acted in good faith. When Mr. Doud brought the policy to Cahill the natural presumption would have been that he was authorized to receive the premium on the policy, and that the policy took effect as though he was, although there is a clause in fine print in the policy which reads in effect that the policy shall not take effect until the premium is actually paid; for if parties see fit to give credit, and a party is misled by supposing that credit is given to him, I think that clause would cut no figure.

§ 1135. *One not in employ of an underwriter may be its agent.*

It is true the testimony discloses that Doud was not in the employ of defendant, but in each specific case where he obtained the assent of parties to accept insurance in the Andes Insurance Company, and they issued the policy and intrusted him with it, he became the representative of that company, as between the insurer and insured for that specific transaction. He may not have been, generally, but in that case he is their representative, and the payment of the premium is a good one. There is no question but, if Cahill had gone to the office and had paid the \$20 at that time, it would have been a good payment. The only question is, if Doud came at a subsequent day and asked for the money, was plaintiff bound to see to the appropriation of the money? I think he was not. (Verdict for plaintiff.)

BANG v. FARMVILLE BANKING & INSURANCE COMPANY.

(Circuit Court for Virginia: 1 Hughes, 290-294. 1876.)

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—Woodward & Sherwood were the agents of the defendant at Jersey City, with authority “to take fire risks, rates of premium, receive moneys, countersign, issue, renew, and grant leave to transfer policies of insurance signed by the president and secretary of the company, and to transact the business of insurance in accordance with the rules and regulations of the company, and such instructions as might from time to time be given them by the officers thereof.”

The plaintiff employed a firm of insurance brokers in New York to place a large amount of insurance for him upon his “frame building, known as Congress Hall, . . . in the village of Sharon Spa, N. Y.” These brokers placed \$1,000 with the defendant, and received from Woodward & Sherwood, as its agents, a policy for that amount, dated June 2, 1875. The policy did not acknowledge the receipt of the premium and contained conditions as follows: “This company shall not be liable by virtue of this policy, or any renewal thereof, until the premium thereof shall be actually paid. The use of general terms, or anything less than a distinct, specific agreement, clearly expressed and indorsed on the policy, shall not be construed as a waiver of any printed or written condition or restriction therein. The insurance may also be terminated at any time, at the option of the company, on giving notice to that effect, and refunding a ratable proportion of the premium for the unexpired term of the policy.”

When the policy was delivered to the brokers, they were charged on the books of Woodward & Sherwood with the amount of the premium, less their commission of fifteen per cent. as brokers, and they credited that firm with

the same amount on their own books. Woodward & Sherwood also at the same time credited the company with the premium.

Soon after receiving the policy the brokers delivered it to Bang, charging him on their books with the premium. It is the custom of insurance agents to transact their business with brokers in good credit in this way. This practice had prevailed between Woodward & Sherwood and this firm of brokers for more than a year previous to this transaction. Statements were rendered the brokers monthly, showing each premium unpaid. As payments were from time to time made, they were so entered on the books as to show the particular premium they were intended to meet.

Monthly statements were also made by Woodward & Sherwood to the company, showing the risks taken and the premiums collected, as well as those uncollected. Remittances were made in such manner as to indicate the particular premiums paid. The agents were charged on the books of the company with the premiums upon all risks taken. Whenever a policy was canceled for non-payment of premium, as was sometimes done, the charge against the agents for the premium on that policy was balanced by a corresponding credit. The company had ample means of ascertaining from month to month what premiums were paid upon the outstanding risks and what were unpaid. It also appears from the testimony of the president of the company that the general course of business between the agent and the brokers, as well as their customers, was understood at the home office, and no objection was ever made.

In August, Bang paid his brokers on account \$450, and this amount was placed to his credit without applying it to the discharge of any particular premium. This was sufficient to pay in full all premiums on all the policies obtained up to and including that of the defendant, but left a considerable sum due on the general account, which included premium upon a large number of policies obtained after that had been issued. The premium on the defendant's policy was never paid by the brokers to Woodward & Sherwood, and they reported it to the company in all their monthly reports as unpaid and the risk uncanceled. Several times during the summer Woodward & Sherwood called the attention of the brokers to the fact that there had been unusual delay in the payment, and intimated that, unless it was soon provided for, they would be compelled to give notice of a cancellation of the policy on that account. The brokers recognized the fact of the delay, and promised to give it attention at once, but no steps were taken to cancel the policy, neither was the charge for the premium marked off in any of the accounts.

Things remained in this condition until September 1, 1875, when the property insured was destroyed by fire. Within a few days after, the brokers tendered the premium to Woodward & Sherwood, but they, under instructions from the company, refused to accept it. The share of the loss payable by the defendant, and which is not disputed, if any liability exists, is \$763.13.

§ 1136. *Waiver of objections.*

Some questions were raised upon the trial as to notice and proofs of loss, but the testimony shows clearly that prompt notice was given immediately after the fire, and that as soon as the adjustment was completed proofs were furnished showing the amount of the entire loss, the amount of the whole insurance, and the percentage to be paid upon each policy. Copies of the written portions of the several policies other than that of the defendant were not given, but no objection was made at the time on that account, the com-

pany rejecting the claim on the sole ground that the premium had not been paid. It is now too late to make this objection. *Blake v. Exchange Mutual Ins. Co.*, 12 Gray, 265.

It was also objected at the trial that there was such overvaluation of the property for the purposes of insurance as rendered the policy void. The proof fails to sustain this defense.

§ 1137. *Delivery of policy without payment of premium.*

The only other question presented by the pleadings or upon the trial is as to the effect of the non-payment of the premium upon the liability of the defendant. There is no doubt that Woodward & Sherwood had power to give credit upon the premium, and to waive that condition of the policy which required its payment before the liability of the company should attach. This was not denied at the trial. They were the agents of the defendant to transact generally its business of insurance at Jersey City, in accordance with the rules and regulations of the company, and these rules and regulations, it is agreed, provided for credit by special arrangement. Neither can there be any doubt that there was a waiver of the advance payment in this case, if it could be done in any other manner than by an express agreement to that effect indorsed upon the policy. This case is not materially different from that of *Miller v. Insurance Co.*, 12 Wall., 303, in which it was said that "where the policy is delivered without requiring payment, the presumption is, especially if it is a stock company, that a credit was intended, and the rule is well settled, where a credit is intended, that the policy is valid though the premium was not paid at the time the policy was delivered, as, where credit is given by the general agent and the amount is charged to him by the company, the transaction is equivalent to payment."

The real question then is, whether this case falls within the provision of the policy which is relied upon. The language is not that there can be no waiver unless an indorsement to that effect is made upon the policy, but that "the use of general terms, or anything less than a distinct and specific agreement, clearly expressed and indorsed on the policy, shall not be construed," etc. This is no more than providing that nothing shall be construed as a waiver that is less distinct or specific than an agreement clearly expressed and indorsed on the policy would be.

Here the acts are clear, distinct and specific, and the intention of the parties is unmistakable. The policy was delivered, and simultaneously with the delivery the brokers, with their consent, were charged in general account for the premium. The case is in effect as it would have been if, upon the delivery of the policy, the agents had accepted the note of the brokers for the amount of the premium payable on demand. A charge in account on book, with the consent of the party charged, is equivalent to an agreement by him to pay on demand the amount charged. We can hardly believe it will be seriously contended that if these brokers had in fact given their due-bill for the premium when the policy was delivered, an indorsement to that effect on the policy would be necessary to charge the company with liability.

In our opinion the charge on book, under the circumstances, made as it was in the usual course of business according to the custom of the trade, and known and assented to by the officers of the company, is to be treated as the equivalent of payment, and not as the waiver of the condition only. Certainly the acceptance of a note for the amount would have been such an equivalent, and we can see no difference in principle between that case and this. The brokers

would be as much liable for the payment of the premium in the one case as in the other.

If by any chance the premium could not be collected, ample protection was furnished the company against a continuance of the risk by that clause in the policy which authorizes its termination at the option of the company, on giving notice to that effect. This seems to have been relied upon by the agents as a means of protection against loss, under the practice which prevailed of delivering policies in advance of the payment of premiums, for it is proven to have been a part of the custom to cancel the policies upon notice if payment was not made within a reasonable time.

Let judgment be entered in favor of the plaintiff for..... \$763 13
Less charges for premium and policy unpaid..... 83 50

\$729 63

And interest from December 17, 1875.

§ 1138. *Union of minds.*—Equity will not relieve against the effect of a mistake made in a policy of insurance by the assured's describing the property as being in one building, whereas in fact it is in another. *Severance v. Continental Ins. Co.*, * 5 Biss., 156.

§ 1139. *Special case.*—The plaintiff applied to H., agent of the defendant, for insurance upon salt. The defendant had, to evade certain local laws, issued to H. open policies professing to insure him. H. received the premium from the plaintiff, and delivered to him a slip certifying that he, H., was insured under the open policy. The defendant knew that the salt belonged to the plaintiff. *Hell*, an insurance by the defendant in favor of the plaintiff, and that the facts were provable by parol. *Daniels v. Citizens' Ins. Co.*, * 5 Fed. R., 425.

§ 1140. A parol contract of insurance upon payment of the premium is good. *Ide v. Phoenix Ins. Co.*, * 3 Biss., 333. See §§ 6-16.

§ 1141. A contract of insurance need not be in writing. A count in the plaintiff's declaration setting out a verbal contract of insurance with the defendant accordingly sustained; and it mattered not that a written and printed policy made out for the plaintiff, but not delivered to him, contained terms differing from those of the oral contract. *Humphry v. Hartford Ins. Co.*, * 15 Blatch., 504. See § 1109.

§ 1142. A contract of insurance can be made by parol, unless statute prohibit. And this right to contract by parol is not changed by a company's charter providing that the company's "purpose and business shall be by instrument under seal or otherwise to make insurance," and, also, that "the president . . . shall be authorized, . . . in and by policy of insurance in writing, . . . to make contracts of insurance." Especially is this true towards a party insuring with such company in a state not that which chartered the company. Nor is the case affected by a statute declaring that "in all insurances . . . the conditions of insurance shall be stated in the body of the policy, and neither the application of the insured nor the by-laws of the company shall be considered as a warranty . . . except so far as they are incorporated in full into the policy." *Relief Ins. Co. v. Shaw*, * 94 U. S., 574.

§ 1143. *Payment of premium.*—A premium note may properly be made payable to the "insurance company or its treasurer for the time being," and the time of payment may be left to the discretion of the directors of the company. *Gaytes v. Hibbard*, * 5 Biss., 99.

§ 1144. If by the terms of a policy it is distinctly stated that it shall not be renewed except on the payment of the premium, it should clearly appear, before that condition can be waived, that there was either an express agreement to that effect or one arising by necessary implication from the facts of the case. Express words of renewal are not necessary; the result may be effected by circumstances if they clearly disclose an understanding in favor of renewal. *Hambleton v. Home Ins. Co.*, * 6 Biss., 91.

§ 1145. If the assured claim that a condition of the policy, such as the payment of premium before a renewal can be effected, has been waived, it is for him to show the fact clearly. *Ibid.*

§ 1146. The owners of buildings in Alexandria insured by the Mutual Assurance Society were bound by the act of assembly of Virginia, passed in 1805, and the subsequent regulations of the society, to pay an additional premium upon the increased hazard according to the new regulations of 1805. *Mutual Assur. Soc. v. Korn*, * 7 Cr., 396. See *Korn v. Mutual Assur. Soc.*, * 6 Cr., 192; *Mutual Assur. Soc. v. Watts*, * 1 Wheat., 279. Also, *Atkinson v. Mutual Assur. Soc.*, * 6 Cr., 201.

§ 1147. *Insurable interest.*—Insurance without interest, if included in the same policy with interests which are insurable, does not vitiate the policy as to the latter interests. *Perry v. Mechanics' Ins. Co.*, 11 Fed. R., 478 (§§ 1404-7).

PARTIES ENTITLED TO BENEFIT OF THE CONTRACT. §§ 1148-1161.

§ 1148. A trustee having no other interest in property insured than as trustee cannot insure the same for his own individual benefit, though he is a creditor of the *cestui que trust*. But a trustee having no other interest may as trustee insure the property to its full value; and one of several trustees of the same property may so insure the property, if he acts with the concurrence of all, or if subsequently the whole number ratify his act. *Insurance Co. v. Chase*,* 5 Wall., 509.

§ 1149. A trustee insuring property can recover in case of loss though he does not specify the nature of his interest, unless the nature of his interest would have had an influence upon the underwriter in deciding whether to take the risk, or upon the rate of premium. *Ibid*.

§ 1150. Although a trustee in bankruptcy holds the equitable title to land, if the formal title be in another, an insurance policy on the property is void, though payable to the trustee, if the formal title be afterwards placed in him without notice to the insurers as provided in the policy. *Dean v. Equitable Ins. Co.*, 4 Cliff., 581.

§ 1151. The owner of an equity of redemption has an insurable interest equal to the value of the insurable property embraced therein, whether he is personally liable for the mortgage or not. *Insurance Co. v. Stinson*,* 103 U. S., 25.

§ 1152. One who has a mechanic's lien upon property has an insurable interest limited only by the value of the property and the amount of his claim. *Ibid*.

§ 1153. Assignment of policy to mortgagee.—Where a mortgagor procures a policy on the mortgaged property, and then assigns the policy to the mortgagee as security, that does not displace the interest of the mortgagor in the premises. *Johnson v. North British Ins. Co.*,* 1 Holmes, 117.

§ 1154. Acceptor of bill drawn on shipment has insurable interest. *Bank of South Carolina v. Bicknell*, 1 Cliff., 89.

§ 1155. One who holds a power of attorney to sell property, on which he has advanced money, has an insurable interest in the same. *Brugger v. State Ins. Co.*, 5 Saw., 804 (§§ 1267-1270).

§ 1156. Consignees have insurable interest, when. *Bank of South Carolina v. Bicknell*, 1 Cliff., 89.

§ 1157. A husband insured his wife's separate property as his own, held in his own right. There was no statement of any interest of his contingent upon the death of his wife and children or of any right of user of the property. *Held*, that he could not recover on the policy. *Cohn v. Virginia Ins. Co.*,* 8 Hughes, 272.

§ 1158. Debtor and creditor — Position of underwriter.—Where a creditor effects insurance on property mortgaged or pledged to him, the insurers do not become sureties of the debt, nor do they acquire all the rights of such sureties. They are insurers of the particular property only, and so long as that property is liable for the debt, its destruction by fire would be covered by the policy. *Held*, accordingly, that the abandonment of proceedings to enforce a mechanic's lien on property insured by him was no defense to an action by him on the policy. *Insurance Co. v. Stinson*,* 103 U. S., 25.

II. PARTIES ENTITLED TO BENEFIT OF THE CONTRACT.

SUMMARY — Mortgage, §§ 1159-1161.

§ 1159. An action upon a policy of insurance taken out by a mortgagor, but payable to the mortgagee, should be brought in the name of the mortgagor. *Friemansdorf v. Watertown Ins. Co.*, §§ 1162-64.

§ 1160. A policy was issued to N., mortgagor of the property, payable in case of loss to F., mortgagee. *Held*, that any violation of conditions by N. would avoid the policy. (a) *Ibid*.

§ 1161. A mortgaged building insured by the mortgagor for the benefit of the mortgagee, having been injured by fire, was repaired by the mortgagor without expense to the mortgagee. *Held*, that the underwriter was not liable upon the policy. *Ibid*.

[NOTES.—See §§ 1165-1178.]

FRIEMANSDORF v. WATERTOWN INSURANCE COMPANY.

(Circuit Court for Illinois: 9 Bissell, 167-172. 1879.)

Opinion by BLODGETT, J.

STATEMENT OF FACTS.—This is a suit brought upon a policy of insurance issued by the defendant insurance company, dated the 2d day of February,

(a) *Sias v. Roger Williams Ins. Co.*,* 8 Fed. R., 187; *Bates v. Equitable Ins. Co.*, 10 Wall., 33 (§§ 1402-3).

1877, to one Nigg, whereby the defendant insured George Nigg to the amount of \$1,500 against loss or damage by fire or lightning on the two-story frame dwelling situate on lot number 2, block 31, in Cooksville, Ill., loss, if any, payable to Henry Friemansdorf as his interest may appear.

The suit is brought in the name of Henry Friemansdorf, and the plaintiff avers that the policy was issued for the sole purpose of insuring the plaintiff; that a full disclosure was made to the defendant's agent of the plaintiff's interest, and that the defendant chose the form of policy which was issued, and that the plaintiff paid the premium, and has the sole right of action. The declaration avers a loss by fire of the property insured, and states that the plaintiff, Friemansdorf, had an interest to the amount of \$1,000 in the premises as mortgagee.

There are three pleas interposed to this declaration. The first is, that the policy contained a clause that other prior or subsequent insurance, without the written consent of the defendant, should void the policy, and averred that there was at that time a policy outstanding, held by Nigg, the mortgagor, issued by the Fireman's Ins. Co. of Philadelphia, which was in full force at the time of the loss. The second plea invokes the same clause of the policy, and avers that in violation of that clause of the policy there was outstanding at the time of the loss another policy of insurance, issued by the Farmers' & Drovers' Insurance Co., of Louisville, Ky., to Nigg, and that the same was in full force at the time of the fire. The third plea states that after the loss, Nigg, the mortgagor and owner of the equity of redemption of the premises, fully repaired the premises without any expense to the plaintiff, whereby the plaintiff has sustained no loss or damage by reason of said fire.

To these pleas the plaintiff has interposed a general demurrer, and on the part of the defendant it is claimed that, as no plea of the general issue now appears on the record, this demurrer should be carried back to the declaration, and the question is made on the argument of the demurrer that this suit cannot be maintained in the name of Friemansdorf, the mortgagee, and to whom the loss was made specifically payable.

§ 1162. *Policy by mortgagor in favor of mortgagee to be sued in name of former.*

I have no doubt but that the authorities both in the state of Illinois and the United States have so settled the law beyond all question or challenge, as far as this court is concerned, that upon a policy like this issued to a mortgagor, and with the loss directed to be paid to a mortgagee, or any other incumbrancer or lienholder, the suit must be instituted in the name of the mortgagor, and cannot be instituted in the name of the mortgagee, or the person to whom the loss is made specifically payable. The contract is in form between the insurance company and the mortgagor. It purports to insure the mortgagor's interest in the property. Such is the uniform holding in the Illinois cases, and in *Bates v. Equitable Ins. Co.*, 10 Wall., 33 (§§ 1402-3, *infra*), the same principle is established. In that case Philbrick, the party insured, received the policy and afterwards he wrote upon the back of it, "payable in case of loss to E. C. Bates," and signed W. D. Philbrick, who was the original party to whom the policy was issued, and the agent of the company wrote underneath this indorsement as follows: "Consent is hereby given to the above indorsement. Equitable Ins. Co., by Frederick W. Arnold, Secretary." So that in legal effect it made a policy precisely like the one now before us.

The supreme court there held that the suit must be maintained in the name

of Philbrick; that he was the insured, and any breach of the conditions of the policy by him made the policy void. The same rule is held in the case of the Illinois Mutual Fire Ins. Co. v. Fix, 53 Ill., 151.

There is a series of cases in New York, commencing after the adoption of their code of practice, which requires that all suits shall be instituted in the name of the party in interest, where the courts have allowed a suit to be prosecuted in the name of the person to whom the loss is payable when it was made to appear that the entire amount insured, or due on the policy, was going to the party bringing the suit, because such person was the only one actually interested in the event of the suit. And the same rule has been held in the state of Wisconsin, where the New York code has been adopted, and there are a few cases in some of the other states depending upon similar reasons; but the general scope of authority throughout the United States, unless otherwise held by reason of some statutory enactment, has been, and now is undoubtedly, that all this class of policies are really to be held as contracts between the insurance company and the mortgagor; and that any act on the part of the mortgagor which renders the policy void, such as a violation of its conditions, makes it void as against the mortgagee, or the person to whom the loss is payable. The same rule is also applicable to the pleas interposed in this case. The pleas set up that there were outstanding policies in violation of the condition of the policy, which amounted to double insurance on the property, and by reason of this the policies have become void.

§ 1163. — *violation by mortgagor of terms of such policy.*

This policy sued upon, having been issued to Nigg, although the loss is made payable to Friemansdorf, I have no doubt that Friemansdorf must lose the benefit of his insurance if there has been any violation of the conditions of that policy by Nigg, the mortgagor. On the authority of Bates v. Ins. Company, just cited, this suit undoubtedly should have been originally commenced in the name of Nigg. That is a mistake, however, which the plaintiff can now remedy by amendment, if he sees fit to do so; but the question arises, whether if the facts stated in this application are true there would be any use in amending. If it is true that there were outstanding policies on these premises in favor of Nigg, contrary to the stipulations in this policy, then it seems to me the facts would be fatal to the plaintiff's recovery in this case.

§ 1164. *Action by mortgagee after repair of premises.*

In regard to the third plea, that the premises have been repaired, there is undoubtedly a conflict of authority, or an apparent conflict upon the question as to whether this defense can be set up. I do not think, however, that a careful examination of all the cases will show there is any real conflict of authority on the subject. I have not had time to examine all the cases that have been cited, but those I have examined have been cases where the policy was issued directly to the mortgagee, and it has been held by the courts for many years past that the mortgagee could insure his interest in the premises by a policy of insurance running directly to himself, in which case the entire privity of the contract is between the insurance company and the mortgagee to whom the policy runs, and upon that class of policies there has been a conflict as to whether, in case the premises were restored by the mortgagor, there was any right of action in favor of the mortgagee. In the class of cases which I have referred to, it has been claimed on one side that the policy was issued for the purpose of direct indemnity to the assured, and that in case of loss the right of action inured to him, notwithstanding there may have been a com-

plete reparation of the property by some other party than the insurance company, for the reason the assured having paid his premium had the right to the indemnity which he stipulated for. On the contrary, the other class of cases which have been passed upon, hold that where the insurance is effected for the benefit of the mortgagee, it must be construed to be solely an insurance that the property shall remain unimpaired as security; that is, that there shall be no diminution of the value of the property as security for the mortgage, and if there is really no such diminution, there is no right of action, because he has sustained no loss.

There being no rule in the federal courts upon this question, and there being a conflict in the state courts, this court has the right to adopt such rule as it considers most consonant with the principles of equity and practice, and I think the most satisfactory reasoning is that as the only purpose of the policy is to prevent a diminution or impairment of the mortgagee's interest in the property — its capacity to pay the mortgagee's debt — if that remains unimpaired, and the property is as good, or is made as good, after the fire as it was before, by reason of some other person's reparation, there is no right of action. In this case the demurrer will be carried back to the declaration and sustained.

§ 1165. **Mortgage.**—A mortgagee in possession, who insures the premises, is, against the mortgagor, entitled to receive the payment of loss. *Russell v. Southard*, 12 How., 139.

§ 1166. Where a mortgagor covenants to insure for the benefit of the mortgagee, such covenant creates an equitable lien in favor of the mortgagee upon the money due for a loss under such policy to the extent of his interest, although the mortgage contains a provision that the mortgagee, in default of the mortgagor's insuring, may take out a policy at the expense of the latter. *Wheeler v. Insurance Co.*, 11 Otto, 439.

§ 1167. The provision of a policy that the loss shall be payable to the mortgagee operates to give the mortgagee precisely the same rights and interest in the policy which he would have had if, without such words, the policy had been assigned as collateral security to the mortgage debt. *Connecticut Ins. Co. v. Scammon*, 4 Fed. R., 263.

§ 1168. The mortgagor cannot claim the benefit of insurance made by the mortgagee at his own expense for his own benefit. *Russell v. Southard*, 12 How., 139.

§ 1169. Where insurance upon property is payable to a mortgagee "as his interest may appear," the meaning is that the underwriter will pay the mortgagee to the extent of his lien. *Sias v. Williams Ins. Co.*, *8 Fed. R., 187.

§ 1170. Same — Where a mortgagor covenants with the mortgagee to keep the premises insured for the benefit of the mortgagee, the latter has a lien upon the proceeds of the policy which will be enforced by a court of equity for his benefit, and if his mortgage is duly recorded, the covenant for insurance is regarded as running with the land, and as giving of the right to others, so that no subsequent assignment of the policy would affect his rights. *In re Sands Ale Brewing Co.*, 3 Biss., 175, 178.

§ 1171. The fact that the policies are not assigned to the mortgagee does not defeat his equitable interest therein. *Ibid.*

§ 1172. Same — In the absence of a covenant or agreement on the part of the mortgagor that the premises shall be insured for the benefit of the mortgagee, the latter cannot claim the benefit of a policy underwritten by the mortgagor on the mortgaged property. *Columbia Ins. Co. v. Lawrence*, *10 Pet., 508.

§ 1173. Same — A mortgagee may insure his interest in the property without regard to the mortgagor, and, in case of loss, he may recover the amount without any liability to account to the mortgagor. The mortgagee's right to recover under a policy providing for an apportionment of the loss in case of any other insurance on the property is not affected by an insurance of the mortgagor's interest where the policy is made payable to the mortgagee without his knowledge. *Johnson v. North British Ins. Co.*, *1 Holmes, 117.

§ 1174. There is an implied obligation arising from the procuring of the insurance upon the request of the mortgagor, or at his expense, that the insurance money, when paid, shall be applied to the mortgage debt. *Holbrook v. Am. Ins. Co.*, 1 Curt., 193 (§§ 1398-1401).

WARRANTY, REPRESENTATION AND CONCEALMENT. §§ 1175-1185.

§ 1175. A creditor having an insurable interest in property of his debtor is not entitled to the benefit of an insurance effected by another creditor whose interest is not insurable. *Wheeler v. Factors' Ins. Co.*, * 8 Woods, 48.

§ 1176. *Life tenant*.—Where a life tenant, who was also the owner of one undivided third part of the premises in fee, procured a policy of insurance upon the premises which ran in terms to him alone, but was in fact procured as additional security in pursuance of the terms of a mortgage jointly executed by the life tenant and the reversioners, and the policy was held to inure to the benefit of all the mortgagors, it was held that the rules of equity were sufficiently flexible to direct a proper application of the insurance money in case of loss. *Connecticut Ins. Co. v. Scammon*, 4 Fed. R., 268.

§ 1177. *Trustee*.—Where one procures insurance on property held by him in trust, and pays the premium as such trustee, and by the express terms of the policy the insurance money is made payable, in case of loss, to the *cestui que trust*, and it does not appear that the trustee had any interest in the insurance, or any authority from the *cestui que trust* to adjust the loss, or to receive the insurance money, the trustee cannot bring the action to recover it. *Brown v. Hartford Fire Ins. Co.*, * 21 Law Rep., 726.

§ 1178. If a trustee who has procured such insurance be empowered by the *cestui que trust* to adjust the amount of the loss, and sue for its recovery, he may refer to arbitration the question what is due on the policy, and an award pursuant to the submission binds the *cestui que trust*. *Ibid.*

III. WARRANTY, REPRESENTATION AND CONCEALMENT.

SUMMARY.—*Condition precedent*, § 1179.—*Literal compliance*, § 1180.—*Existence of pump*, §§ 1181, 1182, 1187.—*Diagrams*, § 1183.—*Reference to prior representations*, § 1184.—*Use of lamps in mills*, § 1185.—*Plan and survey*, § 1186.—*Continuing warranties*, §§ 1188, 1189.—*Equitable owner; insurable interest*, § 1190.—*Disclosure of nature of interest*, §§ 1191-1196.—*Interest of assured*, § 1195.—*Presumption as to ownership of building*, § 1196.

§ 1179. A warranty of an existing fact is a condition precedent, and if not true avoids the policy whether material or not. A promissory warranty is to be regarded as having the effect of a representation in regard to materiality; it is enough that the matter warranted to continue true continues to be true in substance. This principle applied to the defense by an underwriter, to an action upon a policy, that a forcing-pump upon the premises was not kept in perfect order at all times, and that water-casks and buckets were not kept according to the terms of the policy. *Cady v. Imperial Ins. Co.*, §§ 1197-1203.

§ 1180. While a warranty must be strictly fulfilled by the assured, he is bound only to a literal compliance with his engagement; and that is not to be extended to include what is not necessarily implied in its terms. This principle applied to a warranty in regard to a forcing-pump in a bleachery. *Sayles v. Northwestern Ins. Co.*, §§ 1204-9.

§ 1181. A warranty of the existence of a forcing-pump in a bleachery, that "it is in the basement story, and is geared so it can be put in operation outside of building," in answer to a question of the existence of such a pump "at all times in condition for use," implies that there is sufficient power to work the pump; but it does not imply that the power was of any particular kind, such as water, or derived from any particular source, as a water-wheel. *Ibid.*

§ 1182. A warranty that there is a forcing-pump upon premises insured, "at all times in condition for use," is not a warranty that the pump shall continue in condition for use after fire breaks out on the premises. *Ibid.*

§ 1183. A diagram of premises is not to be construed a warranty of the statements and plan on it, in the absence of a clear agreement to that effect. The mere fact that a survey is warranted true will not make the diagram a warranty of what appears on it beyond sufficient reference to it by the survey. *Ibid.*

§ 1184. A policy of insurance on a cotton mill was issued upon certain representations of the assured, in which reference was made to such representations; the property was afterwards alienated, and successive policies issued to the alienee, each referring to the original representations as part thereof. *Held*, that parol evidence was admissible to prove such representations. *Held*, further, that if the alienee adopted these representations, he was bound by them, and that slight acts of recognition would amount to an adoption. (See S. C., * 2 Woodb. & M., 472, in lower court.) *Clark v. Manufacturers' Ins. Co.*, §§ 1210-12.

§ 1185. When the insurer asks for no information upon a particular point, *e. g.*, in regard to the use of lamps in the picking-room of a cotton mill, it must be presumed that he has obtained all the information desired as to the premises in question, or ventures to take the risk without it, and that the insured has a right to presume that nothing more is desired from him, assuming that nothing unusual exists enhancing the risk. *Ibid.*

§ 1186. The terms "plan," "application" and "survey" are often synonymous in fire insurance policies. *Albion Lead Works v. Williamsburg Ins. Co.*, §§ 1218-20.

§ 1187. The fact that a force-pump is represented upon a plan of premises to be insured, and that the plan is part of the policy, is not a warranty that any particular kind of pump shall always remain there, ready for use. *Ibid.*

§ 1188. Consideration of the subject of continuing warranties. *Ibid.*

§ 1189. An oral statement of a fact cannot be construed into a continuing warranty when the contract is in writing. *Ibid.*

§ 1190. A party in possession of insured premises under a valid subsisting contract of purchase is the equitable owner and has an insurable interest, though he may not have paid the whole consideration money. He is not guilty of misrepresentation by stating in the application that the property is his, and there is no breach of warranty if the property is described as his in the policy. *Rumsey v. Phoenix Ins. Co.*, §§ 1221-23.

§ 1191. In such a case failure to make a full disclosure of the equitable interest is not "omission to make known a fact material to the risk," where the word "omission," judged *a sociis*, is equivalent to concealment. *Ibid.*

§ 1192. A contract of insurance provided that any untrue answers or statements by the assured should avoid the insurance. Before the application for insurance, a tax had been assessed against the assured and the property in question seized. In answer to questions in regard to liens, this fact was not disclosed. *Held*, that if a valid lien had been obtained, the policy was not binding. *Runkle v. Citizens' Ins. Co.*, §§ 1224-26.

§ 1193. Consideration of the question whether the tax was lawfully assessed. *Ibid.*

§ 1194. The premises in this case were the sole property, under the laws of Rhode Island, of a married woman, the same being insured to her husband and herself. The policy provided that "if the interest of the assured" was "other than the entire, unconditional and sole ownership of the property for the use" of the assured, the fact must be stated. *Held*, that this did not require a disclosure of the interest of the assured *inter se*. *Perry v. Faneuil Hall Ins. Co.*, §§ 1227-28.

§ 1195. A fire insurance policy provided that if the interest of the assured was other than the entire, unconditional and sole ownership of the property, for the use of the assured, the fact must be disclosed. *Held*, that this applied to the case of an interest apparently absolute, but in fact a mortgage, and that the underwriter's agent's failure to inquire of the assured concerning his interest was not a waiver of the provision. *Waller v. Northern Assur. Co.*, §§ 1229-30.

§ 1196. Land-owners under a fee-simple title are presumed to own the buildings thereon in the absence of evidence. The case is not affected, within the terms of a policy requiring disclosure, if the interest of the assured is less than entire and sole, by the fact that the buildings were erected by the assured land-owners under a contract for lease thereof. Nor is the case affected by the fact that the lessee agreed to proceed to the erection of the buildings in question, at a cost not less than a certain sum, for the lessors, and "to receive payment for the same at the times and in the manner" described in the lease. That the buildings were the property of the lessors is further shown by the lessee's binding himself to insure the same in the name and for the benefit of the lessors, and to deposit the policies with them. *Insurance Co. v. Haven*, §§ 1231-35.

[NOTES.—See §§ 1236-1265.]

CADY v. IMPERIAL INSURANCE COMPANY.

(Circuit Court for Rhode Island: 4 Clifford, 203-212. 1873.)

STATEMENT OF FACTS.—Action on insurance policy for total loss by fire of a cotton factory. The defense was based on stipulations in the policy that a night watchman should be kept, that the forcing-pump should be in good order, and that there should be a good supply of water-casks and buckets in each room.

Opinion by CLIFFORD, J.

Insurance against fire is a contract to indemnify the insured for loss or damage, occasioned by that agency, to such of the property of the insured as is described in the policy, during the period therein specified. *Flanders, Ins.*, 17; *Angell, F. & L. Ins.*, 45.

§ 1197. *Policies of insurance, how construed.*

Policies of insurance, like all other written contracts, are to be construed by ascertaining the intention of the parties, and in collecting that intention the words of the policy must be understood in their plain, ordinary and popular signification, unless, in view of the subject-matter, or the usage of trade, the words have acquired a different meaning, or unless the context clearly shows that they are employed in some special and peculiar sense. *Carr v. Montefiore*, 5 B. & S., 408; *Robertson v. French*, 4 East, 135; *Shore v. Wilson*, 9 Clark & F., 569.

[The court stated its findings as follows:]

1. That the forcing-pump and hydrants were in the building insured at the date of the policy, and that they were at that time in good working order.
2. That shortly after that it was discovered that the forcing-pump was out of order, and the agent and superintendent took it out and sent it to the manufacturers to have it repaired, supposing that all it needed was a new cap; and it appears that the manufacturers took off the old cap and made a new one, and sent the pump back, and it was put in place; but it would not work. Subsequent attempts were made by the agent and the same superintendent to discover what the difficulty was, but without success, though the attempts were repeated a number of times. On the 1st of June the superintendent left, and a new one was appointed in his place; and it appears that he, by the direction of the agent, went immediately to work on the pump to see what it was that prevented it from operating; and the agent testifies that the new superintendent worked upon it without success until he, the agent, got tired of having the men so employed, and towards the last of August he went and got the manufacturers to send a man to the mill for that purpose; and it appears that he came, and finally discovered that the defect consisted of a small hair-crack, so called, hardly discoverable by the eye, but which was sufficient to prevent the pump from working. He took out that section of the pipe and cast a new one, or caused it to be done, and replaced the defective part with the new casting, and the pump was put in good working order in the first week in September. Satisfactory proof was also introduced by the plaintiff, showing that it was examined on the 1st of October following, and found to be in good working order, and again on the 1st of November of the same year, when it was also found to be in the same condition. Testimony was also introduced showing that the forcing-pump was examined as late as the middle of November, and the superintendent testifies to the effect that it was in good order. Viewed in the light of the whole evidence, the court is of the opinion, and accordingly finds, that the forcing-pump was put in good working order during the first week in September; that it was examined the 1st of October and the 1st of November following, and again about the middle of November in the same year, and found to be in good working condition; and that the evidence furnishes no reason to doubt that it remained in the same condition until the night of the 30th of the last named month, when it was rendered inoperative by freezing.
3. That there was a sufficient supply of water-casks and buckets for each room, situated either in the room itself, or in an entry connected with and opening into the room, and so located as to be convenient and accessible for use in each room of the building.
4. That there is no evidence showing any breach of the other clauses of the stipulation.

Assume the facts to be as found by the court, and it is clear that all of the propositions submitted by the defendants in respect to the forcing-pump, ex-

cept two, may be overruled without further remark. They, the defendants, still insist that the policy is void for three reasons: 1. Because the forcing-pump was out of order from the middle of March to September 1st in the same year. 2. Because it was not in good working order at the time of the fire. 3. Because the water-casks and buckets were, in some instances, located in an entry connected with the room, and not in the room itself, as they insist the terms of the policy require. Completely repaired as the forcing-pump was during the first week of the preceding September, no one would contend, it is presumed, if it had continued without any defect, and had been in good working condition at the fire, that the prior omission to prevent it from getting out of order would operate as a forfeiture of the indemnity secured by the policy. Such a proposition, it would seem, is too unreasonable to receive a moment's countenance, and yet it must be adopted, or the first defense must fail, as the second defense, founded upon the fact that the forcing-pump would not operate at the time of the fire, is in every sense a distinct matter, the one having no connection whatever with the other, showing beyond controversy that each must stand or fall by itself, wholly without aid from the other, or, in other words, that the policy, if it was forfeited by the first omission, never afterwards became operative, and that if it was not forfeited by that omission, it continued to be operative throughout, unless it was forfeited by some new breach of the same stipulation or some other wholly irrespective of the prior omission. Warranties are of two kinds, affirmative and promissory; and they may arise from express words, or they may be implied.

§ 1198. *Affirmative warranties defined.*

Affirmative warranties, whether express or implied, are representations in the policy of the existence of some fact or state of things at the time, or previous to the time, of making the policy; and they are conditions precedent, which, if untrue, the policy does not attach as the contract of the insurer. *New Castle v. MacMorran*, 3 Dow, P. C., 262; *Biccard v. Shepherd*, 14 Moore, P. C., 475.

§ 1199. *Promissory warranties defined.*

Promissory warranties may also be express or implied, and they have respect to the happening of some future event, or the performance of some future act, and they may be conditions precedent or conditions subsequent. Their character depends upon the intention of the parties, to be ascertained from the language employed, the subject-matter and the surrounding circumstances. 1 Marsh. Ins., 346; 1 Arn. Ins. (2d ed.), 580. Courts of justice, in some cases, and some text-writers have denied that there is any difference between an affirmative warranty and a promissory stipulation of the kind mentioned, and insist that the latter as well as the former must always be regarded as conditions precedent, on the literal truth or fulfillment of which the validity of the entire contract depends; but it is evident that the rule, if it be one, must have many exceptions, as otherwise the greatest injustice would be done to the insured, in view of the known fact that policies of insurance, of late years, are crowded with stipulations imposing almost innumerable conditions, covenants and agreements, wholly unknown to such instruments until within a recent period, and which, it is to be feared, attract very little attention from the owner of the property insured until they are put forward subsequent to the loss to show that the losing party is not entitled to the indemnity for which the premium has paid. *Borradaile v. Hunter*, 5 M. & G., 639; *Alston v. M. M. Ins. Co.*, 4 Hill, 329; *Angell, F. & L. Ins.*, § 145.

§ 1200. *Words of warranty are subject to construction.*

Even words of warranty are subject to construction, and will receive a strict or liberal construction to meet the justice of the case; as, where there was a warranty that a certain cotton mill was worked by day only, it was held that the warranty was not infringed because it appeared that the engine and unconnected shafting was kept running all night, as the mill and machinery were not substantially worked. *Mayall v. Mitford*, 6 Ad. & E., 170; *Shaw v. Robberds*, id., 75; *Whitehead v. Price*, 2 C., M. & R., 447; *Bunyon, F. Ins.*, 65; 1 Phil. Ins. (4th ed.), § 872.

§ 1201. *Untrue warranty avoids policy, whether material or immaterial.*

Beyond doubt a warranty in respect to an existing fact is a condition precedent, and if it be not true, when reasonably construed, it avoids the policy, whether it is material or immaterial, as the condition is a part of the contract which cannot be enforced unless it appears that the condition is fulfilled; but the insured, even in such a case, is only held to a substantial compliance, it being well settled law that the condition cannot be extended by construction so as to include what is not necessarily implied in its terms. *Turley v. North Am. Ins. Co.*, 25 Wend., 374; *Flanders, F. Ins.*, 205.

§ 1202. *Promissory warranty not held to literal compliance.*

Somewhat different rules are to be applied to the executory stipulations in the policy, which are sometimes denominated promissory warranties, as such stipulations are rather to be regarded as having the legal effect of representations than of warranties, as understood in the law of marine insurance, though partaking in some measure of the character of both. They are like representations, in requiring that the facts shall be true and correct, and, so far as they are executory, that they shall be substantially performed, but not like warranties, in requiring an exact and literal compliance. It is enough, therefore, if these statements, relied on as the basis of the contract, are made in good faith and without intent to deceive; that they are substantially true and correct, as to existing circumstances, and substantially complied with so far as they are executory and regard the future. *Houghton v. M. M. Fire Ins. Co.*, 8 Met., 120; 1 Pars. M. Ins., 423; *Daniels v. Hudson R. Ins. Co.*, 12 Cush., 416; *Hall v. People's Ins. Co.*, 6 Gray, 185; *Columbian Ins. Co. v. Lawrence*, 2 Pet., 25 (§§ 1124-30, *supra*); *Angell, F. & L. Ins.*, § 153; *Gilliat v. Pawtucket M. F. Ins. Co.*, 8 R. I., 292. Substantially the same question was presented in the case of *The Aurora Fire Ins. Co. v. Eddy*, 49 Ill., 106, heard and determined in the supreme court of Illinois. Insurance was granted to the plaintiff in that case, upon his flax factory, and the policy contained a stipulation "that the assured is to keep eight buckets filled with water on the first floor where the machinery is run, and four in the basement by the reservoir, ready for use at all times in case of fire." Payment being refused, the insured sued the company, and the verdict was for the plaintiff. Exceptions were taken by the defendants to the instructions given to the jury, and the supreme court, among other things, decided that the stipulation was not a condition precedent; that it was an agreement in the nature of a promissory warranty, and that it was to be construed like other written agreements; that it did not bind the insured to a literal performance; that a substantial compliance was all that was required; that the jury should have been told that a literal compliance could not have been in the contemplation of the parties, as it might have been impossible, from freezing or other unavoidable causes; that such a construction would be unreasonable, as it would require what is impossible; but that it was

incumbent on the insured to show that the required number of buckets were at the places designated in the agreement, ready for instant use in case of fire; and inasmuch as one of the instructions given was of a different character, the court set aside the verdict and granted a new trial. Evidently the general views of the court in that case were the same as those expressed by the supreme court of Massachusetts in the cases previously referred to, and those cases appear to furnish the correct rule for the construction of the stipulation under consideration. Examined in view of those suggestions and the authorities cited in their support, as the stipulation should be, the court is of the opinion that the first defense must be overruled.

§ 1203. *Application of foregoing principles.*

Enough has already been remarked to show that the second defense cannot be sustained, as it is based upon the extreme rule that the stipulation in question is a condition precedent, and that nothing will excuse a strict performance of the same, which cannot be admitted, as it would render the policy void if the forcing-pump was rendered inoperative by lightning or flood, or even by the fire, which is the peril covered by the policy. Such a rule can never be adopted, as it would render the policy little better than a nullity. *Sayles v. Northwestern Ins. Co.*, 2 Curt., 614 (§§ 1204-9, *infra*); *Flanders, Ins.*, 206; *Peoria M. & F. Ins. Co. v. Lewis*, 18 Ill., 553; *Hide v. Bruce*, 3 Doug., 213; *Underhill v. Agawam M. F. Ins. Co.*, 6 Cush., 440. Sufficient is also remarked to show that the third defense must be overruled, as the first branch of it, which assumed that the supply of water-casks and buckets was deficient, is negated by the finding of the court; and the second branch of it is plainly untenable, as it contravenes the proper rule of construction to be applied to the contract. *Houghton v. M. & M. Fire Ins. Co.*, 8 Met., 120; *Jones' Mfg. Co. v. M. M. F. Ins. Co.*, 8 Cush., 84; *Aurora Fire Ins. Co. v. Eddy*, 49 Ill., 106. Viewed in any light, the court is of the opinion that the plaintiff is entitled to judgment. Damages and interest to be computed under the direction of the court. Judgment for the plaintiff.

SAYLES v. NORTHWESTERN INSURANCE COMPANY.

(Circuit Court for Rhode Island: 2 Curtis, 610-616. 1856.)

Opinion by CURTIS, J.

STATEMENT OF FACTS.—This is an action on a policy of insurance against fire.

The policy bears date on the 1st day of May, 1854, and insured the plaintiff in the sum of \$2,500, against loss by fire on his bleachery and the movable machinery therein, situate in the town of Smithfield, in the state of Rhode Island. The defense set up is the breach of two warranties. The policy declares that it "is made and accepted in reference to the proposals and conditions hereto annexed, which are to be used and resorted to, in order to explain the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for; and a failure to observe or comply with any of the said proposals or conditions, or any violation thereof, shall render this policy void and of no effect."

The twelfth condition annexed to the policy is as follows: "Whenever a policy is made and issued upon a survey, description or representation of certain property, such survey, description or representation shall be taken and

deemed to be a part and portion of such policy and a warranty on the part of the insured, as fully as if the same were therein written or referred to."

A survey is produced, bearing the same date as the policy, and it is agreed the policy was made and issued with reference thereto. In this survey are found the following questions and answers: "Is there a good forcing-pump in the factory, designed expressly for protection against fires and at all times in condition for use?" Answer: "There is." "If so, in what part of the building is it, and is it so geared that it can be put in operation outside the mill? How much water will it throw per minute?" Answer: "It is in the basement story and is geared so it can be put in operation outside of building."

§ 1204. *The foregoing answers deemed warranties.*

I am of opinion that these statements by the assured concerning the force-pump must be deemed warranties, entitled to the same effect as if they had been inserted in the policy in the form of warranties. Indeed this has not been questioned at the bar. The argument has turned wholly upon the meaning and effect of these statements, considered as warranties, and upon the inquiry whether they had been substantially complied with.

The material facts, as to which there is no dispute, are, that this bleachery was upon a stream of water which did not afford permanent power sufficient to operate it, and consequently a steam-engine was used to drive the machinery, including the force-pump, when the water power was not adequate. On the night between the last day of April and the first day of May the dam which raised the head of water was carried away by a flood, so that when the survey was dated the force-pump could not be driven by water power. But, at that date, and down to the time of the fire, the steam power was sufficient to operate it. The fire took in the boiler-house and rendered it impossible to work the force-pump by steam, and as it could not be worked by water power, it was not capable of use after the fire was discovered.

The defendants take two grounds. The first is, that inasmuch as the survey, and the diagram which accompanied it, show that there was a dam and a water-wheel connected with the works, the warranty must be construed to impose on the assured the duty of having the water power always in existence and ready to operate on the force-pump; that the warranty is, in terms, that the pump is at all times in condition for use; and that, taken in reference to the nature of the works as shown by the diagram and survey, this means at all times in condition for use by means of water power.

§ 1205. *Warranty not to be extended beyond literal compliance.*

But it must be remembered that we are here dealing with a warranty, which is a stipulation, on the literal truth or fulfillment of which the validity of the entire contract depends. And that as the insurer has the right to exact of the insured a literal performance, and cannot be compelled to accept a substantial compliance, or to show that the breach was any way material to his interest, so, on the other hand, the insured is held only to a bare and literal compliance with his engagement, which is not to be extended by construction to include what is not necessarily implied in its terms. *Livingston v. The M. Ins. Co.*, 6 Cr., 274 (§§ 391-94, *supra*); *Hide v. Bruce*, 3 Doug., 213; per Kent, J., in *Kemble v. Rhinelanders*, 3 Johns. Cas., 134; 1 Arnould on Ins., 588.

§ 1206. *Warranty of existence of force-pump includes warranty of some power to work the same.*

I think it is a fair inference that a warranty of the existence of a forcing-pump on these premises, at all times ready for use, extends to the fact that

there is sufficient power to work the pump, though it must be admitted this comes very near to the case decided by Lord Mansfield and his associates in 3 Doug. That was a warranty that a ship "should have twenty guns." The guns were on board, but there were not men enough to work them, and it was held the warranty had been complied with, there being no pretense of fraud.

If the warranty were of a forcing-pump in a dwelling-house, at all times ready for use, I should hold it satisfied by the existence of such a pump, in a condition to be worked; but one of the inquiries put here was, whether the pump was so geared that it could be put in operation outside the building. Considering the nature of the works and the uniform and notorious usage to have such a pump in such a position, driven by power, and the inquiry as to the gearing, it seems to me a necessary result that this warranty extended to the pump being so geared that it could be attached to and worked by some suitable power such as is applied to drive such an engine. But I cannot find any stipulation that the power was of any particular kind, or derived from any particular source. It may be true that the insurers had reason to think the power employed would be a water-wheel. If they did so think, and deemed it material, they should have introduced it into the warranty, if they thought it proper to protect themselves by having it in that form. Not having done so I cannot inquire what they expected. If any misrepresentation or concealment affected their interest, that must be tried by the jury. But it can have no bearing upon the construction of the written warranty, which is the only object now under consideration.

§ 1207. — *the pump not warranted to be in condition to use after fire broke out.*

The second ground taken by the defendants is, that this was a continuing warranty that the pump should at all times be ready for use, and that it was not capable of being used at the time of this fire.

It is true that during the progress of the fire the pump became disabled. But surely the statement that there is a pump on the premises at all times in a condition for use cannot be construed to mean that it shall continue in a condition for use after fire breaks out on the premises. This would render the policy little better than a nullity, for at some period during the progress of a fire, by which the premises are destroyed, a force-pump thereon must cease to be in a condition for use. Thus construed the policy would only insure against so much loss or damage by fire as should not prevent the working of the force-pump; that being disabled the policy would be void. I cannot give such a construction to this instrument. And whether the fire broke out near the pump or its gearing, so as to disable it almost instantly, or more remotely, so as to allow it to be operated for a time, cannot affect the question whether the warranty was kept. I think the true construction of the warranty cannot be pressed further than this,—that the force-pump shall be in a condition for use at all times when not rendered useless by fire. I say not further than this, because I have some doubt whether this warranty, considered strictly as a warranty, does extend to the future; whether its true construction does not confine it to the then existing state of things, leaving the rights of the underwriters to depend on another clause of the policy, which guards them against changes of the risk from fault of the assured. But I have not thought it needful to pursue that inquiry, being satisfied that if it be a continuing warranty it was not broken.

§ 1208. *Breach of warranty not excused by direct operation of peril insured against.*

I am aware that the breach of a warranty is not excused even by the direct and irresistible operation of a peril insured against. Thus, a warranty to sail by a given day is not excused by an embargo, though such restraint was one of the perils insured against. *Hore v. Whitmore*, Cow., 784. But the question in this case is, not whether a breach of a warranty to have the force-pump in a condition for use is excused by the occurrence of a fire, but whether the insured did warrant it should not be disabled by fire. Being of opinion he did not, I think this ground of defense is not tenable.

§ 1209. *Alleged breach of warranty in regard to material of building, stated in diagram, denied.*

It is further contended by the defendants that there was a breach of a warranty respecting the material of which part of one of the buildings was composed. A diagram, made on a separate sheet of paper, is twice referred to in the survey. These references are as follows: Question. "Of what material is the building constituted, and with what is the roof covered?" Answer. "Wood and stone, roof covered with shingles." Question. "When built, size, number of stories, how high between joints, and who finished within?" Answer. "About the year 1834 or 1835; that is, the main building; other buildings recently. (See diagram.)" Question. "Description and distance of adjacent buildings, of what construction, dimensions, and how occupied?" Answer. "See diagram." At the foot of the diagram is written, "The above is a ground survey of the Moshassuck Bleachery, showing that the buildings are all connected together. The basements of the main buildings, namely, Nos. 1, 2 and 3, are built of stone. The other buildings have no basements." The ground plan of No. 5 shows forty-six by seventeen and one-half feet. Upon it is written, "Boiler house, stone and brick, roof, wood." In point of fact, the boiler house proper was of stone and brick; but at the end thereof was a shelter in front of the boiler, about twelve feet long, one side of which was wood. The end, also, so far as it was inclosed, was of wood. It is insisted that this amounts to a breach of warranty.

Under the terms of this policy, already quoted, the insured warrants the truth of the survey. But the diagram is not in fact part of the survey, and cannot be deemed to be incorporated therein in legal effect, except in those particulars, and for those purposes, in regard to which it is referred to by the survey. And the survey nowhere refers to the diagram, as showing the materials of which the buildings insured are constructed. The references are confined to the size of the buildings insured, and whatsoever is shown as to any buildings *adjacent* to the premises insured. This interpretation of the extent of the warranty of what is shown on the diagram is not only consistent with the language of the papers, but is demanded by good faith. If the insured were taken to warrant the literal truth of every particular on a complicated diagram, though wholly immaterial to any interest of the insured, the policy would be little better than a snare. Indeed, the clause of the policy which makes every statement in the survey a warranty does in my judgment go further than sound policy and the fair protection of the substantial rights of insurers can justify. It is well known how incautious parties are respecting these printed stipulations; and I feel no disposition to extend the effect of such an one as this. If anything contained on the diagram amounts to a

material misrepresentation, it is a defense; but this involves matter of fact, to be inquired of by the jury.

The defendants can go to the jury on this question, if they shall so elect; otherwise, I shall direct a verdict for the plaintiff.

CLARK v. MANUFACTURERS' INSURANCE COMPANY.

(8 Howard, 235-250. 1849.)

ERROR to U. S. Circuit Court, District of Massachusetts.

STATEMENT OF FACTS.— Action upon a fire insurance policy, which was the last of several renewal policies; the first policy of the series having been issued to Jonathan Stearns, upon representations made by him. The renewals were made without new applications, but referred back to the statements made by Stearns in the first application, and adopted them. It was represented in the original application by Stearns that no lamps were "used in the picking-room." Lamps had, however, been used there for years before the fire; and the fire in question caught, in fact, from a lamp in the picking-room. The defendant contended that the plaintiffs were bound by the representation of Stearns, or, if not, that they should have communicated the fact of the use of lamps in the picking-room. The trial in the lower court is reported in 2 Woodb. & M., 472.

Opinion by MR. JUSTICE WOODBURY.

The original action in this case was *assumpsit* by the plaintiffs in error on a policy of insurance made August 13, 1845. From the detailed statement of the facts it will be seen that the loss occurred on the 13th of March, 1846, and was to be paid to the Ogdensburg Bank, which held the title to the property insured, but was under a contract in a certain event to convey it to the plaintiffs, they having already paid for it in part.

The original insurance was made in 1834 by Jonathan Stearns, who had mortgaged to the bank the factory insured, and who continued most of the time till the loss to conduct its operations under insurances renewed yearly, often in different names, stipulating that any loss should be paid to the bank. In April, 1834, when application was first made for insurance, the defendants, doing business in Boston, Massachusetts, put numerous written interrogatories to Stearns, who lived in Malone, New York, where the factory was situated, and to one of them he replied that no lamps were "used in the picking-room." These interrogatories, and the answers to them, were not annexed to the policy, but were put on file in the office; and the policy purported to have been "made and accepted upon the representation of the said assured, contained in his application therefor, to which reference is to be had," etc., etc.

No new representations appear to have been made at the different renewals, but only a general reference to representations, like that just named; and in three or four instances, when the policy was in a new name, a specific statement was inserted that the insurance was entered into "agreeably to the representations heretofore made by Jonathan Stearns."

Referring to the record and preliminary statement of this case for other details, the plaintiff objected first to the competency of parol evidence, which was offered to prove that the representations signed by Stearns, and on file with his application, were those made by him, and to the instruction of the court that, if they were adopted by the plaintiffs, the present policy, as well

as the original one, must be considered as founded on them and void, if they were not true.

§ 1210. *Parol evidence to prove representations made by one whose statements are referred to in a policy.*

It will be proper, then, to consider first whether this parol evidence was competent for the purpose for which it was offered. Without meaning to impugn the great elementary principle that written instruments are not to be varied or contradicted by parol, it suffices to say here that this testimony was not admitted to vary or contradict any portion of what had been written. See *Phillips v. Preston*, 5 How., 291. It merely went to identify what the writing in the policy referred to, as a part or parcel of the contract, like a reference in one deed or contract to another deed or contract. 13 Wendell, 92; *Jennings v. Chenango Ins. Co.*, 2 Denio, 82; *Phillips on Ins.*, 47; 16 Pick., 502; 1 D. & E., 343; 2 Brod. & Bingham, 553; 4 Russ., 540; 20 Pick., 121; 1 Paige, 291; 8 Metcalf, 114, 350; 4 How., 353; 3 Barn. & Ald., 299; *Wigram on Ext. Ev.*, 54, 55; 1 Hen. Bl., 254; 2 Hen. Bl., 577; 6 D. & E., 710; 1 Duer on Ins., 74. It added to what was written nothing, it subtracted nothing, it changed nothing, and we think its admission was legal.

§ 1211. *Adoption by an alienee of property of statements made by the alienor to an underwriter.*

In the next place, the instruction that the plaintiffs were bound by those representations, if adopting them subsequently at the time of making their insurance, accorded with both the law and equity of the transaction. If they adopted them and induced the defendants to act on them, it would operate fraudulently to let them be disavowed after a loss. So if the plaintiffs ratified them, in their subsequent application, if no other representations were made or relied on except these, if their attention was called to these; if the bank was a party in interest through all these insurances, without repudiating these representations, and if these were the only set of representations used in all of them, it surely must comport with justice, as well as law, to have them govern. The cases of like subsequent adoptions and ratifications of what had been done before by others are very numerous. Among them, see those collected in *Story on Agency*, §§ 252, 253. Even "slight circumstances and small matters will sometimes suffice to raise the presumption of a ratification." *Ward v. Evans*, 2 Lord Raym., 928; 3 Wash., 151; 13 Wend., 114; 3 Chitty, Com. L., 197.

This view of the case, standing alone, would entitle the defendants to be discharged; for the picking-room, contrary to these representations, had a lamp, and indeed lamps, in it; and their use was proved to be the cause of the fire which destroyed the factory. We should, therefore, affirm the judgment below without further inquiry, did not the bill of exceptions disclose another ruling, which, as the record now stands, requires consideration. When the judgment below is, as here, well sustained by the opinion entertained on a decisive point, it is usually of no consequence whether another point was correctly ruled or not. But as the bill of exceptions in this case was drawn up by the plaintiffs, it states that the jury were instructed to find a verdict for the defendants on the last ground, if, on the facts, the first one failed; and hence, looking to the record, the last ground may have been passed on by the jury, and have influenced their verdict. To be sure, the report of this case below, in 2 Woodb. & M., 472, shows that a verdict was taken by agreement of parties, or only *pro forma*, in order to bring the questions of law to the supreme

court; and, therefore, that no jury could in truth in this case have been thus influenced or misled. Yet, this fact not appearing on the record brought here, the case, till revised and corrected below in this particular, must be considered as if the jury had actually examined both grounds, and had really decided upon them. But even on that hypothesis, if the second point was properly ruled, no occasion would exist for sending the case back for correction in the statement as to the verdict, in connection with the first point.

Whether it was properly ruled or not involves a question of much novelty, being, in one aspect of it, a case, perhaps, of the first impression, and without any precedent to govern us, and is of so much importance in insurances as to deserve great caution in settling it. From the report of the case below, before referred to, the circuit court, though alluding to the last point, do not appear to have gone into any critical discussion and opinion on it.

§ 1212. *Non-disclosure of use of lamps in the picking-room of a cotton factory where no inquiry is made.*

But, the bill of exceptions being so drawn up as to exhibit a positive instruction given on it by that court to the jury, it is necessary for us to examine with care whether an instruction like that presented here could legally be given. First, then, what is the substance of that supposed instruction? It is, that if no representations were made or adopted by the plaintiffs, they would not be entitled to recover, if lamps were in truth used in the picking-room, which were conceded to be material to the risk, and this use was known to the plaintiffs and not to the defendants, and this use was meant to be continued and was continued, and caused the present loss. In the next place, what must be considered the law in relation to this subject? Little doubt exists, that, when representations are made or adopted, the denial in them of a material fact, such as here, that any lamp was used in the picking-room, where one or more was in truth used, makes the policy void, not only for misrepresentation, but misdescription and concealment. 1 Marshall on Ins., 481; Ellis on Fire and Life Ins., 58; Dobson v. Sotheby, 1 Moody & Malk., 90; 6 Cowen, 673; 4 Mass., 337.

A false representation avoids the policy, because it either misleads or defrauds. Livingston v. Mar. Ins. Co., 7 Cranch, 506 (§§ 395-408, *supra*). In such a state of things, also, the insured — knowing that he is asked for representations to enable the underwriter to decide properly whether he will insure at all, and, if so, at what premium — must suppress nothing material to the risk, or the underwriter will not stand on equal grounds with himself, and will be forced to act in the dark more than himself, and probably to misjudge. 1 Marshall on Ins., 473, 474, note; Lynch v. Dunsford, 14 East, 494; Maryland Ins. Co. v. Ruden, 6 Cranch, 338, and Livingston v. Mar. Ins. Co., *id.*, 279 (§§ 391-94, *supra*); Columbian Ins. Co. v. Lawrence, 10 Pet., 516; McLanahan v. Universal Ins. Co., 1 Pet., 185 (§§ 352-59, *supra*); 2 Pet., 59; 2 Duer, 388, 379, 411; 2 Caines, 57; 1 Wash., 162. Concealment thus would operate in some cases as a fraud, and in all will make the risk very different from what the insurer knew and agreed to. 3 Burr., 1905; Ellis on Fire and Life Ins., 38.

But the hypothetical position presented by this record is that the law would be the same, provided no representations whatever were made, and in this form it does not, in the state of facts exhibited in the record, meet with the sanction of this court. The chief controversy appears to have been concerning the first point; and when this last question was made a part of the case by agreement of counsel, it was not known whether this court would

consider the original representations by Stearns as adopted, and thus binding on those subsequently insured. Independent of those, none appear to have been made or asked.

Representations, however, in insurances, it is well known, almost invariably exist, either written or parol. *Columbian Ins. Co. v. Lawrence*, 2 Pet., 49 (§§ 1124-30, *supra*); *S. C.*, 10 Pet., 515. But they are not usually named or incorporated in the policy, except on the continent of Europe. 3 Kent, 237; 9 Barn. & Cress., 693. It is fair to presume that they took place in all the reported cases on insurance, though often not named, unless the contrary is expressly stated, as they are in general "the principal inducements to contract, and furnish the best grounds upon which the premium can be calculated." 1 Marsh. on Ins., 449.

But the relation of the parties seems entirely changed, if the insurer asks no information and the insured makes no representations. That is the chief novelty in this question, as hypothetically stated in the bill of exceptions. We think that the governing test on it must be this: it must be presumed that the insurer has in person or by agent, in such a case, obtained all the information desired as to the premises insured, or ventures to take the risk without it, and that the insured, being asked nothing, has a right to presume that nothing on the risk is desired from him.

This rule must not be misapprehended and supposed to rest on a principle different and somewhat ordinary, that insurers are always to be expected to possess some general knowledge of such matters as they deal with, independent of inquiries to the assured. 8 Pet., 582. Nor on the position well settled, that the insurer must be presumed to know what is material in the course of any particular trade,—its usages at home and abroad, and those transactions which are public, and equally open to the knowledge of both parties. *Hazard v. New England Mar. Ins. Co.*, 8 Pet., 557 (§§ 527-31, *supra*); 2 Duer on Ins., 379, 478; 3 Kent's Com., 285, 286; *Green v. Merchants' Ins. Co.*, 10 Pick., 402; 4 Mason, C. C., 439; *Buck et al. v. Chesapeake Ins. Co.*, 1 Pet., 160. Nor on any special usage proved, as in *Long v. Duff*, 2 Bos. & Pul., 210, that it was, in a case like this, the duty of "the underwriter to obtain this information for himself."

But when representations are not asked or given, and with only this general knowledge the insurer chooses to assume the risk, he must in point of law be deemed to do it at his peril. It has been justly remarked, in a case somewhat like this in principle: "With this knowledge, and without asking a question, the defendant underwrote, and by so doing he took the knowledge of the state of the place upon himself," etc. 1 Marshall on Ins., 480; *Carter v. Boehm*, 3 Burr., 1905. In cases of fire insurance, also, the underwriters may be considered as more likely to do this than in marine insurance; because the subject insured is usually situated on land and nearer, so as to be examined easier by them or their agents, and the circumstances connected with it are more uniform and better known to all. 1 Har. & Gill, 295; *Burrit v. Saratoga M. F. Ins. Co.*, 5 Hill, 192.

It is true that, from what is reasonable and just, some exceptions must exist to this general rule, though none of them are believed to cover the present case. Thus, the insurer must be supposed, if no special information has been asked or obtained, to take the risk, on the hypothesis that nothing unusual exists enhancing the risk, and hence, as in this case, if lamps are used in the picking-room, which do enhance it, he must show that their use in the manner

practiced was unusual or not customary, and then, though no representations had been asked or made, he would make out a case, where it was the duty of the insured to inform him of the fact, and where *suppressio veri* would be as improper and injurious as *suggestio falsi*. *Livingston v. Mar. Ins. Co.*, 6 Cranch, 281.

So, if any extrinsic peril existed outside and near a building insured, and which increased the risk, the insured should communicate that, though not requested. *Bufe v. Turner*, 6 Taunt., 338; *Walden v. Lou. Ins. Co.*, 12 La., 134. But as to the ordinary risks connected with the property insured, if no representations whatever are asked or given, the insurer must, as before remarked, be supposed to assume them; and if he acts without inquiry anywhere concerning them, seems quite as negligent as the insured, who is silent when not requested to speak. The conclusions on the whole case, then, are that the defendants are entitled to be discharged on the first ground upon the merits, because the plaintiffs were interrogated in writing on this very fact and risk, or others were, whose answers they adopted, and the truth was not disclosed in their representations in reply, when it is conceded to have been material to the risk; and, therefore, by the express stipulations of this policy, as well as by the general principles of the law of insurance, the plaintiffs should not recover. But our judgment cannot be rendered on this conclusion, standing alone, because the second point is connected with it in the form before explained. Again, the defendants would be entitled to be discharged under the second point, on the ground which accords with the truth here, that representations were really made on this subject, but not, if none whatever were made, according to what is hypothetically suggested in the record. The judgment below must, therefore, be reversed for the purpose of correcting what is defective in the manner of stating how the verdict was taken and how the last question stood by itself on the facts proved; and the case must be remanded to the court below, with instructions to take all proper steps to carry into effect the views presented in this opinion.

ALBION LEAD WORKS v. WILLIAMSBURG CITY FIRE INSURANCE COMPANY.

(Circuit Court for Massachusetts: 2 Federal Reporter, 479-489. 1880.)

STATEMENT OF FACTS.—Action on a policy of insurance on a mill for the manufacture of lead. There was a verdict for the plaintiff and a motion for a new trial. The defenses relied upon were that continuous warranties were given which were broken, and that false representations had been made in procuring the insurance, among others that there was a force-pump on the premises, and that there was a watchman there. It was further insisted that the risk had been increased by neglect to repair the pump, after it had got out of order, and by leaving the buildings “unoccupied without the consent of the company.” Other facts appear in the opinion.

Opinion by **LOWELL, J.**

This case has been carefully argued, and I have examined all the cases cited by counsel.

§ 1213. Continuing warranty.

One of the principal questions is whether there is a continuing warranty or stipulation on the part of the plaintiff to keep a watchman and an effective pump. The first printed condition, or set of conditions, makes the “application, plan, survey or description” of the property a part of the contract, and a warranty

by the assured so long as the policy is kept in force. No language could more fitly describe a continuing warranty, or at least one renewed every year; but being in print, and intended for all cases, it must be fitted to each risk according to its particular circumstances.

§ 1214. "*Plan*," "*application*" and "*survey*" often synonymous.

A careful study of the cases will show, what was likewise testified by experts on the stand, that "plan," "application" and "survey" are often used in the contracts as meaning the samething. "Survey" is the word employed most commonly, and it is not difficult to discover how it came to be used instead of "application." When a person wrote to a company for insurance upon his house or mill, his letter was an application, but not often a full and satisfactory one, and the company would send back a form for a more full application. This paper usually had a caption, stating that it was to be the basis for the insurance, and contained printed questions, with directions how they should be answered. This paper was filled out and signed by the assured, or by his agent, or by the agent of the company, and was the final application; but to avoid misunderstanding it came to be called a survey, as, in many cases, the original letter might be called an application.

The printed condition or stipulation, making the survey or plan or application a warranty, is found in a great many of the reported cases, and is often in substantially this form: "If the insurance is made upon a written plan, survey or application, the same shall form a part of the policy and be a warranty," etc. See, upon both these points, *Glendale Mfg. Co. v. Protection Ins. Co.*, 21 Conn., 19; *Sheldon v. Hartford Fire Ins. Co.*, 22 Conn., 235; *May v. Buckeye Mut. Ins. Co.*, 25 Wis., 291; *First Nat. Bank v. Ins. Co. N. A.*, 50 N. Y., 45; *Garcelon v. Hampden Fire Ins. Co.*, 50 Me., 580. These are samples of the cases, and the meaning is substantially the same in all, that the written application, by whatever name it may be called, shall be a warranty. In this case the application was oral. There is no conflict of evidence upon this point. Mr. Robbins went to the defendant's with a paper in his hand and described the risk and answered questions. I suppose he answered them as they stand upon the memorandum, so far as that goes; but it contains nothing about a pump, or about some other matters concerning which there were oral representations. Whether he read from his memorandum or not, or whether he read correctly or not, is immaterial, because it was what he said that was the foundation of the contract. Nor do I understand that the president asked for a written application. He said: "Send me a copy of the plan and your statements, and I will insure." He did not ask for a written statement, as an application, but an oral application having been made, he asked for a copy of it. At any rate, if he asked for a written application he did not receive one. The plan, with its memorandum, does not purport to be, and has none of the *indicia* of, such a document. The memorandum is a memorandum, and nothing more. There is in this case, therefore, no such plan, survey or application as this printed condition mentions.

§ 1215. *Construction of reference in policy to plan. Force-pump.*

The reference to the plan in the written part of the policy is, in its form, like the ordinary reference in a deed, for the purpose of identifying the subject-matter, and has a similar meaning. The true construction of the policy is not that the company agree to insure "as per plan," but they agree to insure according to the policy, and what they insure is the building shown on the

plan. A force-pump is shown on the plan, but this cannot be considered as a warranty that any particular kind of a pump shall always be maintained ready for use. One would wish to know the character of the pump and how it was worked, etc., as to all which there is no information. If it depended upon the steam which carried the works, it would probably not be useful on Sundays and holidays, nor when the mill was stopped, and there is surely no warranty that the mill shall never be stopped. It is impossible to reconcile the decisions upon this question of continuing warranty. When an underwriter asks about the particulars of a risk he probably takes for granted that things will remain as they are; but when the courts are asked to convert this impression into a covenant, and make words in the present tense operate as a stipulation for the future, there is difficulty and the authorities are doubtful and divided. The result, as far as I can gather it, is that when the fact appears to the courts to be a very important one, such as employment of a watchman, a majority of them have said that this ought to be considered a part of a continuing engagement. When the fact does not appear to be so important, as that a dwelling-house is occupied, or that a clerk sleeps in a store, it is not of that character.

§ 1216. *Warranties not to be treated as continuing, when.*

There is great objection to these continuing warranties when they are conventional or made up from words which do not purport a future warrant, because if the attention of the assured had been called to them as continuing covenants they might have been qualified. Thus, in the important case of *Ripley v. Aetna Ins. Co.*, 30 N. Y., 136, which is in accordance with the weight of authority, if the assured had been asked whether he agreed to have a watchman every night, he would probably have excepted Saturdays; but being asked generally, whether a watchman was employed at night, he said "Yes." There are other objections to construing similar words in the same paper as representations of the present or covenant for the future upon an arbitrary standard of the importance of the particular subject. In all these cases, on either side, there was no written statement upon the subject-matter of the supposed warranty. Here, then, was an oral statement that a watchman was at the mill "day and night," and there was an oral description of the force-pump. These statements were true at that time and true at each renewal of the policy, and therefore it is of no consequence whether they are called warranties or representations.

§ 1217. *Oral statement not to be construed as continuing warranty.*

I have seen no case which holds that an oral statement of a fact could be construed into a continuing warranty or promise when the contract is in writing. *Clark v. Manufacturers' Ins. Co.*, 2 Woodb. & M., 472; 5 How., 235, merely decide that parol evidence might be introduced to identify the written application referred to in a policy. That covenants cannot be imported into or taken out of a written contract by parol is an elementary rule applicable to contracts for insurance as to others. See *Abbott v. Shawmut Mut. Fire Ins. Co.*, 3 Allen, 213; *Schmidt v. Peoria Mut. Ins. Co.*, 41 Ill., 295; *Higginson v. Dall*, 13 Mass., 96; *Kimball v. Aetna Ins. Co.*, 9 Allen, 540. The judgment in the case last cited reviews the authorities and decides that an actual promise, if oral, cannot be given in evidence to defeat a policy which has once attached. Here there is no contention that an oral promise was made, but only that the court ought to infer one from the oral statement of a fact.

§ 1218. *Rule as to increase of risk where a single change and where several changes have been made.*

In respect to increase of risk I understand the law to be that if there is a single change, such as a new use of the building, or an alteration in them, the jury are to say whether, upon the whole, the risk is greater or less. If, however, there are two or more changes, unconnected with each other, and one has increased the risk, it is no answer to the plea of forfeiture to say that something else has diminished it. *Curry v. Com. Ins. Co.*, 10 Pick., 535.

In that case numerous witnesses testified that an enlargement of the insured dwelling-house, and a contemporaneous removal of the uninsured barn to a greater distance from the house, did not increase the risk, and the verdict for the plaintiff was sustained. See, also, *Jones Mfg. Co. v. Mfrs.' Ins. Co.*, 8 Cush., 82, and *Date v. Gove Dist. Mut. Co.*, 15 U. C. (C. P.), 175, as to single and contemporaneous changes; and, as to others, *Heneker v. Brit. Am. Ass'n*, 13 U. C. (C. P.), 99, and *Lomas v. Brit. Am. Ass'n*, 22 U. C. (213), 310. Within this rule it was proper for the jury to inquire whether stopping the mill was, upon the whole, considering the decrease of risk from accidental fires, and the increase from the discharge of the watchman and want of power for the pump, such a change in the use or occupation of the premises as to increase the risk.

§ 1219. *Construction of particular condition as to increase of risk. Permanent change intended.*

There is another question which has impressed me more forcibly during and since the argument of the motion than it did at the trial. The steam-chest of the pump was broken some weeks before the mill was stopped and was not repaired. It is a fair question whether any one in authority at the plaintiff's works was informed of this fact; but it is clearly a matter "within the control of the assured," and, therefore, if the neglect to repair the pump was an increase of the risk within this covenant, that part of the case should have been left to the jury by itself, and not as part of the general change of use and occupation which took place afterwards.

I am of opinion, upon consideration of this condition, and construing it with the context, that it does not refer to mere negligence of the assured, however gross, or however it may increase the risk; but to some permanent change, purposely undertaken in the structure, use or occupation of the insured premises. For instance, if the assured neglected to lock his doors at night, the risk might be largely increased; but, though he had done this for a week together, it would not be such a change as is contemplated by this condition. The failure to repair this pump was a bit of negligence, great in degree, perhaps, and upon an important matter, but still a piece of negligence by the servants of the assured, or by themselves, in the conduct of their business and the care of their property, against which they are insured.

I have examined many decisions upon this subject and have not found one in which the point has been taken that a neglect of this sort was within the covenant. There are many in which a temporary use permitted things, from heedlessness or good nature, increasing the risk and causing the loss, have been held not to be within it, but in none of them was the negligence so long continued as in this case. *Dobson v. Sotheby, M. & M.*, 86; *Shaw v. Robberds*, 6 A. & E., 75; *Gates v. Madison County Ins. Co.*, 5 N. Y., 469; *Loud v. Citizens' Mut. Ins. Co.*, 2 Gray, 221. In one a house was vacant for several weeks, and the court held that, if there was no intentional abandonment of the occupation of the house, but the insured was using reasonable diligence to

obtain a tenant, there was no forfeiture. *Gamwell v. Merchants' Ins. Co.*, 12 Cush., 167. That case differs from this because here there was no evidence of reasonable diligence; but, upon general principles of the law of insurance, the ruling must have been the same, without that element, so long as the assured had not purposely given up the use of his house. Diligence does not come into question in this connection; its presence will not save a forfeiture if the risk is changed, nor will it if it is not.

§ 1220. *Construction of words "become unoccupied."*

The condition avoiding the policy, if the premises "become unoccupied" without the consent of the company, must likewise refer to something more than a temporary suspension of work in a mill. The works had been stopped for five days, and how soon it would have been renewed is uncertain. But I think they were not unoccupied, within the meaning of this clause, while used for the storage and delivery of goods requiring daily visits by one or two persons. I am confirmed in this by the fact that, since the policy was issued, the defendant company has added a clause in this connection avoiding a policy if work in a factory is stopped.

The result is that the rulings are sustained, and there must be judgment on the verdict.

RUMSEY v. PHOENIX INSURANCE COMPANY.

(Circuit Court for New York: 17 Blatchford, 527-530. 1880.)

Opinion by WALLACE, J.

STATEMENT OF FACTS.—The policy upon which this action was brought insured the dwelling-house of one Zimmer, and the loss was, by the terms of the policy, payable to the plaintiff, "as his interest may appear." The policy contains the following conditions: "Any false representation by the assured of the condition, situation or occupancy of the property, or any omission to make known every fact material to the risk, or an overvaluation or any misrepresentation whatever, either in a written application or otherwise; or, if the property be sold or transferred, or any change take place in title or possession, whether by legal process, judicial decree, voluntary transfer or conveyance; or, if the assured is not the unconditional and sole owner of the property; or, if the interest of the assured in the property, whether as owner, trustee, consignee, factor, mortgagee, lessee, or otherwise, is not truly stated in this policy, then, and in every such case, this policy shall be void."

After the policy was issued, and before the loss, Zimmer failed to make payments according to his contract with the plaintiff, and moved out of the dwelling. The dwelling was thereafter occupied by tenants. The question of fact was submitted to the jury, whether Zimmer had surrendered or abandoned his contract to the plaintiff, with instructions that, if there had been such surrender or abandonment, the plaintiff could not recover. The jury found there had been no surrender or abandonment, and, by implication, that the tenants who occupied the premises were Zimmer's tenants. A verdict having been found for the plaintiff, the defendant now moves for a new trial.

§ 1221. *Insurable interest in a valid subsisting contract of purchase. "Unconditional and sole owner."*

It is insisted, for the defendant, that the policy is void, because Zimmer was simply a vendee in possession of the premises, under an executory contract to purchase of the plaintiff, when the policy issued, and, therefore, "not the unconditional and sole owner of the property," within the condition of the

policy. It is also insisted that because Zimmer stated to the defendant's agent, at the time of applying for the insurance, that he "wished his house on Porter street insured," without stating specifically the nature of his interest, there was an "omission to make known every fact material to the risk," within the conditions which render the policy void. These objections to the plaintiff's right to recover may be considered together, and may be disposed of by the answer, that Zimmer was the equitable owner of the property, and was the unconditional owner except as to the plaintiff, and the plaintiff's interest was sufficiently indicated by notice that he had such an interest in the premises that the loss would be payable to him.

A party in possession of insured premises under a valid subsisting contract of purchase is the equitable owner, and has an insurable interest, although he has not paid the whole consideration money. He is not guilty of a misrepresentation if he represents the house as *his*, when he applies for insurance, and there is no breach of warranty if the house is described as "his dwelling-house," in the policy. The statement and the state of facts are consistent with each other. There is no misrepresentation, because an intent to deceive cannot be inferred. There is no breach of warranty, because the representation is true in substance. *Strong v. Manfrs. Ins. Co.*, 10 Pick., 40; *Ætna Fire Ins. Co. v. Tyler*, 16 Wend., 385; *Davis v. Quincy Mutual Fire Ins. Co.*, 10 Allen, 113; *Niblo v. North American Ins. Co.*, 1 Sandf. S. C. R., 551; *Ludlow v. Liverpool, etc., Ins. Co.*, 13 Grant's Ch. R., 377.

It was not incumbent upon Zimmer to make a fuller disclosure of his interest in the premises when he applied for insurance. His failure to do so was not "omission to make known" a "fact material to the risk," within the meaning of the policy. This clause in the policy is to be read with the other clauses of which it forms part, and, applying the maxim *noscitur a sociis*, the word "omission" is equivalent to "concealment" in the contemplation of the policy. The cases cited are authorities to the effect that, in view of Zimmer's interest as equitable owner of the premises, in the absence of specific inquiry, he communicated all that was material to the risk, and was not bound to specify the precise extent or nature of his interest.

§ 1222. "*If any change take place in title or possession*" construed.

The fact that Zimmer moved out of the dwelling-house and let it to tenants is not a defense, within the condition that avoids the policy "if any change take place in title or possession." The change of possession contemplated is something more than a change of occupation. It is a change effected "by legal process, judicial decree, voluntary transfer or conveyance"—one which refers to his possessory right and not to the occupancy of the insured premises. The possession of Zimmer's tenants was his possession within the meaning of the policy.

§ 1223. *Waiver of imperfections in preliminary proofs.*

Finally, it is insisted for the defendant that the plaintiff should be defeated because the proofs of loss were made and verified by him, and not by Zimmer, and, inasmuch as the policy requires the proofs to be made by the insured, a condition precedent to a cause of action on the policy has not been complied with. It is a sufficient answer to this position, that the defendant received and retained the proofs of loss served by the plaintiff, at the same time repudiating all liability upon the policy, upon the ground that Zimmer had no interest in the premises at the time of the fire. The plaintiff was the person to whom the whole loss was payable, by the terms of the policy, and the proper

party to bring an action to recover it. By repudiating any liability under the policy, to the person entitled to demand payment, the defendant waived any imperfections in the preliminary proofs. Angell on Insurance, § 244.

RUNKLE v. CITIZENS' INSURANCE COMPANY.

(Circuit Court for Ohio; 6 Federal Reporter, 143-149. 1881.)

Charge by SWING, J.

STATEMENT OF FACTS.—The action in this case is brought by the plaintiff upon a policy of insurance issued by the defendant to the plaintiff on the 18th day of May, 1878, insuring plaintiff against loss and damage by fire upon a mill and distillery to the amount of \$1,000. The defendant denies liability for the reason that the policy made the application a part of it and provided that if any untrue answers or statements were made the policy should be void; that prior to the application a tax had been assessed by the commissioner of internal revenue against the plaintiff; that a distraint warrant had been issued upon such assessment and the distillery had been seized by virtue thereof, and that said tax was therefore a lien upon said property, and that in the statements and answers in regard to liens this lien was not disclosed. The defendant also claims that by the policy it is provided that if the possession of the property should be changed by legal process the policy should be void, and that by virtue of said tax and distraint the property was seized by an officer of the government, who sold the same, by which the possession was changed. The defendant further claims that the policy was canceled. The plaintiff, by reply, denies the legality of the assessment of taxes, the issuing and levy of the distraint warrant and the sale by virtue thereof, and denies the cancellation of the policy.

It appears from the evidence in the case that the plaintiff was a distiller prior to the issuing of the policy; that before he commenced business a survey of his distillery had been made, and its true spirit-producing capacity had been estimated and determined, and reported in accordance with the provisions of and regulations under the internal revenue laws. It further appears that for a short period of time the distiller had produced spirits in excess of the surveyed capacity of the distillery; that all the spirits produced by him, including the excess, were drawn from the receiving cisterns and placed in the government warehouse, were duly reported and assessed, and that the taxes upon all of said spirits thus produced had been paid, and that the commissioner of internal revenue had made an assessment of seventy cents on the gallon for the spirits produced in excess of the surveyed capacity, and directed the collection thereof; that the collector had placed this upon his list and had issued his distraint warrant, under which he had seized the distillery and sold it; and that some months after, and before the fire, the plaintiff had paid the amount of the taxes thus assessed, with interest, penalty and costs, and had applied to the government to have them refunded. If this tax was legally assessed, it had undoubtedly, by the provisions of the law, and the seizure and levy upon it by the distress warrant, become a lien upon the property which the plaintiff should have disclosed under his application; but whether it was legally assessed will be discussed in connection with the provision of the policy in regard to the change of possession.

§ 1224. *Change in title or possession. Levy of tax must be legal.*

The policy provided "that if the property be sold or transferred, or any

change take place in the title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance, it shall avoid the policy." The language of this provision is "legal process or judicial decree." If this tax had been legally assessed against the property, and the distraint was legally issued, and the property seized by virtue of the distraint, and possession taken thereof, and a sale made under these proceedings by which the possession was changed, then it would be a change of possession by virtue of legal process which would work a forfeiture of the policy.

It is contended by the defendant that the change of possession does not depend upon the legality of the assessment of these taxes, there having been in fact a distraint warrant issued and the property seized under it and sold; that the possession was thereby changed by legal process. I cannot agree with learned counsel for defendant in this proposition. The change of possession which should work a forfeiture of this policy should not only be a change of possession in fact, if it be by virtue of legal process, but it must have been a change of possession by virtue of valid legal process. If it were not a valid legal process it would be of no binding force upon him or anybody else. The parties did not contemplate by this provision any change of possession which might be brought about by proceedings in the nature of legal proceedings or under the forms of law. It could not have been contemplated by the parties that if an officer of the court should take an execution issued without judgment, and levy it upon and sell this property, that this would have been a change of possession by legal process. Such a process would not be legal. And so in this case, if there had been no legal assessment of taxes by the commissioner of internal revenue, if, under the law, he had no power to make such an assessment of taxes as that upon which the distraint warrant issued by which this property was seized and sold, the issuing of the distraint warrant, the seizure of the property by virtue of it, and the sale under it, were, as to this plaintiff, void.

§ 1225. *When an assessment, under internal revenue law, can be attacked collaterally.*

It is said, however, by counsel for defendant that the invalidity of this assessment cannot be shown by the plaintiff in this proceeding; that it cannot be attacked collaterally; that it can only be reached by appeal to the commissioner of internal revenue. The nature and character of these assessments were very fully discussed in the case of *U. S. v. Clinkenbeard*, 21 Wall., 65. In that case the court below held as is claimed by the defendants. The case was taken to the supreme court of the United States upon error, and the judgment of the court below was reversed. Justice Bradley, in delivering the opinion of the court, speaking of the nature of such assessments, says: "Is he precluded by any general rule of law from setting up such a defense? Has an assessment of a tax so far the force and effect of a judicial sentence that it cannot be attacked collaterally, but only by some direct proceeding, such as an appeal or *certiorari*, for setting it aside? It is undoubtedly true that the decisions of an assessor or board of assessors, like those of all other administrative commissioners, are of a *quasi-judicial* character, and cannot be questioned collaterally when made within the scope of their jurisdiction. But if they assess persons, property, or operations not taxable, such assessment is illegal, and cannot form the basis of an action at law for the collection of the tax, however efficacious it may be for the protection of ministerial officers

charged with the duty of actual collection by virtue of a regular warrant or authority therefor."

In the case of *Stoll v. Pepper*, 97 U. S., 438, a case which involved the validity of an assessment for overproduction of spirits precisely as in this case, the supreme court held: "If a distiller uses material for distillation in excess of the estimated capacity of his distillery, according to the survey made and returned under the provisions of the law regulating that subject, but in the regular course of his business pays the taxes upon his entire production, he cannot be again assessed at the rate of seventy cents on every gallon of spirits which the excess of material used should have produced according to the rules of estimation prescribed by the internal revenue law." This decision is conclusive upon the question of the illegality of the assessment in this case. The commissioner had no legal power or authority, under the facts of this case, to make the assessment. All the proceedings which followed the assessment were therefore illegal, and of no binding force or effect against the plaintiff. The possession was therefore never changed by virtue of "legal process." Such proceedings had no effect upon the policy. And referring back to the first defense, they did not create such a lien upon the property, the non-disclosure of which would avoid the policy. That such proceedings may be attacked collaterally I think there can be no doubt. *Thompson v. Whitman*, 18 Wall., 457; *Knowles v. Gas Light & Coke Co.*, 19 Wall., 58.

§ 1226. *Agreement concerning right of cancellation to be strictly pursued.*

It is claimed by defendant that it is not liable because it had canceled the policy of insurance. The policy contains, among other provisions, the following: "It is also a condition of this insurance that it may be terminated at any time at the request of the assured, in which case the company shall retain only the customary short rates for the time the policy has been in force. The insurance may also be terminated at any time at the option of the company by giving notice to that effect, and refunding a ratable proportion of the premium for the unexpired term of the policy." It is within the province of the parties to a contract of insurance to stipulate in the policy that the assured may at any time terminate the contract and surrender the policy, and be entitled to a ratable portion of the unearned premiums; and that the insurer may at any time at its option terminate the contract and cancel the policy by giving notice to the assured to that effect, and paying to him a ratable portion of the premium for the unexpired term. This policy of insurance contains such a stipulation. The right, however, to terminate a contract of insurance which has been fairly entered into, and has taken effect, by this method, is a right which can only be exercised by either party by a strict compliance with the terms of the policy relating to cancellation. Where such a contract has been entered into and has taken effect, and either party claims that the contract has been terminated and put an end to by virtue of such provisions, it devolves upon such party to establish by the evidence that the contract has thus been terminated; and so in this case, the defendant claiming that the contract has been terminated, it must satisfy your minds by the evidence that it had given the plaintiff notice of the cancellation of the policy, and that it had returned or tendered to him a ratable portion of the premium for the unexpired term of the policy. The notice must not be that the policy would be canceled in the future, but that it is canceled, and the payment of the premium must in fact be made or tendered. A promise to pay it in the future is

not sufficient, nor is a request that the party call and receive it sufficient; it must in fact be paid or tendered to the party.

In this case the policy was issued by Adam Gray & Co., who were the general agents of the defendant, and a question is made whether a general agent who issues a policy has the power of cancellation; but as it is admitted that there was a special authority given them by the company to cancel the policy, it is not necessary to determine that question. The facts in this case show that the notice and tender of premium, if any was given and made, was not given or made in person by Adam Gray & Co., but by one Elliott; and it is claimed by the plaintiff that although Adam Gray & Co. had the power of cancellation, that Elliott possessed no such power; that it was a power which could not be delegated by Adam Gray & Co. to Elliott. The general proposition that such power could not be delegated is certainly true. *Delegatus non potest delegare*. If, therefore, you find that Adam Gray & Co. had attempted to delegate this power to Elliott, and, acting under that authority, he had attempted himself to cancel the policy by virtue of such authority, it would not amount to a cancellation of the policy.

If, however, Adam Gray & Co., acting under their authority from the company and for the company, prepared the notice of cancellation as their act for the company, or the act of the company through them, and provided the money to be paid by them for the company, it was not necessary that they should in person have delivered to the plaintiff the notice and paid or tendered to him the money. They could have these things done by Elliott. "Such service would not be of such a personal character as to come under the maxim," *delegatus non potest delegare*. May on Insurance, 154. Such delivery of notice and tender or payment of the money by Elliott would be a cancellation of the policy.

PERRY v. FANEUIL HALL INSURANCE COMPANY.

(Circuit Court for Rhode Island: 11 Federal Reporter, 482-484. 1882.)

Opinion by LOWELL, J.

STATEMENT OF FACTS.—This was an action upon a policy of fire insurance issued to John A. Perry and Ellathea Perry, his wife, for \$700, on buildings and personal property. The evidence tended to show that the premises were the sole property of the wife, and were totally destroyed by fire. The policy contained the following clause: "If the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property for the use and benefit of the assured, or if the building insured stands on leased ground, it must be so represented to the company, and so expressed in the written portion of the policy, otherwise the policy shall be void."

§ 1227. *Insurance upon property in name of P. and his wife. Non-disclosure of nature of the interest, not material in the case.*

The defendants objected that the policy was void for not disclosing how the husband and wife were respectively interested in the property. This objection misapprehends the meaning of this clause. It is of no interest to the company to know what the rights of the assured are between themselves. What they require is to be satisfied that the estate is absolute and unincumbered in the assured; or, if not, how and to what extent it is incumbered, or what estate, less than a fee-simple, is owned by the assured. The land upon which the building stood was the property of the wife, held according to chapter 152 of the General Statutes of Rhode Island, which gives the husband only a rev-

ocable right to receive rents, and a vested remainder for his life after the death of his wife. *In re The Voting Laws*, 12 R. I., 586. But we see no objection to his joining in the application for insurance and in the policy. The statute requires him to be joined in deeds, and he might well suppose that it was more regular that he should give his concurrence to a contract of this sort. Indeed, when the underwriters are a mutual company, stipulating for a lien upon the land, it is by no means clear that his joinder would not be useful to the company.

No case has been cited to us which holds a policy to be void when the assured were the owners in fee of unincumbered property. On the contrary, in one case where the condition was much more stringent than this, requiring the true title to be specified in the policy, two persons whose interests were several, one owning the building and the other the stock of goods, were jointly insured, and the policy contained no specification at all, and was held to be valid. The title was orally disclosed to the agent of the company, but the decision did not depend wholly upon this. The able and learned judge who delivered the opinion, and who was afterwards for many years chief justice of Connecticut, said: "It is enough that, among all the persons insured in a single policy, they have a perfect title, or a title unincumbered only in the manner stated in the proposal." *Peck v. New London Ins. Co.*, 22 Conn., 575, 583.

It is hardly necessary to invoke the rule which has been established by the courts, that this condition is to be construed most strongly against the company; for a husband and wife insuring property would naturally be understood as representing that it was her property, else she would not be joined. Whether it was hers under the common law or the recent statutes was of no interest to the underwriters.

§ 1228. *Waiver of proofs of loss.*

There is the further question whether any evidence is to be found in the plaintiffs' case fit to be submitted to the jury on the proofs of loss. Condition 9 requires proofs to be furnished in some detail, with the certificate of a magistrate, and the undertaking is to pay sixty days after these proofs have been received. Such proofs were furnished, but less than sixty days before the action was brought. The plaintiffs insist that the formal proofs were waived. Perry testified that the company sent a man named Davis to settle the loss; that Davis asked him to send the company a memorandum of items of the things burnt, and that he would come down in a day or two and settle, and that he, Perry, did send a memorandum. Mr. Davenport, the general agent of the company, testified: "After the fire the company sent Mr. Davis here, as adjuster, to find out the amount of loss." It seems to us, on consideration, that there was evidence to go to the jury that formal proof of loss had been waived. If Davis had authority to adjust and settle the loss, we think, as matter of law, he could do so with or without formal proofs. That he had such authority appears by evidence, of which the jury were to judge.

Again, as matter of law, what Davis said was a waiver; none could be more distinct. Whether he said so was for the jury. If a memorandum of loss was sent to the company, there is much authority for saying that though it was informal and inadequate, yet it was a compliance with the requirements of the policy, unless the company, within sixty days, objected to it for insufficiency. Whether such a memorandum was sent was for the jury. We are of opinion, therefore, that the plaintiffs are entitled to a new trial, and it is so ordered.

WALLER v. NORTHERN ASSURANCE COMPANY.

(Circuit Court for Iowa: 2 McCrary, 637-642. 1881.)

STATEMENT OF FACTS.—Action on a policy of insurance against fire. Plaintiff's interest, although he held by a deed absolute on its face, was only that of a mortgagee in possession, and did not exceed \$5,000 in value, whereas the property was worth \$8,000 or \$9,000. There was a verdict for defendant and a motion for a new trial. The policy contained the following clause:

"If the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property for the use and benefit of the assured, or if the building stands on leased ground, it must be so represented to these companies and so expressed in the written part of this policy; otherwise the policy will be void."

Opinion by McCRARY, J.

The policy provides that "if the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property for the use and benefit of the assured, . . . it must be so represented to the insurer and so expressed in the written part of the policy; otherwise the policy will be void."

§ 1229. *Duty of disclosing nature of title of assured.*

The interest of the assured in the property insured in the present case was not the entire, unconditional and sole ownership, but on the contrary he held only a lien in the nature of a mortgage given to secure a loan of some \$5,000. This fact was not represented by the assured to the defendant, and is not stated in the policy.

There is no proof tending to show that the defendant was aware of the fact. On the contrary, it clearly appears that the plaintiff's mortgage was, so far as the records disclosed the facts, a secret lien, being a conveyance absolute on its face; and since it was accompanied by actual possession in the mortgagee, there was nothing to rebut the presumption that he was the absolute and sole owner. These circumstances made it the duty of plaintiff to disclose the nature of his interest, even if it were conceded that a mortgagee out of possession, and whose interest is disclosed by the record, might be excused from so doing. There are strong reasons for upholding and enforcing the provision of the policy under consideration. It is certainly a very proper and reasonable provision in a contract of insurance of this character which requires the party seeking insurance upon property to state any facts which it is material for the insurer to know. That the nature and extent of the interest of the assured in the property is material must appear very clear upon the least reflection.

In *Insurance Co. v. Lawrence*, 2 Pet., 25 (§§ 1124-30, *supra*), Marshall, chief justice, in delivering the opinion of the supreme court of the United States, speaking of this very question, said: "It may not be necessary that the person requiring insurance should state every incumbrance upon his property, which it might be required for him to state if it was offered for sale; but fair dealing requires that he should state everything which might influence, and probably would influence, the mind of the underwriter in forming or declining the contract. A building held under a lease for years about to expire might be generally spoken of as the building of the tenant, but no underwriter would be willing to insure it as if it was his; and an offer for insurance, stating that it belonged to him, would be a gross imposition. Generally speaking, insur-

ances against fire are made in the confidence that the assured will use all the precautions to avoid the calamity insured against which would be suggested by his interest. The extent of his interest must always influence the underwriter in taking or rejecting the risk, and in estimating the premium. So far as it may influence him in these respects, it ought to be communicated to him."

These observations apply with great force to the present case. The plaintiff appeared to be the owner. The property was worth nearly double the amount of insurance asked for. Assuming, therefore, that he was the owner, he would have a large interest in guarding against the destruction of the property by fire; but when the fact was developed that he was not the owner, and held only an equitable lien upon the property as security for a sum but little greater than the amount of his insurance, it is seen that, in fact, his interest in the protection of the property was comparatively slight. It might well be that the defendant, if advised of the facts, would have declined to insure his equitable interest as mortgagee; or would have declined to insure it for a sum so nearly equal to its full value, or would have charged a much higher premium.

The provision in question is, therefore, one which must be upheld and enforced, not simply upon the ground that it is a warranty, and therefore to be enforced independently of its materiality, but also upon the ground that it calls for the disclosure of material facts. Upon this question see, in addition to the case above cited, the following: *Insurance Co. v. Lawrence*, 10 Pet., 507; *Marshall on Fire Insurance*, 789; *Jenkins v. Insurance Co.*, 7 Gray, 370; *May on Insurance*, secs. 272, 287, 289, 291; *Rohrback v. Insurance Co.*, 62 N. Y., 47.

§ 1230. *Failure of insurer to inquire about title of property insured.*

But it is insisted that compliance with this provision of the policy was waived by the defendant company because its agent made no inquiry concerning the extent of plaintiff's interest, and plaintiff made no statement upon the subject.

This position is not tenable. The contract was, that if the interest of the assured was any other than the entire, unconditional and sole ownership, then he was to represent the facts to the company; not that he was to disclose them truthfully if requested, or that he would make true and full answers to questions upon the subject. The duty of disclosing the nature of his interest (the same being less than the entire ownership) was plainly devolved upon the plaintiff, and for good reason, since he knew and the agent of the company did not know the facts. In other words, under the contract, the defendant was authorized to assume that the property was owned absolutely by the applicant for insurance, unless the contrary was represented by him; and more especially in a case where the applicant held what appeared to be an absolute title. A waiver of this condition of the policy cannot, therefore, be presumed from the mere fact that the agent of the defendant made no inquiry upon this subject. The case might have been different if the plaintiff had been called upon to sign an application and to answer written or printed questions touching his interest, and had failed to do so. In such a case the issuing of the policy, notwithstanding the failure to answer some of the questions, might be held a waiver of such answers. *Hall v. Insurance Co.*, 6 Gray, 186; *Liberty Hall Association v. Insurance Co.*, 7 Gray, 261.

And it may also be true that where the policy requires an application, and provides that it shall contain a true and full exposition of all the facts in re-

gard to the condition, situation, value and risk of the property insured, a company insuring without such application may be held to waive the representations required to be embraced therein. *Commonwealth v. Insurance Co.*, 112 Mass., 136. These authorities are not in point, for the reason that in the present case no written application was provided for in the policy, and, as already stated, the duty of divulging the fact that he was not the full owner of the property was devolved upon the plaintiff. Besides, it would be an unwarranted extension of the doctrine of estoppel to hold that a party may waive that the existence of which he does not know, and is not in duty bound to ascertain.

The proof shows, and the fact is found by the jury, that the nature of the interest of plaintiff was not known to defendant prior to the fire. It was a secret interest, and there is nothing in the evidence tending to show that knowledge on the part of defendant of the nature of plaintiff's interest ought to be inferred. *May on Insurance*, sec. 506; *Finley v. Insurance Co.*, 30 Pa. St., 311; *Allen v. Insurance Co.*, 12 Vt., 366. Motion for new trial overruled.

LOVE, J., concurs.

INSURANCE COMPANY v. HAVEN.

(5 Otto, 242-251. 1877.)

ERROR to U. S. Circuit Court, Northern District of Illinois.

§ 1231. *Nature of contract of insurance.*

Opinion by MR. JUSTICE CLIFFORD.

Policies of fire insurance are contracts whereby the insurers undertake for a stipulated sum to indemnify the insured against loss or damages by fire, in respect to the property covered by the policy, during the prescribed period of time, to an amount not exceeding the sum specified in the written contract. *Angell, Fire and Life Ins.*, 43.

STATEMENT OF FACTS.—Insurance was effected by the plaintiffs, on the 9th of May, 1870, in the company of the corporation defendant for the term of one year, against loss or damage by fire, to the amount of \$3,000, covering the ten buildings therein described, each of which being insured for the sum of \$300. It appears by the bill of exceptions that the policy was in the usual form of policies issued by the defendant, and that it provided that "if the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property for the use and benefit of the assured, or if the buildings insured stand on leased ground, it must be so represented to the company and be so expressed in the written part of the policy, otherwise the policy shall be void."

Two other stipulations are contained in the policy, which it is important to notice: 1. That "the use of general terms, or anything less than a distinct specific agreement clearly expressed and indorsed on the policy, shall not be construed as a waiver of any printed or written condition or restriction therein." 2. That the policy is made and accepted in reference to the foregoing terms and conditions, which are declared to be a part of the contract, and may be used and resorted to in order to determine the rights and obligations of the parties to the policy.

Nothing was expressed in the written part of the policy indicating or tending to indicate that the interest of the insured in the property purporting to

be insured was any other than the entire, unconditional and sole ownership of such property for the use and benefit of the insured, or indicating or tending to indicate that the buildings insured stood on leased ground. Payment of the alleged loss being refused, the plaintiffs instituted the present suit in the state court, which was subsequently removed into the circuit court of the same district, the parties agreeing that the plaintiffs might prove any claim they have under the common counts as if they should add special counts, and that the defendants might prove any defense they have to the action under the general issue the same as if it was set up in a special plea.

Pursuant to that stipulation, the parties went to trial; and the verdict and judgment were for the plaintiffs in the sum of \$3,730 damages, with costs of suit. Exceptions were taken by the defendants to the charge of the court; and they sued out a writ of error, and removed the cause into this court. Neither title deeds nor evidence of the same was introduced by the plaintiffs; but the defendants admitted at the trial that "the plaintiffs were owners in fee of the land on which the buildings insured stood" at the time of the fire, as appears by the bill of exceptions. Proofs were introduced by the plaintiffs, admitted by the defendant to be in due form, which showed that the buildings described in the policy were on December 31, 1870, destroyed by fire, and that the property insured belonged to the plaintiffs, subject to the lease mentioned in the proofs so introduced, to which more particular reference will presently be made. Other evidence was introduced by the plaintiffs, but the defendant offered no evidence; and the court directed the jury to return a verdict in favor of the plaintiffs for the amount of the policy, with interest from the expiration of sixty days subsequent to the time the proof of loss was exhibited.

Seasonable exceptions were filed to the charge of the court, upon the ground that the lease mentioned in the proofs of loss shows that the plaintiffs were not at the time of the loss the entire, unconditional and sole owners of the property for their own use and benefit. Sufficient appears to show that the fee-simple title of the land was in the plaintiffs, and that they were the entire owners of the property destroyed, subject to the lease mentioned in the proofs of loss; and it was admitted by the defendant that the fire caused a total loss of the property, and that the value of the buildings exceeded the amount of the insurance.

By the terms of the lease, referred to in the proofs of loss, it appears that the instrument was for a term of ten years, from May 1, 1868, to May 1, 1878, and that it covered the land on which the insured buildings stood, and the buildings and improvements to be built thereon, having been executed before the buildings were erected, at a rental of \$3,500 per annum for the first five years, and \$5,976 per annum for the second five years.

Ten buildings were to be erected, to cost not less than \$24,000; and the lessor was to pay one-half the amount in instalments, each instalment to be \$1,000, and to be paid when the lessee had expended twice that amount in the prosecution of the work. Arrangements of a contingent character are also prescribed in case the lease is continued or determined, and for the basis of adjustment in either event, and for payment or repayment as the case may be, which it is not necessary to reproduce in the present case.

Errors assigned material to be noticed are as follows: 1. That the court erred in directing the jury to return a verdict in favor of the plaintiffs for the amount of the policy and interest. 2. That the court should have directed the jury to return a verdict the other way, as the law of the case was with the

defendant. 3. That the court erred in not submitting the questions of fact to the jury whether the plaintiffs were so far the sole, entire and unconditional owners of the property insured as to be entitled to recover in view of the evidence.

§ 1232. *Entire, unconditional and sole ownership.*

Authorities to prove that a fee-simple estate is the highest tenure known to the law are quite unnecessary, as the principle is elementary and needs no support; nor is any argument necessary to show that the title of the plaintiffs to the land where the buildings stood was of that character, as that is admitted in the bill of exceptions which constitutes a part of the record.

Concede that and it follows that the plaintiffs were, within the meaning of the policy, the entire, unconditional and sole owners of the land where the buildings stood for their own use and benefit at the time of the fire, and if so the *prima facie* presumption must be that they held the title of the buildings by the same fee-simple title in the absence of any evidence in the case to controvert that conclusion. None certainly was introduced by the defendant, and it is not pretended that there is anything in the proofs introduced by the plaintiffs to support any different theory except the lease referred to in the evidence offered to prove the loss.

§ 1233. *Land owners presumed to own the buildings upon the land.*

Land owners under a fee-simple title, in the absence of any proof to the contrary, are certainly presumed to be the owners of the buildings erected and standing on the premises, the rule being that the buildings and the lands together are known as real estate, and the buildings, where nothing is shown to the contrary, are presumed to be held by the fee-simple owner of the land by the same title as the land on which the buildings are situated, from which it follows that the plaintiffs, being the owners in fee of the same, are also the owners in fee of the buildings, unless there is something in the terms of the lease to disprove that theory; and it is equally clear that if they are the entire, unconditional and sole owners of the buildings as well as of the land, the assignment of error must be overruled.

Nor is anything contained in the lease to support any different theory. Instead of that the lease shows that the plaintiffs were the owners of the land and that the contractor agreed to erect the ten buildings on the land for the owners; nor does it make any difference that the owners of the land contracted with the builder that they, when the buildings were erected, would lease the same to him for the term of ten years.

Buildings of every kind are frequently erected by land owners to be rented, nor is it anything uncommon that the contract for lease should be made before the buildings are erected, or that the contract for a lease should be blended with the contract for erecting the building, as in this case. Leases of the kind are not uncommon, nor is there anything in the terms of the instrument to countenance the theory that the title of the plaintiffs did not remain as before,—a fee-simple title as described in the admission of the defendant.

In the words of the contract the lessee agreed to proceed at once to erect ten buildings on the land therein described, to cost not less than \$24,000, for the other party to the instrument, and "to receive payment for the same at the times and in the manner therein described," which of itself shows to a demonstration that the buildings when erected became the property of the plaintiffs, as the terms of the instrument called a lease show that the buildings were erected for the plaintiffs on their land and that they paid the agreed price

for their erection. Decided support to that theory is also derived from another clause of the lease by which the lessee bound himself to insure the buildings during the time employed in their erection, in the name and for the benefit of the plaintiffs, and to deposit the policies in their keeping and possession. Policies were to be taken out and kept in force in the sum of \$13,000 in the name and for the benefit of the lessors during the continuance of the lease, in companies to be approved by the plaintiffs, and the stipulation was that the policies should be deposited with lessors of the property. Other evidence to support the theory of the defendant is entirely wanting, the record showing that they offered no evidence at the trial, and inasmuch as the terms of the lease show that the plaintiffs owned the land in fee-simple, and that they contracted to have the buildings erected and paid for their erection, and caused them to be insured in their own name and for their own benefit, it is clear that the supposed defense that the plaintiffs were not the entire, unconditional and sole owners of the buildings utterly fails, and that the charge of the court directing a verdict for the plaintiffs is correct.

§ 1234. *Ownership in fee of land under lease.*

Attempt is made in this case to maintain the theory that the plaintiffs are not the entire owners of the property, because it was under lease both when the policy was issued and at the time of the loss, but it is clear that the theory has no foundation in law or justice. Nor can the theory be sustained which attempts to separate the ownership of the buildings from the land, which, it is admitted, is vested in the plaintiffs by a fee-simple title. Such an assumption is contrary to the facts exhibited in the record, and can no more be supported than that the lessees of stores, tenement-houses, or other buildings in our large cities own the same by mere possession or occupancy of the particular store, tenement or building included in the lease they hold from the owner.

Thousands of cases arise where dwelling-houses, stores, and other buildings of every kind are leased to occupants for longer or shorter periods of time, and upon still more varying conditions and stipulations, and yet the owners procure insurance upon the same without mentioning the names of the lessees in the policies, or ever suspecting that they have omitted any duty, or been guilty of any concealment or neglect. Insurance companies set up no such pretense; and, if they should do so, they would find no support to such a theory in the courts of justice.

Stores and other buildings are sometimes erected upon leased lands by parties who have no title other than what is derived from their lease, which is a very different thing from the case where the owner, both of the land and the building, leases the estate to the occupant for a term of years, without parting with the fee-simple title to the land or the building. Fee-simple ownership in such a case is matter of importance to the insurer, especially if the company is a mutual one, as such companies usually have a lien on the premises for the payment of the premium; nor is the ownership of the land an immaterial matter, even if no such lien arises, as it furnishes an important element to enable the company to determine whether it is expedient to take the risk.

Considerations of the kind, it may be presumed, induced the defendant to insert the condition in the policy of the plaintiffs "that if the buildings stand on leased ground it must be so represented to the company, and must be so expressed in the written part of the policy, otherwise the policy shall be void." Nothing of the kind is pretended in this case; and, if it were, it could not be sustained for a moment, as it is admitted in the record that the plaintiffs were

the owners in fee of the land where the buildings stood at the time of the fire.

§ 1235. *Authorities reviewed.*

Adjudged cases are invoked to sustain the theory of the defense; but none of those cited support the proposition involved in the theory. Examples of the kind are *Gahagan v. Mutual Ins. Co.*, 43 N. H., 176, and *Warner v. Middlesex Ins. Co.*, 21 Conn., 444, both of which are cases where the insured represented that the property covered by the policy was free and unincumbered, when, in fact, it was incumbered by mortgage. *May, Ins.*, sec. 290; *Towne v. Mutual Ins. Co.*, 7 Allen (Mass.), 51.

Cases are also cited where the insured had only a bond for a deed, or only a leasehold interest, and where the insured procured a policy as the absolute owner of the property in the face of those facts. *Atlantic Ins. Co. v. Wright*, 22 Ill., 474; *Smith v. Mutual Ins. Co.*, 6 Cush. (Mass.), 448; *Brown v. Williams*, 28 Me., 252; *Hinman v. Hartford Ins. Co.*, 36 Wis., 167.

Much discussion of such authorities is not required, as it is clear they do not favor the theory of the defendants. Nor does the case of *Smith v. Columbia Ins. Co.*, 17 Pa. St., 253, aid the defendants, as it is clear that if a mortgagee insures his interest in the premises he is bound, under a provision calling for incumbrances affecting his interest, to state prior mortgages on the same premises. *May, Ins.*, sec. 293. Misrepresentations of material facts, of course, avoid a policy; but there were none such in the case before the court. *Columbia Ins. Co. v. Lawrence*, 10 Pet., 507, cited by the defendant.

Where the policy contained the provision that if the property to be insured is held in trust, or on commission, or is a leasehold interest, or an equity of redemption, or if the interest of the insured in the property is any other than the entire, unconditional and sole ownership of the property, for the use and benefit of the insured, it must be so represented to the company and be so expressed in the written part of the policy, otherwise the policy shall be void, the supreme court of Illinois held, in a case where it appeared that the property had been sold under judgment and execution against the insured, that the non-disclosure of the sale and purchase avoided the policy, though the period allowed for redemption had not expired. *Reaper City Ins. Co. v. Brennan*, 58 Ill., 158.

By the sale and purchase in that case, nothing was left in the insured but the right of redemption, which would expire in one year from the sale; and it was well held by the court that the paramount title being in a third person, it could not be truthfully said that the insured had, at the date of the insurance, "the entire, unconditional and sole ownership of the property."

Beyond all doubt, the property in the case under consideration vested in the lessors; and, if so, the two cases cited by the defendant of *Mayor v. Hamilton Ins. Co.*, 10 Bosw. (N. Y.), 537, and *Mayor v. Insurance Co.*, 9 id., 366, are authorities in favor of the plaintiffs, as the facts in this case show that the property, in the true sense of insurance law, belonged to the insured at the date of the policy. *Washington & Atlantic Ins. Co. v. Kelly*, 32 Md., 438; *Hubbard v. Hartford Ins. Co.*, 33 Ia., 333.

Unless the true ownership or interest in the property is required by the conditions of the policy to be specifically and with particularity and accuracy set forth, it will in general be sufficient if the insured has an insurable interest under any *status* of ownership or possession, in cases where no inquiries are made at the time the application is presented or the policy executed. *May, Ins.*,

sec. 284. No inquiry was made in this case, although it appears that the agent of the company who took the insurance resided in Chicago, where the buildings were situated; nor did the defendant offer any evidence at the trial to show that the unincumbered fee-simple title was not in the plaintiffs at the time the buildings were destroyed by the fire; nor did the defendant request the court at the trial to give the jury any instructions upon the subject. On the contrary, it admitted at the trial that the plaintiffs were the owners in fee of the land on which the buildings insured stood, leaving it to be inferred by the jury that the plaintiffs were also the owners in fee of the buildings.

Enough appears in the terms of the instrument called the lease, to show that both the lessee and lessors treated the buildings "during the process of erection" as the property of the plaintiffs, and to show beyond controversy that the buildings when completed vested in the plaintiffs as their absolute property, subject only to the right of the builder to occupy and use the same, just as in the ordinary case where the owners of property agree to lease the same to be used by the lessee for a stipulated rent.

Lessees holding under an ordinary parol lease do not acquire such an interest in real estate so leased as to avoid a policy issued to the lessor, even though the insured failed to represent the matter to the company in a case where no inquiries were made of the applicant, at the time the policy was issued, as to the true character of the title or occupancy of the insured premises, and where no pretense is shown that the insured has been guilty of any fraud or misrepresentation.

Such a lease is a mere chattel interest, being reckoned as part of the personal estate of the lessee, and in case of the death of the lessee goes to his executors, and not to the heirs-at-law, as appears by all the authorities. 2 Bl. Com. (Cooley's ed.), 143; *Ex parte Gay*, 5 Mass., 419; *Brewster v. Hill*, 1 N. H., 351; *Bisbee v. Hall*, 3 Ohio, 463; *Dillingham v. Jenkins*, 7 Smed. & M. (Miss.) Ch., 487; *Spangler v. Stanler*, 1 Md. Ch., 36. Leases for years, says Taylor, are considered chattel interests arising out of a contract between the parties, and pass only a transient interest in the land, which is not a freehold, and might originally be made at common law by parol for any certain period. Taylor, L. & T. (6th ed.), 22; *Moshier v. Reding*, 12 Me., 482; *Maverick v. Lewis*, 3 McCord (S. C.), 211; *Carwell v. Dietrich*, 15 Wend. (N. Y.), 379; *Chapman v. Bluck*, 5 Scott, 533; *Waller v. Morgan*, 18 B. Mon. (Ky.), 141.

Two requisites, says Blackstone, were necessary to make a fief or feud — 1. Duration as to time; 2. Immobility as to place; and he adds, that whatever was not a feud was accounted a chattel. Chattels real, says the same commentator, are such as concern or savor of the realty, including terms for years, and are called real chattels, as being interests arising out of or being annexed to real estate, of which they have one quality, to wit, immobility, but want the quality of indeterminate duration, the want of which constitutes them chattels. 2 Bl. Com., 386; 2 Kent, Com. (12th ed.), 342; 5 Bac. Abr. (Bouvier ed.), 434; 2 Com. Dig., *Biens, a*; 1 Chitt. Gen. Pr., 244; Co. Litt., 46, 118 *b*. Terms of years belonging to a testator or intestate vest in his executor or administrator without any entry, for the reason that in contemplation of law such interests are chattels. Woodfall, L. & T. (9th ed.), 239; *Wollaston v. Hakewell*, 3 Man. & G., 297; *Atkinson v. Humphrey*, 2 C. B., 654; *Insurance Company v. Kelly*, 32 Md., 421.

Insurers, if they desire to object to such a risk, should make inquiries of the applicant, and should not admit at the trial, without qualification, that the in-

sured was the owner in fee of the land, in a case where they offer no evidence in defense.

Judgment affirmed.

§ 1236. **Warranty — Application.**— When a policy of insurance contains a provision that the application forms part of it, the application becomes part of the contract, and all the statements (a) of the applicant are changed from representations to warranties. *Eddy St. Foundry v. Hampden Ins. Co.*,* 1 Cliff., 300.

§ 1237. **Occupancy.**— In an action upon a fire insurance policy describing the property insured as "at present occupied as a dwelling-house, but to be occupied hereafter as a tavern, and privileged as such," the judge instructed the jury that this language did not import a warranty that the premises should be so occupied during the risk. The assured was the mortgagee of the house, and so described in the policy. *Held*, that the instruction was correct, the language of the description only importing a representation of present intention. *Catlin v. Springfield Ins. Co.*, 1 Sumn., 434 (§§ 1435-42).

§ 1238. *The onus probandi* of a representation of intention concerning the future use of insured premises is upon the underwriter. *Ibid.*

§ 1239. Whether a house is or is not occupied by a family is a question of fact; and whether a given number of persons constitute a family is often to be decided by the manner in which they live, which is also a question of fact. *Poor v. Hudson Ins. Co.*, 2 Fed. R., 432 (§§ 56-59).

§ 1240. A family is a number of persons who live in one house and under one management or head. Whether two laborers living in a house are part of a family is to be determined accordingly. *Ibid.*

§ 1241. The fact that the defendant's agent knew how the premises in question were occupied, and was satisfied, is a waiver of objection that they were not occupied by a family. *Ibid.*

§ 1242. Upon the question of the occupancy of premises by a family the court admitted evidence that at the time the insurance was effected the plaintiff's agent told defendant's agent how they had been occupied the winter before; this as aiding in reaching the intention of the parties in the interpretation of the contract. *Held*, competent. *Ibid.*

§ 1243. Plaintiff's witnesses testified that since the loss defendant's agent had said he knew how the premises were occupied and was satisfied. *Held*, proper. *Ibid.*

§ 1244. **Additions.**— The plaintiff, having a building insured by the defendant, applied for further insurance thereon, which was declined on the ground that the property was already fully covered. To induce the defendant to grant further insurance the plaintiff afterwards wrote to the defendant that valuable additions had been made to the building since the original policy was issued, and thereupon further insurance was granted by the present policy. No such additions had been made. *Held*, that this avoided the contract, whether the misrepresentation was by design or by mistake. *Carpenter v. American Ins. Co.*,* 1 Story, 57.

§ 1245. **Uncertain answers.**— If the answers of an applicant for insurance in regard to keeping a watch upon the premises are so doubtful or ambiguous as to lead to different conclusions, and a policy is issued without further inquiries, the underwriter cannot object. *Nicoll v. American Ins. Co.*,* 3 Woodb. & M., 529.

§ 1246. "So far as known."— Where the assured in the application assumes to state facts only so far as they are known to him, an unintentional overvaluation of the property will not annul the contract, though the policy provide that overvaluation shall render it void. *Miller v. Alliance Ins. Co.*,* 19 Blatch., 308; S. C., 7 Fed. R., 649.

§ 1247. Before granting insurance, an underwriter asked whether the property was under mortgage, and for how much and to whom, and whether the mortgagee had insurance. The insured replied in writing, "the property is mortgaged, and the mortgagee has no insurance to our knowledge." Upon this answer a policy was granted. *It seems* that the underwriter could not complain, after loss, of the incompleteness of the answer. *Holbrook v. American Ins. Co.*, 1 Curt., 193 (§§ 1398-1401).

§ 1248. **Overvaluation**— Mere mistake in stating the value of property insured will not avoid the policy; there must have been intentional misrepresentation. *Curtis v. Home Ins. Co.*,* 1 Biss., 485.

§ 1249. An application for insurance, made part of the policy, contained a covenant that the assured had made a just, full and true exposition of all material facts so far as known to

(a) The language of the judge here is, "material statements," but that appears to be a mere slip, as subsequent language of the judge shows. "When the representations of the insured," he says, "are expressly referred to in the policy as forming a part of the contract, they will acquire the character of warranties, and invalidate the insurance unless strictly complied with, whether they are or are not material to the risk assumed by the insurer," a point perfectly well settled.

him. *Held*, that a material overvaluation of the property would not avoid the policy unless intentional. *National Bank v. Insurance Co.*, * 95 U. S., 678.

§ 1250. A charge to the effect that if the valuation of property insured was grossly in excess of its real value, the burden is on the assured to show that he acted honestly in making the valuation is not error. *Franklin Ins. Co. v. Vaughan*, * 92 U. S., 516.

§ 1251. The agent of an underwriter, who had been in the business of insurance for thirty years, testified that he examined the property and formed his judgment in regard to its value. The judge charged the jury that if he took the whole responsibility upon himself, and was not induced to fix the amount of insurance by the representations or acquiescence of the assured, the underwriter was bound by his acts in reference thereto. *Held* correct. *Perry v. Mechanics' Ins. Co.*, 11 Fed. R., 485 (§§ 1824-25).

§ 1252. A policy of insurance upon a building contained a provision that "if the assured shall cause the property to be insured for more than its value, the policy shall be void." *Held*, that this language referred to fraudulent overvaluation, and that a slight overestimate, such as might be accounted for from difference of opinion, would not avoid the policy. And it is for the insurance company to show such overvaluation. *Field v. Insurance Co.*, * 6 Biss., 121.

§ 1253. The same policy contained this clause: "If the property insured be held . . . by a leasehold or other interest not amounting to absolute or sole ownership, or if the building stands on leased ground, it must be so represented to the company and expressed in the policy in writing; otherwise the insurance will be void." The agent of the insurance company wrote the answers to the questions in the application, and also wrote the policy; but in reply to the question concerning title no answer was written. *Held*, that if at the time the policy was issued the agent knew that the insured was occupying the lot on which the house stood, under a verbal contract with the owner for the occupation or purchase of the same at her option, his failure to write the facts in the application would not avoid the policy. *Ibid*.

§ 1254. *Ownership*.—A policy provided that if the interest of the assured was other than entire, unconditional and sole, for the use of the assured, the fact should be stated. *Held*, that the title of a mortgagee who was in possession, though absolute on the face of the mortgage, fell within the provision; and this though no inquiry was made concerning the title of the assured. *Waller v. Northern Assur. Co.*, * 10 Fed. R., 232.

§ 1255. Such a case is distinguishable from a case where a policy is issued upon an application containing questions touching the interest of the assured which are not answered. *Ibid*.

§ 1256. A trustee insured property for the benefit of his *cestui que trust*, the trustee holding merely the bare legal title, and the *cestui que trust* being, aside from that fact, full owner. *Held*, that the *cestui que trust* was "the entire, unconditional and sole" owner. *Held*, also, that an oath of ownership is not false by reason of the title being in a trustee, where the oath is made in good faith. *American Basket Co. v. Farmville Ins. Co.*, * 3 Hughes, 251.

§ 1257. Where goods are bought at an auction house of H. & Co., and left at the place by the purchaser under agreement that out of the first proceeds of sale a certain sum shall be paid the vendor from whom he had received possession, and that if any advances were made by H. & Co. they should hold the goods as security, *held*, that this does not show that the purchaser is not absolute owner. *Franklin Ins. Co. v. Vaughan*, * 92 U. S., 516.

§ 1258. One who claims an absolute title under a deed granting to him "a certain mill site and all the buildings thereunto belonging," and has the exclusive use and enjoyment of the premises, without any assertion of adverse right or interest by any one, is the owner of the property, within the meaning of a policy which provides that if the interest of the assured in the property be any other than the entire, unconditional and sole ownership, it must be so represented. *Miller v. Alliance Ins. Co.*, * 19 Blatch., 308; 7 Fed. R., 649.

§ 1259. L. and P. write to underwriters as follows: "What premium will you ask to insure the following property, belonging to L. and P., for one year, . . . on their stone mill," etc. *Held*, a representation that the title of L. and P. was complete and absolute, and if untrue in that sense, insurance granted thereon is not binding. *Columbian Ins. Co. v. Lawrence*, 2 Pet., 25 (§§ 1124-30).

§ 1260. It may not be necessary that the person requiring insurance should state every incumbrance on his property which might be necessary if it were offered for sale, but he should state everything which might influence and probably would influence the underwriter in the matter. (a) *Ibid*.

§ 1261. If a husband caused a building to be insured as his wife's, it will not be a misrepresentation on her part to describe it to the insurance company as her property. *Field v. Insurance Co.*, * 6 Biss., 121.

(a) *Quaere*, if this proposition, familiar as it is to the law of marine insurance, is applicable as it stands to a case of fire insurance. Marine insurance law requires disclosure of all material facts: fire insurance, all material facts about which there is *inquiry*, and a truthful statement of material facts volunteered.

§ 1262. *Materials of building.*—A policy was issued “upon a stone mill, four stories high, covered with wood.” The following rule was annexed to the policy: The applicant should state in writing “of what materials the walls and roof of each building are constructed.” “And if any person shall cause the same to be described in the policy otherwise than as they really are, so as the same be charged at a lower premium than would otherwise be demanded, such insurance shall be of no force.” The jury were instructed, in an action upon the policy, that it was for them to decide from all the facts whether, to make good the description of the premises, it was necessary that all of the exterior walls, from foundation to top of the roof, should be of stone, and that no variation from the description not made fraudulently would vitiate the policy, unless by reason of the same the insurance was made at a lower premium than otherwise would have been demanded. *Held*, a proper instruction. (Affirmed on the second appearance of the case before the supreme court. *Columbian Ins. Co. v. Lawrence*,* 10 Pet., 507.) *Columbian Ins. Co. v. Lawrence*, 2 Pet., 25 (§§ 1124-30).

§ 1263. *Known danger.*—If the jury find from the evidence that at the time of his application for the policy in evidence, the plaintiff Whittle was in apprehension of incendiarism, and represented in his application he was in no apprehension of incendiary fire, then he is not entitled to recover. *Whittle v. Farmville Ins. Co.*,* 8 Hughes, 421.

§ 1264. *Survey—Act of agent.*—Where a survey of premises insured is made by the underwriter's agent, and he is as well acquainted with the premises as is the assured, and takes the whole responsibility of making the representation on a view of the premises, the insured is not responsible either for concealment or for misrepresentation. *Secus* where the representation is made out under the direction of the insured, or without a view of the premises by the agent. *Roth v. City Ins. Co.*,* 6 McL., 324.

§ 1265. *Property held on commission* may be insured in the name of a nominal partnership, where the business is carried on by and for the use of one of the partners. There being no representation as to members of the partnership, a policy will not be avoided for failure to state that the name embraces a nominal partner. *Phoenix Ins. Co. v. Hamilton*,* 14 Wall., 504.

IV. SUBJECT OF INSURANCE.

SUMMARY—Term “building,” § 1266.

§ 1266. *Construction of term “building”* as applied to a mill, in connection with the sum insured, the sworn understanding of the parties, and other circumstances of the case; the court holding on the facts that the policy on the building covered the machinery in it. *Brugger v. State Ins. Co.*, §§ 1267-70.

[NOTES.—See §§ 1271-1277.]

BRUGGER v. STATE INVESTMENT INSURANCE COMPANY.

(Circuit Court for Oregon: 5 Sawyer, 304-311. 1878.)

Opinion by DEADY, J.

STATEMENT OF FACTS.—This suit is brought to correct an alleged mistake in a policy of insurance against fire, issued by the defendant to the plaintiff on his mill property. The facts appear to be as follows: During and before the month of July, 1876, the defendant was a corporation formed under the laws of California, and engaged in the business of fire insurance in this state; and A. P. Hotaling & Co., of Portland, were its general agents for the state, while F. Friedenrich was its local agent at Hillsborough, with authority to solicit business—to take and prepare applications and forward the same to the general agents, and deliver policies and receive the premiums thereon.

§ 1267. *Party holding power to sell property on which he has advanced money has an insurable interest in it.*

During the same period the plaintiff, a native of Switzerland and an illiterate person, was in the possession of a three-story frame mill situated on the west side of the base line road, in Washington county, Oregon—the legal title to the property being in his brother, but the plaintiff holding a power of attor-

ney to dispose of the same in consideration of money advanced by him to assist his brother in the purchase thereof.

True, the amended bill alleges that the plaintiff was the owner of the property unqualifiedly and this is denied by the answer. But in the application for the policy the plaintiff stated the nature of his interest in the property correctly, and on the argument it was admitted that this was an insurable interest. Of this there can be no doubt upon authority. Wood on Fire Ins., sec. 248 *et seq.* And because it also appears that the defendant with full knowledge of the facts issued a policy to the plaintiff and accepted the premium thereon, it is now estopped to say the plaintiff had no insurable interest in the property for the purpose of avoiding the policy. Wood on Fire Ins., sec. 498.

§ 1268. "*Building*" construed in the particular case to include machinery in it.

The plaintiff being so in possession, after previous solicitation by said Friedenrich, on July 15, 1876, applied to said agent for a policy upon said property against fire, in which the same appears to be described as a "building" valued at \$4,000, to be insured for \$3,000 at four per centum premium. This application was made upon one of the defendant's blanks, entitled "Store buildings and merchandise survey," and was filled up by the agent and by him soon after transmitted to Hotaling & Co., where the clerk in charge of this business, on July 20, 1876, filled out a policy for one year upon the plaintiff's "three-story frame water power mill building," for the sum and at the rate aforesaid, and forwarded the same to Friedenrich at Hillsborough for delivery to the plaintiff upon the payment of the premium. At the time the application was delivered to the clerk at the place of Hotaling & Co., he remarked to the party delivering it that it was made out on the wrong blank, and taking up one containing many more questions and intended for the survey of mill property filled it up so far as the information contained in the one already signed by the plaintiff would permit, and handed it to the party, saying that he would issue the policy and send it to Friedenrich, but to take the mill blank to Hillsborough and have the filling up completed there and have it signed by the plaintiff. The second blank was taken to Hillsborough on the afternoon of the same day. The filling up was completed by Friedenrich and the paper signed by the applicant, and the policy delivered to him and the premium paid by him, within a day or two from the date of the policy. The first blank remained at the place of Hotaling & Co., and the second one with Friedenrich, by whom it was kept to serve as a guide for similar cases, he having no experience in the business.

The plaintiff took the policy home with him without reading it,—in fact, was unable to read it. On July 8, 1878, the mill building and machinery were destroyed by fire. Upon application to Hotaling & Co. for the insurance, they claimed that the policy only covered the building and offered to pay the plaintiff \$1,500 for the loss. This the plaintiff refused, and insisted that it was his understanding that the machinery was included in the risk, particularly that which was fixed in its character.

On the first application, which is called Exhibit No. 1, there is no description of the property except the printed words or formula, "on buildings," with the *s* crossed out, followed by the figures in writing: "4,000," "3,000," and "4.00" under the words "valuation," "sum to be insured" and "rate," respectively.

These figures are not in the handwriting of Friedenrich, and appear to be in

that of the clerk of Hotaling & Co., who wrote the word "building" and the same figures thereafter in the second application, called Exhibit C. Therefore, it appears there was no description of the property in the first application when signed by the plaintiff on July 15, 1876. The Exhibit C was filled up partly by the clerk aforesaid, and in answer to the forty-second question therein: "What is the cash value of the building or buildings above the foundation?"—he wrote \$4,000; but when the application came to Friedenrich, at Hillsboro, and he completed the filling up, he drew a line through the figures "\$4,000" and wrote "\$2,000" in their place; and in answer to the subdivision "B" of the same question, on the next line below, "Of the machinery," that is the value, he wrote \$2,000; thus making the application read, in effect, the value of the building and machinery together is \$4,000. This application is signed by the plaintiff, but not dated. For the defendant it is suggested rather than asserted that it was not signed until after the policy was delivered, and probably not until after the fire. But the only persons who know what is the truth of the matter are the plaintiff and the defendant's agent, Friedenrich, and they both swear positively that it was signed before the delivery of the policy.

On this state of facts both Exhibits No. 1 and C ought, I think, to be considered parts of one and the same application, unless the latter should be regarded as superseding the former altogether. But in either view of the matter, although only the word "building" is used in No. 1 to denote the property insured, and also in the general description in C, yet the fact being that in the more particular statement as to value in C, the \$4,000 is equally distributed between the building and the machinery, it is satisfactorily shown that it was the intention of the parties to the contract to include them both in the policy.

But insurers are presumed to be acquainted with the nature of the property they insure. And when we consider how unreasonable, if not absurd, it is to suppose that any sane man would propose to insure a mill-house—the mere shell or covering—against fire and leave the more valuable machinery exposed to almost certain destruction and loss in case the house was burned, it seems clear that this application was neither made by the plaintiff nor received by Friedenrich as for insurance upon the shell or building only, but for the property as a whole: the house and machinery. Besides the amount upon which the premium was paid by the plaintiff and received by the defendant was manifestly more than the value of the mere building, and this tends to show also that something more was intended and agreed upon than a policy on the house alone.

It is not to be presumed that the plaintiff would insure his mill building for more than twice its value when, from the nature of the case, if it was destroyed by fire, its real value could be shown. If it was a stock of goods, or something the character and value of which was not known to the whole neighborhood, it might be otherwise. Neither is it to be presumed that the defendant would insure a mill building at twice its value in the face of its own positive rules, which prohibit its agents from taking a risk on any property for more than three-fourths of its value. Indeed this mistake seems to be one of the kind that may be fairly implied from the nature of the transaction, and therefore it is not necessary to resort to positive proof thereof. 1 Story, Eq. Jur., sec. 162.

In *Phoenix Fire Ins. Co. v. Turner*, 1 Paige, 278, the application for the insurance described the property as "a two story and a half frame grist-mill," while the policy described it as a "frame mill house." After a loss by fire and

a refusal on the part of the company to correct the mistake, the court reformed the policy so as to include both the mill and machinery therein. In the determination of the case much weight was given to the consideration that it was unreasonable to suppose that any one would make a contract for insurance upon a mill house alone. In the course of the opinion the chancellor says: "It is to be presumed that insurers are acquainted with the nature of the property which they undertake to insure. If so, the defendant must have known that no owner of a grist-mill would ever think of insuring the mill house only, leaving all the substantial parts of the mill exposed to certain destruction if the mill house or covering was destroyed."

But the case does not end here. Both the plaintiff and Friedenrich swear positively that it was the intention and understanding of both parties that the policy should cover the machinery as well as the house. This testimony stands not only uncontradicted and unimpeached, but is corroborated and supported by every known fact and reasonable inference in the case. It appears probable that both the agent and the plaintiff thought that the term "mill-building" properly included the machinery which made and constituted it a mill, and in this respect they were not singular. Most persons, other than experts and professionals, would understand an application to insure a mill property to be well expressed by the term mill-building, particularly if the proposed valuation was manifestly more than double the value of the mere house.

§ 1269. *An insurance agent who solicits business and fills up blanks of applications acts as agent of the insurers.*

The law applicable to these facts is well settled so far as this court is concerned. When Friedenrich filled up the Exhibits Nos. 1 and C, he was acting as the agent of the defendant, and any mistake made by him in so doing is attributable to the defendant, and it must bear the consequences. For the purposes of this case the defendant, during these transactions, was present at Hillsborough, soliciting this business and making out these applications, because it did so by its agent, Friedenrich. In *Insurance Co. v. Wilkinson*, 13 Wall., 234, the question was directly considered, and Mr. Justice Miller, speaking for the court, says: "The powers of the agent are *prima facie* co-extensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals. An insurance company establishing a local agency must be held responsible to the parties with whom they transact business, for the acts and declarations of the agent within the scope of his employment, as if they proceeded from the principal." See, also, *Wood on Fire Ins.*, sec. 384. But in the case at bar we are not left to presumption as to the authority of the local agent. As has been stated, he was expressly authorized to take and prepare applications for insurance, and in this case did so with a full knowledge of the facts, freely and fairly communicated to him by the plaintiff. If from either ignorance or carelessness he erred, the error is the defendant's, and the plaintiff is entitled to have it corrected. In *Hearne v. Marine Ins. Co.*, 20 Wall., 490, Mr. Justice Swayne announces the rule as to the reformation of written contracts for fraud or mistake, as follows: "Where the agreement, as reduced to writing, omits or contains terms or stipulations contrary to the common intentions of the parties, the instrument will be corrected so as to make it conform to their real intent. The parties will be placed as they would have stood if the mistake had not occurred. The party alleging the mistake must show exactly in what it

consists, and the correction that should be made. The evidence must be such as to leave no reasonable doubt upon the mind of the court as to either of these points. The mistake must be mutual and common to both parties to the instrument. It must appear that both have done what neither intended. A mistake on one side may be a ground for rescinding but not for reforming a contract. Where the minds of the parties have not met there is no contract, and hence none to be rectified." See, also, 1 Story's Eq. Jur., sec. 152 *et seq.*

§ 1270. *Mistake a ground for reforming a written contract.*

In *Gillespie v. Moon*, 2 John. Ch., 597, Chancellor Kent showed that in equity parol evidence was sufficient to reform a mistake in a written contract, and said, "The only question is, does it satisfy the mind of the court?" This case was followed by *Lyman v. United Ins. Co.*, id., 632, in which he said the mistake must be made out "to the entire satisfaction of the court." See *Wood on Fire Ins.*, 796. In my judgment this is a very plain case. The defendant has had the benefit of a premium upon this risk—including the kernel as well as the shell—and ought to perform its part of the agreement accordingly.

Indeed, it would be a reproach to the administration of justice and an admission of a serious defect in the moral jurisdiction of this court, if, under these circumstances, the plaintiff could not have relief from this plain mistake and consequent gross wrong. The case has been tried upon the assumption that the court, if it reformed the policy, would retain the case and enforce the contract as reformed. There is no doubt as to the authority of the court to do this, and the propriety of it is apparent. Story's Equity Jurisprudence, sec. 161. After the instrument is reformed, all of the facts necessary for a decree are admitted, unless it is the value of the property, and that, taking the answer and evidence together, is plainly shown to be greater than the sum it was insured for.

But as it now appears that the prayer for relief goes no farther than for the reformation of the policy, the plaintiff may amend the prayer so as to ask for such relief as he may be entitled to upon the contract when reformed as prayed for.

The decree of the court will be that the policy be reformed so as to include the machinery of the mill as well as the house, and that the plaintiff recover of the defendant the sum of \$3,000, with interest upon the same at the rate of ten per centum per annum, from sixty days after the loss, to wit, September 8, 1877, to the date of this decree, together with the costs and disbursements of this suit.

§ 1271. *Construction.*—A policy describing the property insured as "blacksmith and carriage-makers' stock, manufactured and in process of manufacture, contained in a certain building," embraces unmanufactured or raw stock of the kind mentioned in the policy. *Spratley v. Insurance Co.*,* 1 Dill., 892.

§ 1272. What the term "dry goods" includes is a question of fact for the jury. *Bassell v. American Ins. Co.*,* 2 Hughes, 531.

§ 1273. Insurance on property in and connected with an iron foundry was effected to the amount of \$1,500 in three divisions: on stock, \$150; on tools and flasks, \$750; on fixtures, cupola and patterns, situated in a building in rear of 82 Eddy street, Providence. The loss consisted chiefly in patterns, and was confined to property contained in a store-house on the premises, but not in said building in the rear of 82 Eddy street, and separate therefrom. The store-house was in the rear of 82 and 84 Eddy street. *Held*, that the patterns contained in the storehouse were not covered by the policy. This ruling fortified by the admitted fact that answers given to interrogatories in the application, made part of the policy, show that the

building in the rear of 82 Eddy street, referred to in the policy, was not the store-house. *Eddy St. Foundry v. Hampden Ins. Co.*, * 1 Cliff., 300.

§ 1274. A policy issued to a chartered warehouse company, insuring goods "their own or held by them in trust," insures the property, and not merely a bailee's interest therein; and this though the company's charter required that every receipt for goods should contain, and every receipt did contain, notice that the property mentioned therein was held in bailment only, and was not insured by the bailee. *Home Ins. Co. v. Baltimore Warehouse Co.*, * 93 U. S., 527.

§ 1275. If the goods are destroyed by fire, the assured are entitled to recover their entire value, within the amount of the insurance, applying so much as necessary to cover their own interest, and holding the remainder as trustees for the owners. *Ibid.*

§ 1276. Where goods are insured by a warehouseman, and are described as goods held in trust, the words are to be construed in a mercantile sense—goods intrusted to the warehouseman by the legal owners. *Ibid.*

§ 1277. A policy described the assured as a "German jobber and importer," and gave him permission to keep fire-crackers on sale in the premises insured. *Held*, that this was not permission to keep fire-works on sale, even under the added description of "other articles in his line of business," where fire-works were described as specially hazardous and subject to an increased rate of insurance. *Steinbach v. Insurance Co.*, * 13 Wall., 183.

V. RISK INSURED.

SUMMARY—*Proximate cause*, §§ 1278, 1279.

§ 1278. In case of the concurrence of two causes of loss, one at the risk of the assured, and the other insured against, if the damage by the perils can be discriminated each party must bear its proportion. This proposition applied to the case of a steamboat insured against loss by fire, which collided with another vessel, receiving a hole in her side, and after partly settling in the water, taking fire from the engines; the steamer continuing to float for half or three-quarters of an hour, while her upper works were enveloped in flames, which finally consumed considerable part thereof. The jury found a verdict for that part of the loss which was the effect of fire, and a motion for a new trial was refused. *Norwich Transp. Co. v. Western Mass. Ins. Co.*, §§ 1280-83.

§ 1279. Where the assured and the underwriter are responsible for different causes of loss, and the damage by each cannot be distinguished, the party responsible for the predominating efficient cause, or that by which the operation of the other is directly occasioned as being merely incidental to it, is liable to bear the loss. *Insurance Co. v. Transp. Co.*, §§ 1284-85.

[NOTES.—See §§ 1286, 1287.]

NORWICH & NEW YORK TRANSPORTATION COMPANY v. WESTERN MASSACHUSETTS INSURANCE COMPANY.

(Circuit Court for Connecticut: 6 Blatchford, 241-253. 1868.)

STATEMENT OF FACTS.—Action on a policy of insurance upon a vessel against loss or damage by fire. There was a verdict for the plaintiffs, and a motion for a new trial.

The steamer of the plaintiffs came in collision with a schooner, and was so much injured that she sunk to her furnace fires. Then by reason of the blowing the fire to the surrounding wood-work that ignited, the upper portion of the steamer was enveloped in flames. In half an hour or so the steamer sunk. She was subsequently raised and repaired. The evidence was that she was damaged to the amount of \$84,000, of which \$69,000 was attributed to the fire, and \$15,000 to the collision apart from the fire.

By the terms of the policy defendants were entitled to proof of the loss, and exempted from suit for sixty days after the presentation of the proofs of loss. After notice of the loss defendants refused to pay, on the ground that it was a marine and not a fire loss, and plaintiffs sued within the sixty days.

Opinion by SHIPMAN, J.

The disputed facts in this case lie within a very limited range, and were all distinctly submitted to the jury. The only matter now for consideration is whether the court correctly instructed the jury on the questions of law applicable to the facts.

§ 1280. *Waiver of proofs of loss by denial of all liability.*

1. As to the waiver of proofs of loss. This point was raised on the trial, and, although not insisted on upon the argument of the motion, we will notice it here. It is conceded that there were no formal proofs presented to the defendants as provided for in the policy. But the written admission of the defendants, produced on the trial, conclusively proves that the plaintiffs gave the defendants timely and proper notice that the loss had occurred, and that the latter, after examining the wreck and inquiring into the circumstances, denied all liability under the policy, on the ground that the loss was the result of a marine and not of a fire peril. This was all done before the time within which the plaintiffs were by the terms of the policy bound to present the formal proofs had expired. The court charged the jury that this denial of all liability whatever, by the defendants, was in judgment of law a waiver of any further proofs of loss. On this point the authorities are numerous and decisive, and fully sustain the rule laid down by the court. The denial by the defendants of all liability in the case expressly conceded that there was a loss, and was a notice to the plaintiffs that they would not be bound, in any event, though formal proofs were furnished. The presentation of proofs, under such circumstances, was of no importance to either party, and the law rarely, if ever, requires the observance of an idle formality, especially after the party for whose benefit the original stipulation was made has rendered conformity thereto unnecessary and practically superfluous. *Schenck v. The Mercer County Mut. Fire Ins. Co.*, 4 Zab., 447; *Allegre v. The Maryland Ins. Co.*, 6 Har. & Johns., 408; *McMasters v. The Westchester County Mutual Ins. Co.*, 25 Wend., 379; *Francois v. The Ocean Ins. Co.*, 6 Cow., 404; *Taylor v. The Merchants' Fire Ins. Co.*, 9 How., 390; *O'Neil v. The Buffalo Fire Ins. Co.*, 3 Comst., 122; *The Maryland Ins. Co. v. Bathurst*, 5 Gill & Johns., 159; *Graves v. The Washington Marine Ins. Co.*, 12 Allen, 391.

§ 1281. *Waiver of terms as to time of suing.*

2. There was no error in that part of the charge which instructed the jury that the suit was not prematurely brought. There was a provision in the policy that the loss should be payable after sixty days from notice and the furnishing of preliminary proofs of loss to the underwriters. If the matter had gone through the formal stages provided for in the policy, and the proofs had been made, without any denial of all liability on another ground, no suit could have been sustained on the policy until the sixty days had expired. This clause was for the protection or convenience of the underwriters; but, when they waived the preliminary proofs, they also waived the benefit of this stipulation, and rendered it nugatory. It would be absurd to say that they still retained the right to have sixty days within which to pay a loss, which they had declared they would not pay at any time or under any circumstances. *The Columbian Ins. Co. v. Catlett*, 12 Wheat., 383 (§§ 657-63, *supra*); *Allegre v. The Maryland Ins. Co.*, 6 Har. & Johns., 408; *Phillips v. The Protection Ins. Co.*, 14 Mo., 220.

§ 1282. *Causa proxima.*

3. We discover no error in that part of the charge in which the court sub-

mitted to the jury the question whether or not the proximate cause of the loss for which a recovery was sought was to be found in the fire which followed the collision. There was little or no controversy about the facts which characterized the disaster, up to the time the fire broke out. The boat was struck on her port side, forward of her wheel-house, and her hull was stove in below the water line. She immediately began to fill, and in ten or fifteen minutes after the collision the water rose to her furnaces and forced the fire out upon the wood-work. It made rapid progress, and soon enveloped her in flames. She continued to float for half or three-quarters of an hour, and until a considerable portion of her upper works was consumed, when she went down, bow foremost, ending completely over and resting on the bottom, keel up, in about twenty fathoms of water. Up to the time the fire broke out, all the damage the boat had received was the wound in her side, and the injury resulting from the water which rushed in. And here an important question of fact arose, and that was whether the consequences resulting from the collision alone, without the intervention of the fire, would have gone beyond her filling, and settling in the water to her promenade deck, and there remaining suspended in the water until she could be towed to a place of safety, her side be repaired, and the whole boat be restored to her former condition. The uncontradicted evidence was that, had she so remained, suspended in the water, she could easily have been towed to a place of safety, her wound repaired, and every part of the boat, including her furniture, which would have been injured by the water, restored to the condition it was in before the collision, for a sum not exceeding \$15,000. The actual loss proved, however, was about \$84,000. On this point there was no conflicting evidence. The difference between these sums is \$69,000, and this latter sum was claimed by the plaintiffs to be the amount of their loss naturally and necessarily resulting from the fire, and which, but for the fire, would not have happened. They offered evidence to show that from the predominance of the floating over the sinking materials in her structure and cargo, in connection with the fact that she was so housed in, from stem to stern, between her main and her upper or promenade deck, that her cargo would have been kept in its place, although immersed in water, her sinking was impossible, as a result of the collision merely. They also offered the testimony of eye-witnesses of the conflagration, to prove that she did actually float for half or three-quarters of an hour, and that it was not till her upper works were all on fire, and nearly consumed, by which her light freight was liberated, and enabled to float away, and her floating capacity thus greatly reduced, that she finally sank. To overcome this evidence, no proof was offered by the defendants. The court instructed the jury that the contract upon which the plaintiffs sought to recover was one of indemnity against loss by fire only, and that, therefore, whether her sinking was the natural and necessary result of the fire became a vital question; and that if the jury found this question in the negative, the plaintiffs could not recover. This instruction was more favorable to the defendants than they had a right to demand, for it was conceded that a considerable portion of the steamer's upper works was actually consumed. The other injuries resulting after the fire broke out, for which the plaintiffs sought to recover, were occasioned by her sinking to the bottom. But in order to simplify the question to the jury, they were instructed that if they found the boat would have finally sunk, had no fire broken out, their verdict must be for the defendants. They must, therefore, have found by their verdict that she would not have sunk but for the

fire, and consequently that all the damage which naturally resulted from the marine injury was \$15,000, and that all the rest was the natural and necessary result of the fire. This part of the charge may not have been couched in the formal and technical language of the text-writers on this branch of the law, but it distinctly presented the question as to the proximate cause of the loss for which a recovery was claimed. The effect of the verdict, therefore, is to bring the case within the scope of the sound proposition (Phillips on Insurance, vol. 1, subsection 1136, p. 679, 5th ed.), that "in case of the concurrence of two causes of loss, one at the risk of the assured, and the other insured against, or one insured against by A., and the other by B., if the damage by the perils respectively can be discriminated, each party must bear his proportion." In the case before us this was clearly done. The loss resulting from the fire was distinctly separated by the evidence from any loss resulting from the collision, and the jury were instructed that the plaintiffs could recover only for such loss as naturally and necessarily resulted from the former element. There was no conflict of evidence on this point, and the jury found no damages, except such as were chargeable to fire, as the proximate cause. It is well settled by numerous authorities that the proximate cause of loss is to be looked to. This rule prevails in both fire and marine insurance. Jewett, J., in *Gates v. The Madison County Mut. Ins. Co.*, 1 Seld., 469, 478, and cases there cited.

§ 1283. *The rule of damages. Cash value of vessel before loss.*

4. The rule of damages was correctly stated under the circumstances. The rule prescribed by the policy was the cash value of the boat just before the fire. The offer was made by the plaintiffs to prove her cash value, deducting the amount she was damaged by the collision, including all necessary consequences. To this mode the defendants objected, and the only other mode was to ascertain what it cost to repair the damages necessarily resulting from the fire. The jury were instructed that, if the cost of the repairs exceeded the fire damage, and rendered the boat more valuable, they should deduct the excess. Under the instructions, the plaintiffs could obtain no more than indemnity for the loss by fire. This they were entitled to.

5. The objection to the allowance of \$22,500 for raising the wreck is untenable. This was found to be the precise value of the wreck when recovered. It was in proof that it cost over \$40,000 to raise it, but no more was allowed than the value of the same when raised. So much was saved from an otherwise total loss, and, as defendants had the benefit of it, in the adjustment of the damages, they are chargeable with the necessary and reasonable cost of saving it.

A new trial is, therefore, denied on all the grounds. (a)

(a) The above case was affirmed in the supreme court. *Western Massachusetts Insurance Company v. Transportation Company*, 12 Wallace, 201-204. 1870. The following opinion was delivered by MR. JUSTICE STRONG:

As the issues of fact in this case were submitted to a jury, it is to be considered whether they were submitted with proper instructions.

It is complained that the circuit court instructed the jury that the way to determine the question whether the insurers were liable was to consider and determine whether the steamer would have sunk except for the effect of the fire. This is hardly a fair statement of the manner in which the case was submitted. The charge must be taken, not in detached portions, but according to its general tenor and effect. That what the judge did charge was, in our opinion, proper instruction, is sufficiently shown by what we have said in the case just de-

INSURANCE COMPANY v. TRANSPORTATION COMPANY.

(12 Wallace, 194-201. 1870.)

• **ERROR** to U. S. Circuit Court, District of Connecticut.

The facts in this case were the same in substance as in the preceding case, the same disaster being in question.

§ 1284. *Loss from two causes, (1) that can, (2) that cannot, be discriminated, how to be borne, defendant having insured against but one of them.*

Opinion by MR. JUSTICE STRONG.

• Mr. Phillips, in his treatise on the Law of Insurance, lays down two rules respecting the concurrence of different causes of loss, which the plaintiffs in error contend should be applied to this case, and which, if applied, they insist must lead to a reversal of the judgment in the court below. Phillips on Insurance, vol. i, §§ 1136, 1137. The first of these is: "In case of the concurrence of two causes of loss, one at the risk of the assured, and the other insured against, or one insured against by A., and the other by B., if the damage by the perils respectively can be discriminated, each party must bear his proportion."

The second is: "Where different parties, whether the assured and the underwriter or different underwriters, are responsible for different causes of loss, and the damage by each cannot be distinguished, the party responsible for the predominating efficient cause, or that by which the operation of the other is directly occasioned, as being merely incidental to it, is liable to bear the loss."

These propositions may be accepted as correct statements of the law, and the question before us is, whether the circuit court, in giving judgment for the assured, failed to apply them rightly to the facts of the case. The insurance in this case was against all such loss or damage, not exceeding the sum insured, as should happen to the property by fire, other than fire happening by means of any invasion, insurrection, riot or civil commotion, or of any military or

cided. (a) We have also shown that the policy contained no implied exception against the consequences of any marine peril.

The only other thing which need be noticed is the allegation of the plaintiffs in error that the jury were instructed to ascertain the amount of the damage, not by reference to the actual cash value of the subject, but by the cost of restoration. If this complaint were founded in fact, it would call for a reversal of the judgment, for the policy stipulated that loss or damage should be estimated according to the true and actual cash value of the property at the time the same should happen. But when the insured offered evidence to prove what was the actual cash value of the steamer before the collision, from which the damage caused by the collision might have been deducted, and thus the cash value of the property at the time when the fire attacked it might have been ascertained, the plaintiffs in error objected and the evidence was excluded. There remained then no way of establishing the cash value except by ascertaining the cost of restoration to the condition in which the steamer was before the fire. This was allowed, but the jury were instructed that if the cost of repairs exceeded the damage done by the fire they should deduct the excess. It is plain, therefore, that under such instructions the loss of the assured must have been measured by the standard provided in the policy.

• It is sufficient to say of the admission of evidence to prove how much it cost to raise the steamer, that if it was erroneous it did no harm. The value of the boat when raised was proved to have been exactly equal to the cost of raising her, and the insurers had the benefit of it.

Nothing need be said of the other exceptions. They were not pressed in the oral argument, or in the printed briefs, and they exhibit no error.

Judgment is affirmed.

(a) The case following this.

usurped power. Thus loss from fire happening in consequence of every other cause than those excepted was covered by the policy. The insurers took the risk of fires caused by lightning, explosions and collisions. Such was the contract.

It is urged on behalf of the plaintiffs in error the findings in the case establish that the sinking of the steamer, wherein consisted principally the loss, or that part of it in excess of \$15,000 chargeable to the collision, was the result of two concurrent causes, one the fire and the other the water in the steamer's hold, let in by the breach made by the collision. As the influx of the water was the direct and necessary consequence of the collision, it is argued that the collision was the predominating, and therefore the proximate, cause of the loss. The argument overlooks the fact, distinctly found, that the damage resulting from the sinking of the vessel was the natural and necessary result of the fire only. If it be said that this was but an inference from facts previously found, it was not for that reason necessarily a mere legal conclusion. But we need not rely upon this. Apart from that finding, the other findings, unquestionably of facts, show that neither the collision nor the presence of water in the steamer's hold was the predominating efficient cause of her going to the bottom. That result required the agency of the fire. It is found that the water would not have caused the vessel to sink below her promenade deck had not some other cause of sinking supervened. It would have expended its force at that point. The effects of the fire were necessary to give it additional efficiency. The fire was, therefore, the efficient predominating cause, as well as nearest in time to the catastrophe, which not only directly contributed to all the damage done, after the steamer had sunk to her promenade deck, but enlarged the destructive power of the water and rendered certain the submergence of the vessel. This plainly appears, if we suppose that the fire had occurred on the day after the collision and had originated from some other cause than the collision itself. The effects of the prior disaster would then have been complete. The steamer would have been full of water, sunk to her promenade deck, and, remaining thus suspended, would have been towed to a place of safety and saved, in that condition, to her owners, except for the new injury. But the fire occurring on the next day, destroying the upper works and the housing, thus liberating the light freight and greatly reducing the floating capacity of the steamer, would have caused her to sink to the bottom as she did. In the case supposed the water would have been as truly a concurrent and efficient cause of the steamer's sinking as it was in the case now in hand. It would have operated in precisely the same manner, remaining dormant until given new activity. But could there have been any hesitation in that case in determining which was the proximate, the efficient, predominating cause of the sinking of the vessel? And can it be doubted that the underwriters against loss by fire would be held responsible for such a loss? Wherein does the case supposed differ in principle from the present, when the facts found are considered? True, the fire in this case was caused by the collision, but the policy insured against fire caused by collision. True, the fire immediately followed the filling of the steamer with water, or commenced while she was filling, but the effects of the fire are conclusively distinguished from the breach in the steamer's hull, and the filling of her hold with water. The damages caused by the several agencies have been discriminated, and its proper share assigned to each. It is an established fact that the damaging effect of the water, independent of the fire, would not have reached beyond

sinking of the steamer to its upper deck, when she would have been saved from further injury.

§ 1285. *Causa proxima.*

There is, undoubtedly, difficulty, in many cases, attending the application of the maxim, "*proxima causa, non remota, spectatur*," but none when the causes succeed each other in order of time. In such cases the rule is plain. When one of several successive causes is sufficient to produce the effect (for example, to cause a loss), the law will never regard an antecedent cause of that cause, or the "*causa causans*." *General Mutual Ins. Co. v. Sherwood*, 14 How., 366 (§§ 558-62, *supra*). In such a case there is no doubt which cause is the proximate one within the meaning of the maxim. But, when there is no order of succession in time, when there are two concurrent causes of a loss, the predominating efficient one must be regarded as the proximate, when the damage done by each cannot be distinguished. Such is, in effect, Mr. Phillips' rule. And certainly that cause which set the other in motion and gave to it its efficiency for harm at the time of the disaster must rank as predominant. In the present case, however, the rule hardly seems applicable, because the damage resulting from the fire and that caused by the filling of the steamer are clearly distinguished.

It is true, as argued, that as the insurance in this case was only against fire, the assured must be regarded as having taken the risk of collision, and it is also true that the collision caused the fire; but it is well settled that when an efficient cause nearest the loss is a peril expressly insured against, the insurer is not to be relieved from responsibility by his showing that the property was brought within that peril by a cause not mentioned in the contract. *St. John v. American Mutual Ins. Co.*, 1 Kern., 519. The case quoted—*St. John v. The American Mutual Insurance Company*—is instructive, and is, in one particular at least, responsive to the argument of the plaintiffs in error. It exhibits the difference, in effect, between an express exception from a risk undertaken, and silence in regard to a peril not insured against. The policy, as here, was against fire, but it contained a provision that the company would not be liable "for any loss occasioned by the explosion of a steam boiler." While it was in force there was an explosion of a steam boiler which caused the destruction of the property insured by fire. It was held the insurers were not liable. The proviso, or exception, was construed as extending to *fire* caused by such explosions, for, as the parties were contracting about the peril of fire alone, an *express* exception of all loss from explosions must have been meant to cover fire when a consequence of explosions, otherwise the exception would have been unmeaning. But the court said, if nothing had been said in the policy respecting a steam boiler, the loss, having been occasioned by fire as its proximate cause, would have rested on the insurers, though it had been shown, as it might have been, that the fire was kindled by means of the explosion. The judgment thus turned on the effect of an express exception. Had there been none, the court would not have inquired how the fire happened, whether by an explosion or not. In the case before us there is no exception of collisions, or fires caused by collisions. It must therefore be understood that the insurers took the risk of all fires not expressly excepted.

It has been argued that because the policy was against fire only, the assured are to be considered their own insurers against perils of the sea, including collisions, and as insurers against marine risks are liable for collisions, with all their consequences, including fires, the assured in this case must be

held to have undertaken that risk. This would be so if they had taken out no policy against fire. But that works a material difference. Suppose these underwriters had insured the steamer against collisions and fire, and had then re-insured in another company against fire alone, as they might have done, would it have been a sufficient answer to a suit brought by them against their insurers, that the fire which caused the steamer to sink was itself caused by a collision? No one will affirm that. Yet, upon the theory of the plaintiffs in error, this is substantially what is now attempted. Before any policy was issued, the transportation company were their own insurers against collisions and fire, no matter how caused. They sought protection against some of the possible consequences of these risks, and they obtained a policy insuring them against all loss by fire, except fire caused by certain things, of which collision was not one. Against every other consequence of a collision than a fire, they remained their own insurers, but the risk of fire was no longer theirs.

We have already sufficiently said that the amount of the loss caused by the collision, apart from the fire, was distinctly ascertained, and the insurers were not charged with it. So was the amount of loss caused by the fire itself ascertained. If, therefore, it was a case of the concurrence of two causes of loss, one at the risk of the assured and the other of the insurers, the damage resulting from each has been discriminated, and the insurers have been held liable only for that caused by the peril against which they contracted. *Vide Heebner v. Eagle Ins. Co.*, 10 Gray, 143.

Judgment has therefore been given in conformity with the rules as above stated, in Phillips on Insurance. It is affirmed.

§ 1286. Removal of goods.—Upon a policy of insurance upon goods while in a certain building, against loss by fire, the underwriters are liable for loss sustained by the removal of the goods in case of imminent danger from fire. *Holtzman v. Franklin Ins. Co.*, * 4 Cr. C. C., 295.

§ 1287. "Design."—A policy of fire insurance provided that the underwriter should be liable for loss "by fire originating in any cause except design in the assured, invasion," etc. *Held*, that the policy covered negligence in the assured. What constitutes design considered. *Catlin v. Springfield Ins. Co.*, 1 Sumn., 434 (§§ 1435-42).

VI. WORDS OF EXCEPTION.

SUMMARY—*Petroleum*, § 1288.—*Saltpeter*, § 1289.—*Word "kept,"* §§ 1290, 1291.—*Explosion*, § 1292.—*Property fired by the military*, §§ 1293, 1294.

§ 1288. An exception in a policy of fire insurance of loss caused by petroleum includes loss by fire caused by collision of a train of cars with a coal-oil tank. *Insurance Co. v. Express Co.*, § 1295.

§ 1289. A policy of insurance on the plaintiffs' "stock in trade as wholesale grocers, comprising all articles kept for sale in such stocks," contained the provision in the printed part, the quoted part just mentioned being in writing, that "if the assured shall keep or use gunpowder, . . . saltpeter, . . . this policy shall be void." Permission was indorsed to keep fifty pounds of gunpowder. A considerable quantity of saltpeter was kept in the building insured, but only a reasonable amount for trade. *Held*, that this did not avoid the policy, and that the saltpeter was insured. *Stout v. Commercial Assur. Co.*, §§ 1296-98.

§ 1290. The word "kept," in a clause of an insurance policy, forbidding the keeping of explosives, is not to be construed as applying where explosives of a known fixed character, known to be such, are accidentally present in the building in question. *Contra*, where they are kept there knowingly, in violation of the terms of the contract of insurance. *Washburn v. Miami Ins. Co.*, §§ 1299-1801.

§ 1291. Where a policy forbids the keeping of certain explosives, referring to them only in connection with fires which they have produced, the case is not to be considered as all one

whether the explosives cause the fire, or fire affect the explosives; in the latter case the underwriter may be liable. *Ibid.*

§ 1292. A fire insurance policy provided that if the fire producing the loss occurred "by means of any invasion, insurrection, riot, or civil commotion, or any military or usurped power, explosion, earthquake or hurricane," the underwriter should not be liable. An explosion took place in the M. warehouse, in consequence of which other buildings, including the A. warehouse and the insured property therein, were burned up. The fire was not communicated directly to the A. warehouse, but was blown by the wind from a third building, itself set on fire by the explosion. *Held*, that the fire had occurred by means of explosion, and that the insured could not recover. *Insurance Co. v. Tweed*, §§ 1802-3.

§ 1293. A fire insurance policy upon goods in a building destroyed with the goods by fire communicated from a building burned by order of an officer of the United States army, during an attack by Confederate forces in the civil war upon a town in which the buildings were situated, contained the following provision: "The company shall not be liable to make good any loss or damage by fire which may happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power." *Held*, that the loss was not within the provision. *Boon v. Aetna Ins. Co.*, §§ 1804-12.

§ 1294. History of the term "military or usurped power" as used in policies of insurance. *Ibid.*

[NOTES.— See §§ 1818-1818.]

INSURANCE COMPANY v. EXPRESS COMPANY.

(5 Otto, 227-232. 1877.)

ERROR to U. S. Circuit Court, Southern District of New York.

Opinion by MR. JUSTICE STRONG.

STATEMENT OF FACTS.— This was an action upon two policies of insurance against fire, issued by the defendants to the plaintiffs below, an express company, and covering goods, wares and merchandise in their care for transportation while on board cars or other conveyances, including water and stage routes, embracing the entire routes of the company designated on a map specified. The policies, though differing in the sums insured, were alike in all other particulars. To the action two defenses were set up, both founded upon certain provisions of the policies. The material parts out of which the first of these defenses is thought to arise are the following:

"It is a further condition of this insurance, that no loss is to be paid in case of collision, except fire ensue, and then only for the loss and damage by fire. And that no loss is to be paid arising from petroleum or other explosive oils."

"Petroleum, rock, earth, coal, kerosene, or carbon oils of any description, whether crude or refined; benzine, benzole, naphtha, camphene, spirit gas, burning fluid, turpentine, phosgene, or any other inflammable liquid, are not to be stored, used, kept, or allowed on the above premises, temporarily or permanently, for sale or otherwise, unless with written permission indorsed on this policy, excepting the use of refined coal, kerosene, or other carbon oil for lights, if the same is drawn and the lamps filled by daylight, otherwise this policy shall be null and void."

"If any property covered by this insurance be damaged by lightning, or the bursting of a boiler, or by explosion from any cause, this company shall not be liable therefor, unless fire ensues, and then for the loss by fire only, which shall be determined by the value of the damaged property after the casualty by explosion or lightning."

It is claimed that by force of these provisions the loss which occurred was excepted from the risk undertaken by the insurers, or, in other words, that the loss was not covered by the policies. This is one of the defenses set up against any recovery by the plaintiffs.

The other defense is, that the suit was not brought within the term of twelve months next after the loss or damage occurred, and was, therefore, barred by an express stipulation contained in the policies. Both these defenses were overruled in the circuit court, and the jury was instructed to return a verdict for the plaintiffs. It is obvious that, if either of the defenses was maintainable,—if the loss was not covered by the policies, or if the suit was barred by any stipulation contained in them,—the instruction given to the jury was erroneous. And, as we think the loss was excepted from the risk assumed by the insurance company, it will be unnecessary to consider whether the action was brought too late.

There is no controversy about the facts. They were agreed upon and admitted at the trial. During the years 1870 and 1871, the New York Central & Hudson River Railroad was one of the routes of the plaintiff denoted on the map referred to in the policies of insurance. On February 6, 1871, an oil freight-train of said railroad was on its way from the city of Albany to the city of New York, on the westerly track of the railroad. The train was composed mainly of oil-cars, so called, the same being trucks or platforms, having upon them, respectively, two large wooden tanks, with iron hoops; one of the tanks at each end of the trucks or platforms, and each tank containing several thousand gallons of petroleum.

By the breaking of an axle one of the oil-cars was thrown from or left the westerly track, and so left and situated that it stood across the easterly track of the railroad, upon the bridge next south of the tunnel at New Hamburg. While the oil-car was so situated, an express passenger-train of the railroad company, composed of locomotive and tender, baggage-car, express freight-car, five sleeping-cars, and one ordinary passenger-car, connected in the order stated, was on its way from the city of New York to the city of Albany, upon the easterly track of the railroad. In the express freight-car was a large quantity of merchandise in the possession of the plaintiffs, and in the course of transportation by them.

The express passenger-train was proceeding at a high rate of speed, and while so proceeding, at or about the hour of 10 o'clock in the evening of the said 6th day of February, 1871, struck one of the oil-tanks upon the oil-car standing across the easterly track of the railroad upon the bridge, as before mentioned. Immediately upon the collision, the petroleum in said tank so struck was in some way ignited and burst into flames, which surrounded and enveloped the locomotive and tender, baggage-car, express freight-car, and first, second, and third sleeping-cars of the express passenger-train, and consumed the bridge, the baggage-car and its contents, the express freight-car and most of its contents, and the first, second, and third sleeping-cars, with many of the passengers therein. There was no petroleum or other explosive oil in or upon either of said trains in the possession or under the control of the plaintiffs.

§ 1295. *Exception in a policy of "loss caused by petroleum." Collision of train with coal-oil car.*

In view of the facts thus stated, it is an inevitable inference that the destruction of the express-car and its contents arose from the burning petroleum, or was caused by it; and it makes no difference to this case how the petroleum was ignited, whether by burning coals from the locomotive, or by heat generated in the collision.

The policies insured only against fire, and the excepting clause we have

quoted was plainly intended to exclude from the risk taken certain possible fires. It stated, as a condition of the insurance, that no loss should be paid in case of collision, except fire ensued, and then only for the loss and damage by fire, and that no loss should be paid arising from petroleum or other explosive oils. This plainly implies that, in contemplation of the parties, a loss by fire might arise or be caused by petroleum. That would be impossible unless the petroleum were ignited in some way. It must, therefore, have been understood that burning petroleum, distinguished from the match, coals or collision that ignited it, might originate a fire, and that a loss might arise from it. Such a loss, therefore, must have been the one intended to be excepted, as truly as the excepting a loss from gunpowder would mean from ignited gunpowder, not merely from the loss caused by the match which ignited it. Keeping in mind the general intent of the contract, which was insurance against fire, we may, perhaps, arrive at the understanding of the parties by following the succession of provisions the policy contains. After having acknowledged the receipt of the premium for insurance of the property against fire generally, the thought seems to have occurred that railroad collisions might take place, causing damage and resulting in fire. The policy, therefore, stipulated that in such cases only the damage caused by fire, as distinguished from that caused by the collision, should be covered by the policies. Then it seems to have been considered that collisions might result in setting fire to petroleum, a known dangerous substance, which, when ignited, produces uncontrollable fires; and, therefore, it was stipulated that no loss arising from petroleum should be paid for, even though its ignition should ensue as a consequence of collision. Looking at the position in the contract of these excepting provisions, being in juxtaposition, as they are, and in one policy parts of the same sentence, it is evident that such must have been the process of thought of the parties. The meaning of the language used by the insurers, then, is this: We will insure you against fire; and, if fire ensues from a collision, we will pay the damages caused by the fire, though not that caused by the collision; but if a fire ensuing a collision arise from petroleum or other explosive oils, we do not undertake to pay the loss. All other losses caused by fire resulting from collision we will pay. Such, we think, is the most natural construction of the excepting clause.

The circuit judge was of opinion that what the parties contemplated was exemption from liability for loss occasioned by explosion. This he inferred from the expression, "no loss is to be paid arising from petroleum or other explosive oils" (severing it from the sentence of which it is really a part). Hence, he concluded that the parties treated petroleum as an explosive substance; and that when, as generally in case of fire, if an explosion occur which is caused by the fire, the insurers might be liable for the whole damage caused by the explosion, in this case they were exempted by the exception from all loss except that immediately communicated by fire. To us this appears to be a strained and unnatural construction, and it is decisive against it that the parties have clearly and expressly stipulated for the case of loss by explosion in another part of the policy. It is a fair and necessary inference from this that the parties had in mind, when they inserted the clause, other causes of loss and other limitations of liability.

The defendants in error have argued that the exempting clause may fairly be construed so as to read: "No loss is to be paid arising from petroleum or other explosive oils carried by the parties insured," or "carried upon the same

train of cars or other conveyance used by the parties insured." But such a construction would be making a contract, instead of interpreting one already made. Another section of the policies contains a condition that petroleum, rock, earth, coal, kerosene or carbon oils of any description, whether crude or refined, benzine, benzole, naphtha, camphene, spirit gas, burning fluid, turpentine, phosgene or any other inflammable liquid, shall not be stored, used, kept or allowed on the premises insured (that is, in the cars or conveyances employed), either permanently or temporarily, for sale or otherwise. The petroleum referred to in the excepting clause must, therefore, have been some other than such as might be carried by the assured, or on the conveyances used by them. Collisions of express trains with petroleum oil trains, and the consequent frightful destruction of property and life by fire, had occurred before these policies were issued, and manifestly the contracting parties intended to take out of the risk assured the damages which might result from such a possible catastrophe.

We are, therefore, led to the conclusion that the loss sustained by the plaintiff was not covered by the policies, and that the circuit court erred in charging the jury to return a verdict against the defendants.

Judgment reversed.

STOUT v. COMMERCIAL UNION ASSURANCE COMPANY.

(Circuit Court for Indiana: 12 Federal Reporter, 554-557. 1892.)

Opinion by GRESHAM, J.

STATEMENT OF FACTS.—The Commercial Union Assurance Company, of London, issued a fire policy to the plaintiffs for \$5,000, for one year, from the 2d day of July, 1880, for a premium of \$——. The property covered was described in the written part of the policy, which reads thus: "Five thousand dollars on their stock in trade as wholesale grocers, comprising all articles kept for sale in such stocks, in, etc., Nos. 107 and 109 South Meridian street, Indianapolis, Indiana; \$50,000 total insurance. Permission is hereby granted the assured to keep fifty pounds of gunpowder on the premises without prejudice to this policy." It is provided in the printed part of the policy that "if the assured shall keep or use gunpowder, fire-works, nitro-glycerine, phosphorus, saltpeter, nitrate of soda, petroleum, naphtha, gasoline, benzine, benzole or benzine varnish, or keep or use camphene, spirit gas or any burning fluid or chemical oils, without written permission in this policy, then, and in every such case, this policy shall be void." Also, that "this company shall not be liable . . . for any loss caused by the explosion of gunpowder or any explosive substance." The building and its contents were destroyed by fire during the life of the policy, and this suit is brought to recover the amount of the risk. The insurer sets up in the third paragraph of its answer that at and before the fire the assured had in the building described in the policy two hundred and eighteen pounds of saltpeter, without the insurer's written consent in the policy. To this paragraph the assured replies that saltpeter is an article in a wholesale grocer's stock; that it is usually kept for sale as a part of such stock; that they had on hand at the time the insurance was taken, and at the time of the fire, for sale to their customers, and for no other purpose, from one to three hundred pounds of saltpeter—that being a reasonable amount and no more than their trade demanded; and that the insurer knew the assured were carrying on the business of wholesale gro-

cers at the time the risk was taken. The insurer demurs to this paragraph of the answer.

§ 1296. "*All articles kept for sale in such stocks*" of goods construed; keeping saltpeter.

Does the written part of the policy, describing what was intended to be covered by the risk as "all articles kept for sale in such stocks," limit or modify the condition or warranty contained in the printed part, which prohibits the keeping of saltpeter? There would seem to be no difficulty in answering this question in the affirmative, if permission were not given in the written part of the policy to keep gunpowder, that being one of the prohibited articles. There is weight in the argument that, by expressly mentioning gunpowder, and excepting it from the condition, that it was to remain in force as to the other prohibited articles. On the other hand, the insurer knew at the time the risk was taken that it was insuring a stock of wholesale groceries, and in describing the property insured, language was employed broad enough to include all articles kept for sale in such stocks. Besides this, the demurrer admits that saltpeter is usually kept for sale by wholesale grocers, and that it was in fact an article in the stock of the assured at the time the risk was taken. The keeping of saltpeter, under these circumstances, should not be allowed to avoid the policy. The assured are entitled to a liberal construction of the contract, the written part of which embraces all articles belonging to a wholesale grocer's stock. Saltpeter, as already stated, belongs to such stocks; therefore, it may be said written permission was given in the policy to keep saltpeter.

§ 1297. *Conditions and warranties strictly construed against underwriter.*

Insurance companies, it is known, are in the habit of preparing their contracts to suit themselves, and where doubts arise in their construction it is not unfair to resolve these doubts against the insurer. Conditions and warranties in policies, especially where numerous and in fine print, should be strictly construed against the insurer, and if in reading the written part of the policy in suit, in connection with the condition or warranty which is relied on by the insurer, there be doubts as to whether it was intended to include saltpeter in the risk, the assured are entitled to the benefit of these doubts. *Franklin Ins. Co. v. Brock*, 57 Pa. St., 134; *Grant v. Lexington Fire Ins. Co.*, 5 Ind., 23; *Niagara Falls Ins. Co. v. De Graff*, 12 Mich., 124; *Elliott v. Hamilton Mut. Ins. Co.*, 13 Gray, 139; *Viele v. Germania Ins. Co.*, 26 Iowa, 9; *Hall v. Ins. Co. N. A.*, 58 N. Y., 292; *Citizens' Ins. Co. v. McLaughlin*, 53 Pa. St., 485; *Archer v. Merchants', etc., Ins. Co.*, 43 Mo., 432.

§ 1298. *Steinbach v. Ins. Co.*, 13 Wall., 183, explained.

The case of *Steinbach v. Ins. Co.*, 13 Wall., 183, is relied on in support of the demurrer. That was a suit on a policy against fire, and the subject of insurance was described in writing in the body of the policy as follows: "On his stock of fancy goods, toys, and other articles in his line of business, contained in the brick building situated, etc., and now in his occupancy as a German jobber and importer. Privileged to keep fire-crackers on sale." The premium paid was forty cents on the \$100. Among the second class of hazards, classed as hazardous, No. 2, were enumerated fire-crackers in packages, and it was stated that they added to the rate of premium ten cents on the \$100; and classed as especially hazardous were fire-works, which added fifty cents or more to the rate, and to be covered were to be especially written in the policy. The fire originated in fire-works which the assured had in his

store for sale, without written permission in the policy, and this being admitted he offered to prove on the trial "that fire-works constituted an article in the line of business of a German jobber and importer." The evidence was rejected, and the assured took the case to the supreme court on a writ of error, where it was affirmed. The assured insisted in this case that the language "other articles in his line of business as a German jobber and importer" covered fire-works. It was not claimed that fire-works were covered by the policy because they were an article in a stock of fancy goods and toys in the business of a German jobber and importer, but because they were an article in the line of Steinbach's business. If the business of importing and jobbing fancy goods and toys from Germany was a well-understood trade in well-known articles, like the business of wholesale grocers, Steinbach's business might embrace all or less than all the articles belonging to such a business.

In the case at bar saltpeter is claimed to be covered by the policy; not because it was an article in the stock and business of the assured, but because the subject insured was a stock of wholesale groceries; comprising all articles kept for sale in such stocks, one of which was saltpeter. I think the cases are distinguishable. And, further, fire-works were classed in *Steinbach v. Ins. Co.* as specially hazardous, and added fifty cents or more on the \$100 to the premium. This fact seems to have had weight with the supreme court. "They [fire-works] are among the goods described as specially hazardous," say the court in the brief opinion written by Chief Justice Chase, "and add fifty cents on the \$100 to the ordinary rate of insurance. It is impossible to think they are described by the general terms used in the policy. The insurance was at the ordinary rates." It does not appear from the policy in suit that any increased rate was expected for keeping saltpeter; and written permission being given to keep gunpowder — a much more explosive and dangerous substance than saltpeter — it would be unreasonable, if not unjust, to hold the policy void because the latter was kept. The demurrer is overruled.

WASHBURN v. MIAMI VALLEY INSURANCE COMPANY.

(Circuit Court for Ohio: 2 Flippin, 664-671. 1880.)

Opinion by SWAYNE, J.

STATEMENT OF FACTS.—The policy issued by the Miami Valley Insurance Company contains the following clauses, upon the first of which this controversy is understood to turn, so far as that company is concerned: "Provided, etc., that this company shall not be liable for loss, etc., by lightning, or explosion of any kind, including steam boilers, unless fire ensues, and then for the loss or damage by fire only." And the second clause to which I wish to refer is as follows: "Gunpowder, saltpeter, phosphorus, petroleum, naphtha, benzine, benzole, or benzine varnish, are positively prohibited from being deposited, stored, or kept in any building insured or containing property insured by this policy, unless by special consent, in writing, indorsed on this policy, naming each article separately; otherwise the insurance shall be void."

The policy issued by the Fidelity Fire Insurance Company contains the same clauses. They are as follows: "Or if the assured shall keep gunpowder, fire-works, nitro-glycerine, phosphorus, saltpeter, nitrate of soda, petroleum, naphtha, gasoline, benzine, benzole, or benzine varnish; to keep or use camphene, spirit gas, or any burning fluid or chemical oils, without written permission in this policy, then, and in every such case, this policy is void." Then follows

the clause upon which, as respects this company, the controversy turns. The exception is in these words: "The company shall not be liable, etc., for any loss caused by the explosion of gunpowder, or any explosive substance, nor explosion of any kind, unless fire ensues, and then for the loss or damage by fire only," etc.

The language of the policy issued by the Union Company, touching these exceptions, is as follows: "This company will not be liable for the loss or damage occasioned by the explosion of a steam-boiler, gunpowder, or any other explosive substance, except only such loss as shall result from fire that may ensue therefrom; nor shall the company be liable for any loss by fire, unless privilege shall have been given in the policy to keep such articles," etc.

§ 1299. "*Explosive substance*" construed.

That makes the case very peculiar as to the Union Company. Giving a literal view to the language of the second clause, which I have just read, the policy was void at the outset, and never had any validity, because there was in the mill from the first an explosive substance, to wit, flour dust, and there was no permit given in the policy to keep such substance.

Now, according to the theory contended for by the defense, the company never in legal effect insured the property which is named in the policy, and was known to have connected with it necessarily more or less of this explosive substance, and yet the company took the money of the assured, when it knew, or ought to have known, that according to the terms of its policy it had no validity whatever. Now, I cannot suppose that that was the intention of this company. The policy must be construed, like all other instruments in writing, in the light of surrounding circumstances; and I am willing to construe this particular "explosive substance" as not within the terms or meaning of the particular language of the policies upon that subject. I shall construe it as if the language was the same, or substantially the same, as that upon the subject in the other policies. But I do not see, if the microscopic eye of a special demurrer was applied, why the gentleman for the defense might not as well contend that this policy had no validity, as that it had no validity so far as the effect of the explosion is concerned in the results that followed. But, as I do not take that view of the subject, I shall not apply that principle. Now, certain remarks are to be made in the light of the clauses which have thus been read, construing the last one reasonably, in the light of the circumstances surrounding the parties when the contract was entered into, and which are material to be borne in mind.

§ 1300. The word "*kept*."

It will be observed that the companies are protected with respect to explosives, by making it fatal to the policies to keep them; the policies become void if such explosives are kept. Perhaps right here I might remark that that word "kept" must have a particular signification in this connection, and that it does not apply where explosives of a known fixed character, known to be such, were accidentally present in the structure insured; but it does apply where they were kept there knowingly, in violation of the terms which the policy contains with reference to them. That must have been the understanding or intention of the parties in reference to the peculiar substance flour dust, which is highly explosive, but which, as I have remarked, was necessarily present, and from which arose the genesis of the explosion out of which this controversy has arisen. The company had taken care to secure itself against the perils of explosion: *First*, by a comprehensive stipulation in the policy;

second, the exceptions referred to are named only in connection with *fires which they have produced*. That is the clause on which the controversy turns. And, by the way, the second clause I have read is the only clause to which counsel have referred. Nothing was said about the other provisions which I have read.

§ 1301. *Excepting losses caused by explosions, unless followed by fire, does not include in the exception losses in which fire caused the explosion.*

I repeat, explosives are named only in connection with fires which they have produced. There is nothing said about them in connection with fires which have produced them. The policies on that subject are wholly silent. Is not this somewhat remarkable if the construction contended for by the companies be correct? In that case would not the language of the context have naturally been that the company will not be liable for explosions, and will not be liable for fires which produce them, or fires which they have produced? The first may define the liability of the company, and the sentence I have just read is certainly important. Would not the policies have read "that they will not be liable for explosions caused by fires, or for fires caused by explosion?" I repeat, and it is a feature of great significance in the case, as it seems to me that where explosions are produced by fires — accidental fires — the policy is wholly silent. Now I am free to remark that it seems to me that this could hardly have been so if the intention of the parties had been as is contended for by the counsel for the defendants.

But, further, if it be suggested that this would leave the exception without any legal effect, I would say that there are several obvious answers. First, these clauses are frequently prepared by non-legal men, who do not know the legal effect of the language which they employ in such instruments, and I will add that these instruments go into the hands of individuals who know nothing of the legal effect of these special clauses which they contain. Again, if prepared by a legal hand, the writer may not have known, probably did not accurately know, the state of the law touching the subject to which the exception, and the exception within the exception here in question, relate. Again, there is nothing which in terms, and this is substantially what I have said already, withdraws the exception here in question from the clause of insurance, as it would be if the construction contended for by the plaintiff's counsel be sustained. There is nothing disclosed which tends to withdraw the subject of these exceptions (nothing in terms, there may be by implication) of the clause here in question from the general language and operation of the clause employed. They refer to fires which the explosion shall produce, and are wholly silent as to the fires which produce such explosions.

Again, insurance policies, like all other written contracts, are to be reasonably construed; yet, as with respect to all other written contracts, insurance policies are to be construed most strongly against the party making them, which, in this case, is the insurance company.

I deem it proper to advert for a moment to the case in 7 Wallace (Ins. Co. v. Tweed, 7 Wall., 44; §§ 1302-3, *infra*), which I did not fully understand at the argument. The exception was somewhat similar, and the fire happened in that case from an explosion, producing a fire at a distant point from the site of the insured property. A wind prevailed at the time and swept the fire a considerable distance, and the property insured and covered by the policy was destroyed by fire. The company was sued, and it defended on the ground that the case was covered by the exception, which was that the company

should not be liable for a fire produced by an explosion. That policy was at the opposite pole from the one here under consideration and the assured was defeated. He recovered nothing. No doubt he thought that very unreasonable, as it seems to me most persons would regard it. He intended, no doubt, to have his property protected by that policy and supposed it was protected. The supreme court of the United States held from principle that it was not.

It is very possible that the conditions of this clause (which were frequently brought to my attention, for I had a great deal to do with this head of the law, practically) had produced a good deal of dissatisfaction, and hence this clause was changed. If that policy had been the same in this particular as those under discussion here, then, irrespective of the question of explosion, the party would have been entitled to recover; but, the policy being different, the result was different. A change was made, probably having its origin in that case and others like it—a change was made to meet that difficulty, and hence it is, perhaps, we have these policies phrased as they are before us.

Now, to recur again to the proposition to which I adverted at the outset, to wit, that there is nothing here which in terms withdraws the protection against fire, although that fire should involve an explosion. It seems to me that there would have been language to that effect if such had been the intention of the parties. The intention of the statute constitutes the law; the intention of the law-makers constitutes the law; the language may be within the letter of the statute and not within its meaning, and the language may be within its meaning and not within its letter. That is a familiar proposition. If we can ascertain the intention and meaning of the parties here, that constitutes the contract which it is the object of the court to carry out. Now, there is another remark, perhaps rather hypercritical but proper in this connection to be made, and that is, according to the technical formality of the law of insurance this explosion cannot be recognized. It was a part of that fire—just as much a part of the fire, and admitted to be, as such, covered by the insurance, as if there had not been an explosion, by the general language, “insurance against fire.” If the exception had not been made it would have been considered (which was conceded at the argument) a part of the fire, and the policy would have been held, for the purpose of this view of the case, just as effectual as it regards the effects of the explosion produced by the fire, as the policy is now effectual with respect to fires produced by an explosion, upon which the language of the policy is express. Now, I think, under the circumstances of this case, that that view of the subject is entitled to very considerable consideration.

But there is another matter to be considered which has very great weight in the case. I am free to confess that, viewing this policy in its own light, I might doubt very much more than I do; but this subject has been litigated very fully before a very able and learned judge, a great lover of the authorities, and perhaps as much influenced by them as any judge to be found. I refer to the district judge of Michigan. *Washburn v. Union Fire Ins. Co.*, U. S. Cir. Court, E. D. Mich., Brown, J. (see *Detroit Post & Tribune* of Nov. 8, 1879). It seems he had no hesitation in coming to the conclusion that the insurers were liable under policies drawn like this, and for the purposes of this action identical with these in the cases before me. The same question was in several cases before the learned circuit judge of the Pennsylvania circuit (*Washburn v. Artisans' Ins. Co.*; *Same v. Penn. Ins. Co.*, U. S. Cir. Court, W. D. Penn., 9 Pittsb. L. J. (N. S.), 55, and, without the slightest doubt or hesi-

tation, he ruled in the same way in a case involving the same question. And they were afterwards before the district judge of this district (*Washburn v. Farmers' Ins. Co.*, U. S. Cir. Court, S. D. Ohio, 2 Fed. R., 304; *Washburn v. Western Ins. Co.*, U. S. Cir. Court, S. D. Ohio, October term, 1870, Swing, J.), and he ruled in the same way.

Now, I must say that, under these circumstances, upon a mere doubt, and technical criticism and objection, of the importance of those which have been urged upon my attention, I am not quite bold enough to overrule these adjudications. In my judgment they decide the question before me. I do not mean that the views of these gentlemen are in anywise conclusive—not at all, or that the same result would follow if a like adjudication had been made by one of my peers and brethren, or any number of them. But there is, doubtless, a moral binding force in the very indications to which I have adverted, which gives them a sufficient amount of gravity in my judgment, and rightfully gives it to them, to turn the scale of this case in favor of the plaintiff, and judgment will be rendered accordingly.

Judgment for plaintiff for amount of policies and interest.

INSURANCE COMPANY v. TWEED.

(7 Wallace, 44-53. 1868.)

ERROR to U. S. Circuit-Court, Eastern District of Louisiana.

STATEMENT OF FACTS.—Action on a fire policy, exempting the underwriter from liability in case of loss by *means* of any invasion, insurrection, riot, or civil commotion, or any military or usurped power, *explosion*, earthquake or hurricane. The policy covered baled cotton in the Alabama warehouse, Mobile. An explosion occurred in a warehouse upon other premises, resulting in fire, which finally burnt up the property in question, the fire being blown to the Alabama warehouse by the wind from still another building which had taken fire from the explosion. All these buildings were separate from each other.

Opinion by MR. JUSTICE MILLER, after considering certain matters of practice.

The only question to be decided in the case is, whether the fire which destroyed plaintiff's cotton happened or took place by means of the explosion; for if it did, the defendant is not liable by the express terms of the contract.

§ 1302. *Causa proxima.*

That the explosion was in some sense the cause of the fire is not denied, but it is claimed that its relation was too remote to bring the case within the exception of the policy. And we have had cited to us a general review of the doctrine of proximate and remote causes, as it has arisen and been decided in the courts in a great variety of cases. It would be an unprofitable labor to enter into an examination of these cases. If we could deduce from them the best possible expression of the rule, it would remain after all to decide each case largely upon the special facts belonging to it, and often upon the very nicest discriminations.

§ 1303. — *application of the rule; new cause.*

One of the most valuable of the *criteria* furnished us by these authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself

sufficient to stand as the cause of the misfortune, the other must be considered as too remote.

In the present case we think there is no such new cause. The explosion undoubtedly produced or set in operation the fire which burned the plaintiff's cotton. The fact that it was carried to the cotton by first burning another building supplies no new force or power which caused the burning. Nor can the accidental circumstance that the wind was blowing in a direction to favor the progress of the fire towards the warehouse be considered a new cause. That may have been the usual course of the breeze in that neighborhood. Its force may have been trifling. Its influence in producing the fire in the Alabama warehouse was too slight to be substituted for the explosion as the cause of the fire.

But there are other causes of fire mentioned in the exempting clause, and they throw light on the intent of the parties in reference to this one. If the fire had taken place by means of invasion, riot, insurrection, or civil commotion, earthquake, or hurricane, and by either of these means the Marshall warehouse had been first fired, and the fire had extended, as we have shown it did, to the Alabama warehouse, would the insurance company have been liable?

Could it be held as necessary to exemption that the persons engaged in riot or invasion must have actually placed the torch to the building insured, and that in such case if half the town had been burned down the company would have been liable for all the buildings insured, except the one first fired? Or if a hurricane or earthquake had started the fire, is the exemption limited in the same manner? These propositions cannot be sustained, and in establishing a principle applicable to fire originating by explosion, we must find one which is equally applicable under like circumstances to the other causes embraced in the same cause.

Without commenting further, we are clearly of opinion that the explosion was the cause of the fire in this case, within the meaning of the policy, and that the judgment of the circuit court must be reversed and a new trial granted.

BOON v. ÆTNA INSURANCE COMPANY.

(Circuit Court for Connecticut: 12 Blatchford, 24-35. 1874.)

Opinion by WOODRUFF, J.

STATEMENT OF FACTS.—The facts in this case are not doubtful or in dispute. The action is brought to recover from the defendant the amount of an insurance, against loss by fire, upon the goods of the plaintiffs, in their store in Glasgow, Missouri, in the sum of \$6,000. It is founded on a policy executed by the defendant, dated September 2, 1864, and the goods were destroyed by fire on the 15th of October, 1864, within the term of the insurance. The loss was sufficiently great to entitle the plaintiffs to recover, if the defendant is liable at all, the whole sum insured. The plaintiffs have complied with all the terms and conditions of the policy, by the payment of premium, furnishing proper preliminary proofs of loss, and compliance with all other requirements. The policy, however, contained the following express proviso annexed to the agreement of insurance, and in the body of the policy, namely: "Provided always, and it is hereby declared, that the company shall not be liable to make good any loss or damage by fire which may happen or take place by means of any invasion, insurrection, riot or civil commotion, or of any military or usurped power, or any loss by theft at or after a fire." The defense herein rests solely

on this proviso, and the facts which are claimed to bring the plaintiffs' loss within its operation, so as to exempt the defendant from liability under the policy.

At and before the time of the fire in question, the city of Glasgow, within which the said store of the plaintiffs was situated, was occupied as a military post by the military forces, and portion of the army of the United States, engaged in the civil war then, and for more than three years theretofore, prevailing between the government and the citizens of several southern states, who were in rebellion and seeking to establish an independent government under the name of The Confederate States of America. As such military post, the said city of Glasgow was made the place of deposit of military stores for the use of the army of the United States, which stores were in a building called the city hall of the said city of Glasgow, situated on the same street, on the same side of the street, and about one hundred and fifty feet distant from the plaintiffs' store, three buildings being located in the intervening space, not, however, in actual contact with either. Colonel Chester Harding, an officer of the United States government, and in command of the military forces of the United States, held the possession of the said city, and had lawful charge and control of the military stores aforesaid. On the said 15th of October, 1864, an armed force of the rebels, under military organization, surrounded and attacked the city at an early hour in the morning, and threw shot and shell into the town, penetrating some buildings and killing soldiers and citizens. The city was defended by Colonel Harding and the military forces, under his command, and battles between the loyal troops and the rebel forces continued for many hours. The citizens fled to places of security, and no civil government prevailed in the city. The rebel forces were superior in numbers, and, after a battle of several hours, drove the forces of the government from their position, compelled their surrender, and entered and occupied the said city. During the battle, and when the government troops had been driven from their exterior lines of defense, it became apparent to Colonel Harding that the city could not be successfully defended, and he thereupon, in order to prevent the said military stores from falling into the possession of the rebels, ordered Major Moore, one of the officers under his command, to destroy them. In obedience to that order to destroy the said stores, and having no other means of doing so, Major Moore set fire to the city hall, and thereby the said building with its contents was consumed. Without other interference, agency or instrumentality, the fire spread along the line of the street aforesaid to the building next adjacent to the city hall, and from building to building through two other intermediate buildings to the store of the plaintiffs, and destroyed the same, together with its contents, including the goods insured by the defendant's policy aforesaid. During this time and until after the fire had consumed such goods, the battle continued and no surrender had taken place, nor had the forces of the rebels, nor any part thereof, obtained possession of or entered the city.

Upon these facts, and in view of the before-mentioned proviso in the policy of insurance, the question arises: Is the defendant liable for the loss of the plaintiffs' goods, or does that proviso exempt the defendant from liability?

§ 1304. *Loss "by means of any invasion, insurrection, riot or civil commotion, or of any military or usurped power."*

That question depends upon the answer to be given to some other questions. That is to say: 1. It is insisted that within the just and proper meaning of the

proviso, the fire in question happened by means of the unlawful and rebellious attack upon the city, by forces acting in assumption of usurped power, endeavoring to capture the forces of the United States, obtain possession of territory in the lawful possession and power of the United States, in aid of the usurped rebel government, and forcibly accomplish its objects and designs; that the fire, and therefore the destruction of the goods, were a military necessity, created by such attack by an illegal armed force, and so they happened by means of the rebellion, and the employment of organized forces to effect the objects thereof, and the actual attempt of such forces to overcome the authority and government of the United States; that this was, therefore, the direct or proximate cause of the loss, or, in the words of the proviso in the policy, "the means" by which the fire destroying the goods "happened." We think that this reasoning cannot prevail. Fire destroyed the goods. The fire was not communicated to the goods, nor to the building from which it spread, by the rebel forces, nor by any person acting in co-operation with them; nor was it so communicated in any wise in furtherance of the rebellion, its purposes or objects. No act of the rebels, in any physical sense, caused the fire. There is nothing to justify the inference that the rebels would have destroyed the government stores, found in the city hall, by fire or otherwise, nor to justify the inference that the destruction of the goods or any loss thereof would have happened to the plaintiffs by the capture and the occupation of the city by the rebels. As matter of fact, there was no connection, direct or by necessary inference, between such destruction of the goods and the attack of the rebels, the capture of the United States forces and the occupation of the city.

But it is said that such attack by a superior armed force created a military necessity that the government stores should be destroyed, which destruction, in the manner in which alone it could be done, involved the destruction of the plaintiffs' goods, and so that destruction was the necessary result of the attack, and that the fire being thus the necessary result of the attack, it "happened by means" thereof. The fire was actually and voluntarily communicated to the city hall by the military authority of the United States. It is conceded on this trial that, in the exigency, it was a lawful exercise of such military authority. The power was discretionary, and if the circumstances were such as made it discreet—and no doubt they were,—such setting fire to the city hall may have been a duty. In saying that it was voluntary, we only mean that it was not a physical necessity, nor the physical result of any agency or act of the rebels, or of their unlawful or usurped power. It was physically independent of them, hostile to them, and an act which they not only did not commit, but would not have committed, and would, if possible, have prevented. What is called a military necessity was, therefore, nothing more than this: it constituted the motive, and no doubt the sufficient motive, to the burning of the city hall. This was not even an act of resistance to the attack upon the city. It was no part of the defense, nor a force employed in any wise in maintenance of the authority or possession of the government. It was done in an exercise of military discretion, for the incidental purpose of preventing an accession to the means of the rebels for maintaining their rebellion. The importance of preventing such an accession to their means furnished a motive, and, it may be conceded, a controlling motive, to the burning of the city hall, but that did not make the fire happen by *means* of anything done by them. In a certain sense it may be true that the city hall was set on fire by *reason* of

the attack upon the city by an armed force of rebels; but between that attack and the fire was interposed another actor who caused the fire, who set in operation the means by which it happened. An efficient and a sufficient cause of fire, and the means by which it happened, intervened between the acts of the rebels and the fire itself, and a cause or means without which, notwithstanding the acts of the rebels, the fire would not have happened at all. In the language of Mr. Justice Miller, in the supreme court of the United States, in *Insurance Company v. Tweed*, 7 Wall., 52, (§§ 1302-3, *supra*), "If a new force or power has intervened, of itself sufficient to stand as a cause of the misfortune, the other must be considered as too remote." That language was used in reference to a similar provision in a policy of insurance, and in aid of the inquiry by what "means" the fire happened. There, as in this case, there was, in some sense, another cause but for which the fire would not have happened at all; and the opinion shows that the existence of just such an influential cause is not enough to bring a case within the proviso. The facts here are much stronger than the reasoning there, in withdrawal of the case from the operation of the proviso, because, although the fire would not have happened but for the existence of such remote cause — the attack by the rebels — it is equally true that such remote cause would not have produced the fire at all. To apply the criterion suggested by Mr. Justice Miller, there was here the intervention of distinct, new, affirmative power and force, other than the acts of the rebels, not only sufficient but efficient, as the cause of the fire in the city hall, and the actual means by which it happened. We think, therefore, that it cannot be held, that, within the meaning of the proviso in question, the fire which destroyed the plaintiff's goods happened by means of the rebellion, or of anything done by the rebel forces.

§ 1305. *Causa proxima.*

2. An obvious inquiry is suggested by the facts stated — whether the setting on fire of the city hall was the cause of the loss, in such sense that, within the proviso, it was "the means" by which the fire happened, or whether that, also, was not the remote cause of the fire which destroyed the plaintiffs' goods. In our preceding discussion, we have assumed that the setting on fire of the city hall was the means of the fire to the plaintiffs' goods, within that proviso, unless the rebellion or the acts of the rebels should be held to be such means; and that, in this sense, the acts of the lawful military authorities of the United States were the proximate and efficient cause and means by which the fire happened, and of the destruction of those goods by fire. We do not find it necessary to discuss the question, what was the proximate and what was the remote cause of such destruction, under this head. The suggestion that the setting on fire of the city hall was only the remote cause, while the casual and incidental communication of the fire to the plaintiffs' store, from the burning building next adjacent thereto, was the proximate cause of the fire, and the means by which the fire happened, within the meaning of the said proviso, is not made by the counsel for either of the parties. The contrary is conceded, if not, in truth, insisted upon by both. The decision by the supreme court in *Insurance Company v. Tweed* was assumed by both to be decisive against such a suggestion. We are, therefore, not called upon to pursue that subject.

§ 1306. "*Military power.*" *History of use of the term.*

3. It remains to consider the claim of the defendant that the fire happened by means which exempt the company from liability, upon the ground that it

was caused by "military power," and was, therefore, within the very words of the proviso. It is insisted, by the plaintiffs, that the word "military," in the connection in which it is found in the proviso, does not mean the lawful military power of the government, acting lawfully in the performance of the proper duty of the government forces, whether engaged in hostile contest with an invading army, or in a forcible endeavor to suppress an internal rebellion. For reasons which seem to us convincing, we are of opinion that the word "military," in the proviso in question, has no reference to the lawful acts of the military forces of the government. Neither the reasons for the insertion of the proviso in policies of insurance against fire, nor the history of that insertion, nor any judicial decisions upon the meaning and purport of the proviso, nor the discussions had upon its construction, with special reference to the meaning of other terms employed therein, sustain the interpretation for which the defendant contends. It is true that the precise question, what is the import and legal effect of the word "military," does not appear to have been decided in any case to which our attention is called; and, had that proviso been now, for the first time, employed to exempt the defendant from a portion of the liability which the preceding general agreement for insurance imports, there would be much plausibility in the argument that the defendant intended not only to exclude liability for the consequences of an insurrection, invasion or rebellion, but for the plausible consequences of those violent and forcible means which may be necessary to repel or suppress it. And yet, if this were the intent, it may pertinently be asked, why was the exemption limited to the employment of military force, and not made to include the forcible or violent measures which municipal authorities or police organizations might find it necessary to employ to suppress a riot, insurrection or other civil commotion?

The proviso containing the words "military or usurped power" was inserted in policies as early as 1720, and the history of the subject as given in Ellis on Insurance, p. 42, etc.; Park on Insurance, p. 445, etc.; and Marshall on Insurance, p. 791, etc., shows that the occasion thereof was manifestly the liability to loss by fire caused by a foreign enemy and invasion. And the terms "military or usurped power" were used in reference to the existence of claims to the exercise of governmental authority enforced within the kingdom and constituting rebellion against the recognized government. The clause originally embraced no other terms than were apt to indicate the violence of enemies from abroad and of usurpation exercising governmental authority or rebellion sustained by organized forces within the kingdom. The exception as then introduced into policies read as follows: "No loss or damage by fire happening by an invasion, foreign enemy, or any military or usurped power whatsoever, will be made good by this company." The idea of interference with the peace and safety of the realm by organized force from abroad or rebellion rising to the proportions of actual or at least formal usurpation of governmental authority, whether more or less successful, and manifestly hostile to the lawful government, is indicated by this language. The experience of the country in those days of not infrequent invasion and rebellion, the result of disputes touching the right of the succession to the crown of England, gave occasion for the exception, and by suggesting its cause furnished also an explanation of its meaning. Foreign invading armies and the organized forces rallied, in whole or in part, within the kingdom to overturn the government or to enforce the alleged title of a claimant to the crown, usurping or endeavoring forcibly to usurp governmental authority, were in view. Reason for refus-

ing to become liable for losses caused by these forces, in either form, is found not only in helplessness and inability to resist them and the magnitude of the destruction they may effect, but in the want of recourse for indemnity to those who commit the violence. It is well and pertinently suggested that while on the one hand no one would think of obtaining insurance against the lawful acts of the government, so on the other an insurer would not think of excepting such lawful acts as a cause of the fire against which he insured. The citizen without insurance, and an insurer making insurance, if that contingency were contemplated, would regard his government as bound and presumptively always ready to indemnify against losses sustained by acts done in its own defense or in maintaining the authority of the laws. The subsequent extension of the proviso to "riot, insurrection and civil commotion," rather confirms than impairs this view of the meaning and intent of the original proviso; and these were held to import occasional local or temporary outbreaks or lawless violence, which, though temporarily destructive in their effects, did not rise to the proportions of organized rebellion against the government. The observations made by the court in the few early cases in which this proviso came under consideration (although any possible separate meaning of the word "military" is not suggested) indicate that the clause has reference to acts done in disregard, or in subversion, of lawful authority, and includes only such affirmative acts. *Drinkwater v. London Assurance Corp'n*, 2 Wilson, 363; *Langdale v. Mason*, referred to by the text-writers above cited. In the last named case Lord Mansfield used this significant language (cited in *Park on Insurance*, p. 446): "What is meant by military or usurped power? They are ambiguous; and they seem to have been the subject of a question and determination. They must mean rebellion, where the fire is made by authority; as, in the year 1745, the rebels came to Derby, and, if they had ordered any part of the town, or a single house, to be set on fire, that would have been by authority of a rebellion. That is the only distinction in the case—it must be by rebellion got to such a head, as to be under authority."

The term "military" is employed, in the proviso, in a meaning synonymous with the usurped power intended to be described, or as qualifying and explaining what was meant by "usurped power." It was in this view, and as a ground of distinguishing between the usurped power specified in the proviso and the power of a mob, that Mr. Justice Bathurst, in the case of *Drinkwater*, construed "usurped power" to mean, either an invasion by foreign enemies, to give laws and usurp the government thereof, or an internal force or rebellion, assuming the power of the government, by making laws and punishing for not obeying those laws. An "invasion" necessarily supposed organization and military power or force. So, of the words, "foreign enemy;" and, in the use of a phrase which should include, also, violence within the kingdom, viz., "military or usurped power," something in like manner hostile to or subversive of the laws and of lawful government, was intended as plainly as if the clause had been "or any other military or usurped power." That the terms used in the proviso have express application to force illegally employed and adverse to the government is indirectly but impliedly involved in the decision and opinion of the court in *The City Fire Ins. Co. v. Corlies*, 21 Wend., 367. The court deemed the meaning of the words "usurped power" long settled. The property there in question was destroyed by order of the mayor of the city of New York, for the purpose of arresting a conflagration. It

was claimed that this was usurpation of power and authority, in disregard of the law. The court deemed that if the mayor had no authority to do the act, the company was still liable, for that it was not a usurpation of the power of government, "against which the defendants intended to protect themselves." The case of *Sprull v. North Carolina Ins. Co.*, 1 Jones' N. Car. Law R., 126, tends strongly in the same direction; and, if an armed patrol may be deemed a military power, that case is especially pointed and significant. These considerations, and the significant fact that every other word used in this proviso to designate the means by which a fire may happen, for which the company will not be liable, expresses clearly and unequivocally what is unlawful, employed in disregard or in subversion of the laws or the government, furnish a strong case for the application of the maxim relied upon by the plaintiffs—*noscitur a sociis*. This maxim is not conclusive, but, in a case of doubt, and where like meaning will satisfy the provision, where there is no other clause or language hostile to the like interpretation, and especially where other considerations tend to support it, the maxim has especial force and significance. We think it not too much to say that most, if not all, intelligent readers of the proviso in question would at once declare that the word military therein was employed in a sense kindred to the other terms, and that it described an organization military in its form but unlawful and hostile to the government in its character and purpose.

§ 1307. *Words susceptible of different constructions.*

Again, it is a familiar rule in the construction of provisos and exceptions of this sort, made in qualification of the general positive agreement, that words susceptible of either construction should be taken most strongly against the speaker or party whose language is to be interpreted, and that the general and positive agreement should have effect, unless the exception clearly withdraws the case from its operation. This has especial force when the other considerations pertaining to the subject tend to the same result. To this it should be added, that it is the duty of an insurance company, seeking to limit the operation of its contract of insurance by special provisos or exceptions, to make such limitations in clear terms, and not leave the insured in a condition to be misled. The uncertainties arising from provisos, exceptions, qualifications and special conditions in or indorsed upon policies, have been often condemned, and such special modifications are justly characterized as traps to deceive and catch the unwary. An insured may reasonably be held entitled to rely on a construction favorable to himself, where the terms will rationally permit it. Where, as in this case, such construction gives a signification to a word *ejusdem generis* of all those with which it is found associated, and in harmony with the general character and purpose of the provision in which they are found, he is clearly entitled to insist upon such construction.

Our conclusion is that the plaintiffs are entitled to judgment, for the amount of the insurance, with interest thereon from the expiration of sixty days from the 2d of May, 1865, on which day it is admitted the preliminary proofs of loss were furnished to the defendant, that is to say, with interest from the 1st of July, 1865, and with costs.

[The case was now carried to the supreme court, where the decision below was reversed. *Insurance Co. v. Boon*, 5 Otto, 117-143. 1877.]

Opinion by MR. JUSTICE STRONG, who, after stating the view of the majority of the court, that the bill of exceptions and special findings of fact in the case were part of the record, proceeded thus:

Coming, then, to the merits of the case, the main question is whether the fire which destroyed the plaintiff's property "happened or took place by means of any invasion, insurrection, riot or civil commotion, or of any military or usurped power." If it did, the loss was excepted from the risk taken by the insurers.

§ 1308. *Destruction of property by lawful power may be a loss "by means of insurrection."*

The policy contains this express stipulation: "Provided always, and it is hereby declared, that the company shall not be liable to make good any loss or damage by fire which may happen or take place by means of any invasion, insurrection, riot or civil commotion, or of any military or usurped power, or any loss by theft at or after the fire." The general purpose of this proviso is clear enough, but there is controversy respecting the extent of the exemption made by it. It has been very strenuously argued that the words "military or usurped power" must be construed as meaning military *and* usurped power; that they do not refer to military power of the government, lawfully exercised, but to usurped military power, either that exerted by an invading foreign enemy, or by an internal armed force in rebellion, sufficient to supplant the laws of the land and displace the constituted authorities. There is, it must be admitted, considerable authority, and no less reason, in support of this interpretation. In our view of the present case, however, we are not called upon to affirm positively that such is the true meaning of the words in the connection in which they were used in the policy now under review; for, if it be conceded that it is, we are still of opinion that the fire which destroyed the premises of the plaintiffs below "happened," "took place," or occurred by means of a risk excepted in the policy. In other words, it was caused by invasion, and the usurped military power of a rebellion against the government of the United States, as the contracting parties understood the terms "invasion" and "military or usurped power."

§ 1309. *Construction of policies of insurance to be reasonable. Ambiguities.*

Policies of insurance, like other contracts, must receive a reasonable interpretation consonant with the apparent object and plain intent of the parties. This is entirely consistent with the rule that ambiguities should be construed most strongly against the underwriters, and most favorably to the assured. *Manhattan Ins. Co. v. Stein*, 5 Bush (Ky.), 652. It was well said recently by the New York court of appeals, that, in construing contracts, words must have the sense in which the parties understood them. And, to understand them as the parties understood them, the nature of the contract, the objects to be attained, and all the circumstances must be considered. *Cushman v. United States Life Ins. Co.*, 6 Law Jour., p. 601.

§ 1310. *Application of foregoing principles.*

Apply, now, these principles to the present case. The policy was issued in 1864, while the country was convulsed by a civil war. The property insured was in a state bordering upon sections, the people of which were in insurrection against the general government, and confederated as a usurping power. The state had been the theater of civil commotion and of armed invasion during the struggle between the confederated states and the federal government, a struggle not then ended. It was quite possible that new inva-

sions might be made and new destruction of property might be caused by the military or usurped power then in rebellion. It is evident that the insurers were willing to assume only ordinary risks, and that, to guard against more extended liability, the excepting clause was introduced into the policy. The provision must have been intended to be a protection to the company against extraordinary risks, attendant upon the condition of things then existing. Invasion involved, of necessity, resistance by the constituted authorities of the government, and the employment of its military force. Destruction of property, by fire was quite as likely to be caused by resistance to the usurping the military power as by the direct action of that power itself. This must have been foreseen and considered when the insurance was effected. It is difficult, therefore, to believe that the parties intended to confine the stipulated exemption within the limits to which the assured would now confine it. That the destruction of the plaintiff's property by fire was a consequence of the attack of the organized rebel military forces upon the forces of the United States holding possession of Glasgow, the special finding of facts clearly shows. Glasgow was a military post, and a place of deposit for the military stores of the United States, which were in the city hall. The city was guarded and defended by a military force under the command of Colonel Harding.

At an early hour of the morning of the 15th day of October, 1864, an armed force of the rebels, under military organization, surrounded and attacked the city and threw shot and shell into it, penetrating some buildings, and one thereof penetrating the store of the plaintiffs, but without setting fire thereto or causing any fire therein, and some of the shell killing soldiers and citizens. The city was defended by Colonel Harding and the military forces under his command, and a battle between the loyal troops and the rebel forces continued for many hours. The citizens fled to places of security, and no civil government prevailed in the city. The rebel forces were superior in number, and drove the forces of the government from their position, compelled their surrender, and entered and occupied the city.

During the battle, and when the government troops had been driven from their exterior lines of defense, it became apparent to Colonel Harding that the city could not be successfully defended, and he thereupon, in order to prevent the said military stores from falling into the possession of the rebel forces, ordered Major Moore, one of the officers under his command, to destroy them.

In obedience to this order to destroy the said stores, and having no other means of doing so, Major Moore set fire to the city hall, and thereby the said building, with its contents, was consumed. Without other interference, agency or instrumentality, the fire spread along the line of the street aforesaid, to the building next adjacent to the city hall, and from building to building through two intermediate buildings, to the store of the plaintiffs, and destroyed the same, together with its contents, including the goods insured by the defendant's policy aforesaid. During this time, and until after the fire had consumed such goods, the battle continued, and no surrender had taken place, nor had the forces of the rebels, nor any part thereof, obtained the possession of or entered the city.

§ 1311. *Causa proxima.*

In view of this state of facts found by the court, the inquiry is whether the rebel invasion or the usurping military force of power was the predominating and operative cause of the fire. The question is not what cause was nearest in time or place to the catastrophe. That is not the meaning of the maxim *causa proxima, non remota, spectatur.*

§ 1812. — *authorities reviewed.*

The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster. A careful consideration of the authorities will vindicate this rule. Mr. Phillips, in his work on Insurance, sec. 1097, in speaking of a *nisi prius* case of a vessel burnt by the master and crew, to prevent its falling into the hands of the enemy (*Gordon v. Rimmington*, 1 Camp., 123), says the "*maxim causa proxima spectatur* affords no help in these cases, but is, in fact, fallacious; for if two causes conspire, and one must be chosen, the more scientific inquiry seems to be whether one is not the efficient cause and the other merely instrumental or merely incidental, and not which is nearer in place of time to the consummation of the catastrophe." And again, in section 1132: "In case of the concurrence of different causes, to one of which it is necessary to attribute the loss, it is to be attributed to the efficient predominating peril, whether it is or is not in activity at the consummation of the disaster." In *Brady v. Northwestern Ins. Co.*, 11 Mich., 425, Martin, C. J., in delivering the opinion of the court, said: "That which is the actual cause of the loss, whether operating directly or by putting intervening agencies, the operation of which could not be reasonably avoided, in motion, by which the loss is produced, is the cause to which such loss should be attributed." In *St. John v. American Mutual Ins. Co.*, 11 N. Y., 519, the insurance was against fire, but the policy exempted the insurers from any loss occasioned by the explosion of a steam-boiler. A fire occurred, caused by an explosion, which destroyed the insured property. The court, regarding the explosion, and not the fire, as the predominating cause of the loss, held the insurers not liable. Decisions are numerous to the same effect. Policies of insurance do not protect an assured against his voluntary destruction of the thing insured. Yet in *Gordon v. Rimmington*, *supra*, it was held that when the captain of a ship, insured against fire, burned her to prevent her falling into the hands of the enemy, it was a loss by fire within the meaning of the policy. It was because the fire was caused by the public enemy. The act of the captain was the nearest cause in time, but the danger of capture by the public enemy was regarded as the dominating cause. *Vide* also *Emerigon*, tom. i, p. 434. And we find the same principle followed in common practice. Often, in case of a fire, much of the destruction is caused by water applied in efforts to extinguish the flames. Yet it is not doubted all that destruction is caused by the fire, and insurers against fire are held liable for it. In *Lynd v. Tynsboro'*, 11 Cush. (Mass.), 563, where it appeared that a traveler had been injured by leaping from his carriage, exercising ordinary care and prudence, in consequence of a near approach to a defect in a highway, the town was held liable, though the carriage did not come to the defect. The defect was regarded as the actual, the dominating cause. And in this court similar doctrine has been asserted (*Insurance Company v. Tweed*, 7 Wall., 44; §§ 1302-3, *supra*), the principle of which case, we think, should rule the present. There it was, in effect, ruled that the efficient cause, the one that set others in motion, is the cause to which the loss is to be attributed, though the other causes may follow it and operate more immediately in producing the disaster.

In *Butler v. Wildman*, 3 B. & A., 398, may be found a case where the cap-

tain of a Spanish ship, in order to prevent a quantity of Spanish dollars from falling into the hands of an enemy by whom he was about to be attacked, threw them into the sea. The suit was upon a policy insuring the dollars, and judgment was given for the plaintiff. Bayley, J., said: "It was the duty of the master to prevent anything which could strengthen the hands of the enemy from falling into their possession. Now, as money would strengthen the enemy, it was the duty of the master to throw it overboard; and the sacrifice of the money was, therefore, *ex justa causa*. It seems to me, therefore, this is a loss by jettison. But it is not a loss by jettison; it is a loss by enemies. It clearly falls within the principle stated by Emerigon, in the case of the destruction of a ship by fire; and I think the enemy was the proximate cause of the loss." Holroyd, J., said, "It seemed to him it was a loss by enemies, for the meditated attack was the direct cause of the loss." A similar doctrine was asserted in *Barton v. The Home Ins. Co.*, 42 Mo., 156; and in *Marcy v. Merchants' Mutual Ins. Co.*, 19 La. Ann., 388. It is a doctrine resting upon reason, and in accord with the common understanding of men. Applying it to the facts found in the present case, the conclusion is inevitable, that the fire which caused the destruction of the plaintiffs' property happened or took place, not merely in consequence of, but by means of, the rebel invasion and military or usurped power. The fire occurred while the attack was in progress, and when it was about being successful. The attack, as a cause, never ceased to operate until the loss was complete. It was the *causa causans* which set in operation every agency that contributed to the destruction. It created the military necessity for the destruction of the military stores in the city hall, and made it the duty of the commanding officer of the federal forces to destroy them. His act, therefore, in setting fire to the city hall, was directly in the line of the force set in motion by the usurping power, and what that power must have anticipated as a consequence of its action. It cannot be said that was not anticipated which military necessity recognized. And the insurers and the assured must have looked for such action by the federal forces as a probable and reasonable consequence of an overpowering attack upon the city by an invading rebellious force. Having excepted from the risk undertaken responsibility for such an attack, they excepted with it responsibility for the consequences reasonably to be anticipated from it.

The court below regarded the action of the United States military authorities as a sufficient cause intervening between the rebel attack and the destruction of the plaintiffs' property, and therefore held it to be the responsible proximate cause. With this we cannot concur.

The proximate cause, as we have seen, is the dominant cause, not the one which is incidental to that cause, its mere instrument, though the latter may be nearest in place and time to the loss. In *Milwaukee & St. Paul R'y Co. v. Kellogg*, 94 U. S., 469, we said, in considering what is the proximate and what the remote cause of an injury, "the inquiry must always be whether there was any intermediate cause *disconnected from the primary fault*, and self-operating, which produced the injury." In the present case the burning of the city hall and the spread of the fire afterwards was not a new and *independent* cause of loss. On the contrary it was an incident, a necessary incident and consequence of the hostile rebel attack on the town,—a military necessity caused by the attack. It was one of a continuous chain of events brought into being by the usurped military power,—events so linked together as to form one continuous whole. The case is, therefore, clearly within the doctrine

asserted by Emerigon, and held in *Butler v. Wildman* and in the other cases we have cited. Hence it must be concluded that the fire which destroyed the plaintiffs' property took place by means of an invasion, or military or usurped power, and that it was excepted from the risk undertaken by the insurers.

Judgment reversed and record remitted, with instructions to enter judgment for the defendant below.

JUSTICES CLIFFORD, MILLER and FIELD dissented, in regard to the question whether the merits of the case were, under the bill of exceptions, properly before the court.

§ 1818. It is not necessary to negative exceptions in the policy from the risk, such as fraud, design, etc., in the affidavit of loss made by the assured. The exceptions are matter of defense, in the absence of stipulation making them anything else. *Catlin v. Springfield Ins. Co.*, 1 Sumn., 434 (§§ 1435-42).

§ 1814. Gunpowder, saltpeter, etc.—If insurance companies do not mean to take risks on property where gunpowder, saltpeter, and the like substances are kept, even for ordinary use, they should declare their intention in terms which cannot admit of controversy. *Insurance Co. v. Slaughter*,* 12 Wall., 404.

§ 1815. A construction of a clause which would prohibit altogether the keeping of saltpeter, not a dangerous substance, and permit the keeping of a barrel of camphene and burning fluid, should not be adopted unless the language require it. *Ibid.*

§ 1816. Explosion.—A policy of insurance upon a mill, machinery, etc., insured the plaintiff against loss or damage by fire, provided "that the defendant shall not be liable for any loss or damage caused by explosion unless fire ensue, and then for the loss and damage by fire only." The mill having been destroyed by an explosion, the judge instructed the jury that if a fire existed in the mill and that fire produced an explosion, the fire would be the proximate cause of the loss. *Washburn v. Farmers' Ins. Co.*,* 2 Fed. R., 304.

§ 1817. Keeping explosives.—A policy of insurance contained the following provisions: "If in said premises there be kept gunpowder, fire-works, nitro-glycerine, phosphorus, saltpeter, nitrate of soda, petroleum, naphtha, gasoline, benzine, benzole, or benzine varnish, or there be kept or used therein camphene, spirit gas, or any burning fluid, or any chemical oils, without written permission in this policy, this policy shall become void." Held, that the keeping of naphtha being forbidden by name, it was presumably not intended to be included among the articles forbidden to be kept in the second description; and not being included among the articles in the second description, it is not forbidden to be used if the case does not involve the keeping within the meaning of the word "kept" in the first description. Held, further, that the use of kerosene or naphtha to light premises, or its presence or burning in lamps therein used for lighting the same, cannot be considered as a keeping of naphtha in the sense of the word "kept" in the first description. *Putnam v. Commonwealth Ins. Co.*, 18 Blatch., 368 (§§ 1874-78).

§ 1818. Neither naphtha nor kerosene is camphene or spirit gas, or a chemical oil, or within the expression "any burning fluid." *Ibid.*

VII. ARSON.

SUMMARY—Evidence to establish, § 1819.—*Husband and wife*, § 1820.

§ 1819. The defense to an action upon a fire insurance policy upon a building was arson. The court instructed the jury that it was not necessary for the defendant to show the fact beyond all doubt, but that they should be clearly satisfied of the truth of the charge. *Scott v. Insurance Co.*, §§ 1821-23.

§ 1820. The property insured in this case was the sole and separate estate of a married woman under the laws of Rhode Island. Evidence was offered to show that her husband, in her absence, and without her complicity, wilfully set fire to the same. Held, inadmissible. *Perry v. Mechanics' Ins. Co.*, §§ 1824-25.

[NOTE.—See §§ 1826-1829.]

SCOTT v. HOME INSURANCE COMPANY.

(Circuit Court for Missouri: 1 Dillon, 106-108. 1870.)

Action on a policy of fire insurance. The defense charged that plaintiffs burned the property.

Charge by DILLON, J.

The questions of fact specially submitted to you require, at the hands of the court, a statement of the rules of law applicable to the decision of such questions. The second interrogatory requires you to find "whether the plaintiffs, or either of them, caused, procured, planned or instigated the burning, or whether either one of them set fire to the building, consented to, or connived at the burning?" The charge of wilful burning is made by defendants, and must be proved by them.

§ 1321. *Reasonable doubt.*

In the trial of ordinary civil suits like the present, the jury determine the issues upon what is called the weight or preponderance of evidence. If the evidence preponderates in favor of the plaintiff, he is entitled to a verdict, though the evidence may not be so strong as to exclude all reasonable doubt. So if the balance is in favor of the defendant, the finding should be for him, although the jury are not convinced beyond all possible or even beyond all reasonable question. This is the ordinary rule in civil actions. In criminal cases, where the United States or the government is plaintiff, the rule is different, and no more weight of evidence is adequate to warrant a verdict of guilty unless it be sufficient to exclude all reasonable doubt.

One of the issues submitted requires you to find whether the plaintiffs set fire, or caused fire to be set, to the insured property; and it becomes the duty of the court to instruct you respecting the degree of proof essential to enable you to find that issue against the plaintiffs, and in favor of the insurance company.

§ 1322. *Charge of arson by underwriter must be clearly proved.*

1. The court instructs you that it is not necessary that the degree of proof should be the same as if the plaintiffs were on trial under an indictment for wilfully burning the property to defraud the insurance companies. On the contrary, as between the rule in criminal and the rule in civil cases, as above defined, it is the rule in civil cases that is to be your guide in this case. But the charge is a grave one. The act charged is one which men in general will not commit, but of which men are sometimes guilty; in view of which the court instructs you that in order to justify you in finding that the plaintiffs themselves burned, or caused the property to be burned, the legal evidence, taken altogether, must be such as *clearly satisfies* you of the truth of the proposition. It need not be such as to exclude all doubt, but it should be such as to satisfy your minds and judgment that they did, or caused or procured the act in question to be done. On this point the decided cases are conflicting, but the foregoing seems to the court to express the sound and true rule of law on the subject.

§ 1323. *Extorted confessions to be disregarded.*

2. As to the question whether any or what weight should be given by you to the confessions in evidence, the court instructs you that any confessions extorted from either of the plaintiffs are to be entirely disregarded. It is a free and voluntary confession only that should be considered by you. It should be observed, however, that in a case like the present, confessions made from

hope of personal benefit, unaccompanied by apprehensions of danger or duress, and not obtained by promises, are competent evidence, and should be weighed by you with a view of ascertaining the exact truth.

In your deliberations you will bear in mind the distinction between the evidence outside of the confessions, and the confessions themselves. Though you should arrive at the conclusion to disregard all confessions, yet if evidence outside of the confessions satisfies your mind of the truth of any matter in issue, you will find accordingly. You are the exclusive judges of the weight of evidence. You may regard or disregard portions or all of the testimony given by any witness, attribute little or great weight to the whole, or such portions as you may regard; in fine, deal in your deliberations with the testimony as you may deem proper, always bearing in mind, however, the object, arriving at the truth of the matters submitted to you. (Verdict for defendants.)

TREAT and KREKEL, JJ., concurred.

PERRY v. MECHANICS' MUTUAL INSURANCE COMPANY.

(Circuit Court for Rhode Island: 11 Federal Reporter, 485-487. 1889.)

The facts are stated in the opinion.

Opinion by LOWELL, J.

This case involves less than \$5,000, and we have therefore carefully examined the defendant's exceptions to the rulings and charge of the presiding judge.

§ 1824. *Evidence of firing wife's separate property by the husband inadmissible in a suit for insurance.*

The property insured was the sole and separate estate of the wife, and the first exception is to the refusal to admit evidence tending to show that the husband, in his wife's absence, and without her complicity, wilfully set fire to the buildings. In this ruling we find no error. The title of the wife was held under chapter 152 of the General Statutes of Rhode Island, which we have discussed in the case against the Faneuil Hall Ins. Co. (11 Fed. R., 482; §§ 1227-28, *supra*). The husband has a revocable agency to collect rents and profits of his wife's estate until she chooses to revoke it, and he has a vested remainder for life in her realty if children have been born alive. *In re* The Voting Laws, 12 R. I., 586. He has no power to effect her title by any act or neglect, and we think it would be contrary to the whole intent of the statute to hold her responsible for his criminal conduct.

If this money is recovered it will belong exclusively to the wife, and a trustee may be appointed at any time to protect it from the husband. It is true that until such appointment the statute requires him to join in the action, and as the action survives, by the words of the statute, it is possible that upon the death of the wife, before a recovery was had, the defendants might avail of this defense against the husband. But it is too narrow a view of the subject to make the defense depend upon the joinder of the husband in the suit.

It is argued that the wilful destruction of the property by any tenant or agent in lawful occupation or charge of the premises will defeat the action; but authority is not furnished for a statement so general. In the absence of special provisions in the contract the liability of the principal must depend upon the character of the agency. If the statute has made the husband a stranger to his wife's property during her life, excepting as to a veto upon her

conveyances, we cannot admit that he has the power to destroy her house and thereby vitiate her insurance.

§ 1325. *Overvaluation.*

The remaining exception relates to the defense of overvaluation. There was much evidence on both sides concerning the cost and the value of the building insured. The agent of the company, who has been in the business for thirty years, testified that he examined the property and formed his judgment about it. And the judge charged that if the agent took the whole responsibility upon himself, and was not induced to fix the amount of insurance by the representations or acquiescence of the assured, the company were bound to pay the amount stated in the policy. He defines his meaning of acquiescence to be a refusal to answer a question, or in any other way deceiving or misleading the agent, and refused to rule that acquiescence might also be, if in any way Perry allowed the agent to be deceived as to the value of the property, or if he knew that the agent was putting on an amount of insurance substantially greater than the value of the property.

The ruling was sound. Whether the learned judge used the word "acquiescence" in its ordinary sense or not is unimportant. The word is not in the policy, and all that he was to do was to lay down the law correctly for the guidance of the jury. It has been decided, upon reasons which are entirely satisfactory, that if the valuation is agreed on between the parties fairly and without deception, it is conclusive upon both. *Ins. Co. of N. A. v. McDowell*, 50 Ill., 120; *Fuller v. Boston Ins. Co.*, 4 Metc., 206; *Trull v. Roxbury Ins. Co.*, 3 Cush., 263. The argument for the defense assumes that value is a simple fact of observation, like the existence of a fire-escape, and that it was a fraud on the assured to permit the agent to estimate the property higher than he himself did. If it is a fraud in a seller to permit one to buy his goods for more than he thinks they are worth, or for the buyer to offer less than he thinks them worth, no doubt the argument is sound; otherwise not. The facts were all left to the jury.

The cases above cited decide the point that the recovery is to be for the value at the time of the loss. There was no offer to prove a depreciation since the policy was issued, and these decisions make the valuation conclusive in such a case if the amount be recovered, in case of a total loss, as well as conclusive that there was no overvaluation.

Judgment on the verdict.

§ 1326. *Evidence.*—If the defense of the underwriter is arson, he need only show the fact by clearly preponderating evidence. *Mack v. Lancashire Ins. Co.*, * 2 McC., 211.

§ 1327. *Same.*—In an action on a policy of insurance against fire, where it is charged that the insured was guilty of burning the building, the rule of civil cases, in regard to proof, is to be the guide. But the evidence must be such as clearly satisfies the jury of the truth of the charge. *Scott v. Home Ins. Co.*, 1 Dill., 105.

§ 1328. Confessions extorted from the plaintiff are to be entirely disregarded; only a free and voluntary confession should be considered. *Ibid.*

§ 1329. Acquittal of the assured in a criminal prosecution for arson is not evidence in his favor in an action upon an insurance policy on the building burned, to which the defense of arson is raised. *Sibley v. St. Paul Ins. Co.*, * 9 Biss., 31.

VIII. INCREASE OF RISK.

SUMMARY — *Repairs*, §§ 1330, 1331.

§ 1330. It became necessary to put a new boiler into a woolen mill insured against loss by fire. The doing of the work, which required the erection of various structures, did not in-

crease the existing risk. A loss by fire occurred, but not by reason of such work. *Held*, that the insurance was not rendered invalid, though the new boiler was in a different position and somewhat larger than the old one. *James v. Lycoming Ins. Co.*, §§ 1332-40.

§ 1331. A fire insurance policy upon a woolen mill contained a provision relating to "builder's risk," declaring that the working of carpenters, roofers and other mechanics in building, altering or repairing the premises insured would vitiate the same. *Held*, that the necessary work required for the substitution of a new boiler in the mill in place of the old one which had been cracked, when such work did not increase the risk, and was completed before, and had nothing to do with the loss, did not fall within the provision. Such a provision, whether a condition subsequent or a promissory warranty, need not be literally complied with. *Ibid*.

[NOTE.—See §§ 1341-1350.]

JAMES v. LYCOMING INSURANCE COMPANY.

(Circuit Court for Massachusetts: 4 Clifford, 272-291. 1874.)

STATEMENT OF FACTS.—Defendant insured plaintiff's woolen mill, machinery, etc., which were burnt in January, 1872. At the date of the policy the building contained a boiler which was afterwards found to be cracked, and was replaced by another, somewhat larger and in a different position. The repairs required the erection of various structures, but did not increase the existing risk. There was a condition called "builder's risk" in the policy, the effect of which is stated in the opinion. It was contended both that this condition was broken, and that the changes involved and made in the repairs avoided the policy.

Opinion by CLIFFORD, J.

Viewed in the light of the facts disclosed in his several propositions, it is contended by the plaintiff that he is entitled to recover the whole amount of the loss. Two principal questions arise in the case, as follows: 1. Whether the facts as agreed show that by the work done on the premises in taking out the old boiler and putting in a new one, and in building the brick chimney and fire-place, and in erecting the described structure for the purpose mentioned, and in using the steam-engine as auxiliary to the deficient water power, the policy was rendered null and void, irrespective of the condition denominated the builder's risk. 2. Whether the condition embodied in the policy, called the "builder's risk," renders the policy null and void in view of the work done on the premises by the insured, and the means adopted by them to accomplish the same, as set forth in the annexed statement, unless permission is indorsed in writing on the policy for the purpose. The condition denominated "builder's risk" is that the working of carpenters, roofers, tin-smiths, gas-fitters, plumbers or other mechanics, in building, altering or repairing the premises named in the policy, will vitiate the same, except in dwelling-houses, where five days are allowed, without notice, in any one year, for incidental repairs.

RESTATEMENT OF FACTS.—Properly arranged, the several propositions mentioned show the following facts, which are very material to be considered in deciding both of the questions presented for determination: That the boiler and chimney were cracked and in a dangerous condition; that the safety of the property insured required that both should be repaired or that new ones should be put in their place; that steam was used in the premises both for heating the same and for washing wool; that the quantity of steam was not increased by replacing the old cracked boiler with a new one of sound construction; that the new structure erected to cover the new boiler, the fire-place, and the man who feeds the boiler, was reasonable, necessary and proper for that purpose; that all the work had been completed several months before the

fire occurred; that the work did not interrupt the use of the mill while it was being done, and that the fire was in no respect attributable to the change made in the premises, nor to the work that was done; and that the risk was not increased either by the change made or by the work done. Several other questions were discussed at the bar, but the opinion of the court will be limited to the two questions presented in the agreed statement of facts, without stopping to inquire what the decision of the court would be if the facts were different.

Repairs in this case became indispensably necessary to remedy defects in the premises and the machinery, which endangered the safety of the whole property insured; and the agreed facts show that the repairs made did not increase the risk, and they negative every possible ground of inference that the fire was in any respect attributable to the changes made in the premises or to the work that was done in executing the repairs; such an inference cannot be made, as the agreed statement expressly negatives any such theory, and shows that the work was completed several months before the fire occurred. Insurers know, as well as the insured, that such a building and its operative machinery are liable to wear out or to get out of repair, and that it is for the interest of the insurer as well as of the insured that defects which endanger the safety of the property insured, when discovered, should be repaired so as to remove the danger of loss.

§ 1332. *Necessary repairs not increasing risk may be made.*

Old fixtures and old machinery, under such circumstances, may be fully repaired; or if an old chimney or an old boiler has become so defective that good judgment and common prudence would dictate that one or both should be replaced with new, it is entirely competent for the insured to remedy the defects and remove the danger to the safety of the premises in that way; nor can it make any difference that the new boiler is a horizontal one instead of an upright one, nor that it is a few feet longer than the one in prior use, unless it appears that the change increases the risk or is more likely to occasion loss by the described perils. Attempt is made in argument to maintain that the structure erected to cover the projecting end of the new boiler, and the fire-place, and the man who feeds the boiler, is a greater change in the premises than the law of insurance will allow; but the agreed statement affords a complete and decisive answer to that suggestion, as it shows that the changes made did not increase the risk, and that the structure erected was reasonable, necessary and proper for the purpose. Unequivocal support to that view is found in the recent decisions of the courts in England, which show conclusively that the first defense set up by the underwriters cannot prevail. *Stokes v. Cox*, 1 Hurlst. & N., 540.

Commenced as the suit in that case was, in the court of exchequer, it is necessary to refer to the original case in order to understand the full force of the decision in the appellate court. Same Case, 1 Hurlst. & N., 320. Insurance was effected in that case on a range of buildings of three stories, all communicating, comprising offices, warehouses, curriers' shops, and drying-rooms, having a stock of oil and tallow deposited therein, a part of the lower story being used as a stable, coach-house, and boiler, and the policy contained the words, "no steam-engine employed on the premises, the steam from the boiler being used for heating water and warming the shops;" that the process of melting tallow by steam in the boiler-house, and the use of two pipe stoves in the building are hereby allowed, but it is warranted that

no oil be boiled, nor any process of japanning leather be carried on therein nor in any building adjoining thereto.

Four kinds of insurances were described in the policy, to wit: common, hazardous, doubly hazardous, and special risks; and the policy stated that when insurances deemed special risks are proposed, the most particular specifications of the property and all the circumstances attending the same will be required, and that special risks must be particularized on the policy to render the same valid or in force. Certain conditions were indorsed on the policy, one of which provided that if, after the insurance shall have been effected, the risk shall be increased by any alteration of the materials composing the building, or by the erection of any stove, "coalkel," kiln, furnace, or the like, the introduction of any hazardous communication, or by any other alteration of circumstances, and the particulars of the same shall not be indorsed on the policy, and a proportionate higher premium paid if required, such insurance shall be of no force. After the policy was effected, which was for a special risk, the plaintiff, without notice to the defendants, erected in the stable the machinery of a steam-engine, which was supplied by steam from the boiler mentioned in the policy, but the jury found that the risk was in no way increased. Subsequently, the premises were destroyed by an accidental fire. Creswell, J., presided at the trial, and he directed a verdict for the plaintiff, reserving leave to the defendants to move to enter a nonsuit. Accordingly, the defendants obtained a rule *nisi*, and the parties were heard before the chief baron and two of his associates, when the rule was made absolute, one of the associate justices dissenting. Whereupon the original plaintiffs removed the cause by appeal into the exchequer chamber, and the parties were there fully heard, and the appellate court unanimously reversed the judgment rendered by the court of exchequer, and directed that a verdict be entered for the plaintiffs. Cockburn, C. J., gave the opinion of the appellate court that the insured in such a case was not bound to give notice to the insurance company of the alteration of circumstances unless it appeared that the change made increased the risk, which was negatived by the finding of the jury. Exactly the same rule was applied by the court of exchequer, in a subsequent case, where they refer to the final decision in the former case with approbation; and that rule, it is believed, is universally adopted and applied by the courts of that country. *Baxendale v. Harvey*, 4 Hurlst. & N., 444.

§ 1333. *The "builder's risk."*

Suppose the rule is so when the facts are tested by the general law of insurance, still it is contended by the defendants that the evidence as to the work done in taking out the old boiler and putting in the new one, and in building the brick chimney and the fire-place, and in erecting the described structure to cover the projecting end of the boiler and the fire-place, and to afford shelter to the attendant, and in using the steam as an auxiliary motive power, render the policy null and void as in violation of the condition denominated "builder's risk." Such a condition, however, must receive a reasonable construction in view of the agreed facts in the case, and that construction must be one not repugnant to the nature and purpose of the contract, nor one inconsistent with the due and customary use and enjoyment of the property. Parties, it is true, may make their own contract, but courts of justice, in all cases except where the language employed is so explicit and unambiguous that it must be understood that the words speak their own interpretation,

may give the language a reasonable construction to effect the intention of the parties as collected from the whole instrument, the subject-matter, and the surrounding circumstances. Of course, the province of construction is limited to the language employed, as applied to the subject-matter and the surrounding circumstances, contemporaneous with the instrument; but courts of justice are not denied the same light and information the parties enjoyed when the contract was executed, and for that purpose they may acquaint themselves with the persons and circumstances that are the subjects of the stipulations in the written instrument, and are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described. *Shore v. Wilson*, 9 Clark & F., 570; *Clayton v. Grayson*, 4 Nev. & M., 602; *Add. Con.*, 846.

Most of the agreed facts are as material in considering the present question as in considering the question just decided, of which the following are the most important: 1. That the risk was not increased either by the changes made in the premises or by the work done. 2. That the fire was in no respect attributable to the changes, or to the work, or the subsequent use of the property. 3. That the work was completed several months before the fire occurred. 4. That the repairs became indispensably necessary to render it safe to use the chimney and boiler, without which the mill could not be operated. 5. That the new boiler did not generate any more steam than the old one before it got out of repair. 6. That the structure erected to cover the projecting end of the new boiler, and the fire-place, and to afford shelter to the necessary attendant, was reasonable, necessary and proper for the purpose.

Facts agreed make a part of the case, and are as material in considering the second question presented for decision as the first; and in that view it necessarily follows that the authorities invoked to support the conclusion that the policy, under the general rules of insurance, is not rendered null and void by the changes made and work done by the insured subsequent to its date, are equally applicable in considering the second question presented for decision. *Stokes v. Cox*, 1 Hurlst. & N., 540.

Mills and manufactories having mill, steam, or engine work were denominated in that case special risks in the policy, and the representation therein was that no steam-engine power was employed on the premises. Part of the lower story of one of the buildings was used as a stable, coach-house and boiler-house, and the boiler was used for heating water and warming the shops. Without notice to the defendants, the insured, subsequent to the date of the policy, created in the stable the machinery of a steam-engine, which was supplied with steam by the boiler mentioned in the policy. Where the risk is increased by any alteration of the circumstances, the condition was that the policy shall be of no force unless the particulars of the same shall be indorsed on the policy, and, if required, a proportionate higher premium be paid. Afterwards the premises were destroyed by an accidental fire, not attributable to the erection or use of the steam-engine. Held in the exchequer chamber, reversing the court of exchequer, that the policy was not avoided by the introduction of the steam-engine and the use of the steam generated in the boiler to work it.

All that the assured, say the court, is called upon to do in such a case, is, in the event of an increase of the risk, and in that event only, to give notice to

the insurance company of the alteration of circumstances. Here it is found as a fact that there was no increase of risk; therefore there was no necessity to give notice. Two-thirds of a year and more elapsed, in the case before the court, from the commencement of the risk, before the fire occurred, which shows beyond all doubt that the policy attached, as it is not pretended that the case shows any breach of a condition precedent.

§ 1334. *Conditions and warranties to be construed so as to meet intention of parties. In this case literal compliance not required.*

Conditions subsequent, and even mere promissory conditions, may be of a character that the breach of one or more of them will render the policy null and void; but courts of justice are not inclined to give such a condition that effect unless it clearly appears that such was the intention of the parties as manifested by the language employed in the contract. Whether regarded as a condition subsequent or a mere promissory warranty, the condition in question, it is clear, is not one where a literal compliance with its terms is required. Such a construction would be absurd, as it would render the policy void if the insured employed a mechanic to take out a broken slate and put in a new one, or to replace a broken pane of glass, or to stop a leak in a chandelier or other gas fixture, or in a cistern, or to mend a defective chimney, stove-pipe or furnace. Sudden defects of the kind often occur which endanger the premises, and the comfort, health and safety of the occupants; but if such is the true construction of the condition, the insured is prohibited from mending the slightest defect or removing the danger by the assistance of mechanics, unless he can apply to the insurance company and get their permission to do so, indorsed on the policy, no matter how urgent the necessity for repairs may be, nor how great the distance may be from the *situs* of the property insured to the place where the insurance company transact their business. Extreme conditions of the kind, even if they are not void as repugnant to the nature and purpose of the contract, and as inconsistent with the due and customary use and enjoyment of the property, must receive a reasonable construction unless they are expressed in such explicit and unambiguous terms as to amount to conditions precedent or to absolute and unqualified warranties. Warranties may be affirmative or promissory. Affirmative warranties may be express or implied, but they usually consist of positive representations in the policy of the existence of some fact or state of things at the time, or previous to the time, of the making of the policy; and they are, in general, conditions precedent, which, if untrue, whether material to the risk or not, the policy does not attach, as it is not the contract of the insurer. *Newcastle Ins. Co. v. Macmorran*, 3 Dow, Parl. Cas., 262; *Biccard v. Shepherd*, 12 Moore, P. C., 475.

Promissory warranties may also be express or implied; but they usually, not always, have respect to the happening of some future event, or the performance of some future act, in which case they are usually held to be conditions subsequent, and subject to a reasonable construction to effect the intention of the parties as evidenced by the language employed, the subject-matter, and the surrounding circumstances. *Marsh. Ins.*, 346; 1 *Arn. Ins.* (2d ed.), 580.

Stipulations of this kind must receive a reasonable construction; and the rule is that the intention of the parties, if it can be ascertained, is to govern; "and the intention," says Shaw, C. J., "is to be learned from the language used, construed in connection with every part and clause in the contract, the subject-matter respecting which the words are used and the obvious purpose of each stipulation." *Houghton v. Fire Ins. Co.*, 8 Met., 125; *Fire Ins.*

Co. v. Eddy, 49 Ill., 106; 1 Pars. M. Ins., 423; Daniels v. Hudson R. Ins. Co., 12 Cush., 416; Paul v. People's Ins. Co., 6 Gray, 185; Columbian Ins. Co. v. Lawrence, 2 Pet., 25 (§§ 1124-30, *supra*); Angell, L. & F. Ins., § 153; Gilliat v. Ins. Co., 8 R. I., 292.

§ 1335. *Affirmative warranty a condition precedent.*

Beyond all doubt a warranty of an existing fact is a condition precedent; and if it be not true, when the stipulation is reasonably construed, it avoids the policy, whether it is material to the risk or immaterial, as the condition is a part of the contract, which cannot be enforced unless it appears that the condition is fulfilled; but the insured, even in such a case, is only held to a substantial compliance, it being well-settled law that the condition cannot be extended by construction so as to include what is not necessarily implied in its terms. Turley v. North Am. Ins. Co., 25 Wend., 374; Flanders, Fire Ins., 205.

Even words of warranty, unless they are so explicit and unambiguous as to speak their own meaning, are subject to construction, and will receive a strict or liberal construction to meet the justice of the case; as where there was a warranty that a certain cotton mill should be worked by day only, it was held that the warranty was not infringed because it appeared that the engine and unconnected shafting were kept running all night, as the mill and machinery were not substantially worked. Mayall v. Mitford, 6 Ad. & E., 670; Shaw v. Robberds, id., 75; Whitehead v. Price, 2 C., M. & R., 447; Bunyon, F. Ins., 65; 1 Phil. Ins. (4th ed.), § 872.

§ 1336. *Whether a promissory warranty is a condition precedent, quære.*

Decided cases may be found in which courts have denied that there is any difference between an affirmative warranty and a promissory condition or stipulation; that the latter, as well as the former, must always be regarded as conditions precedent, on the literal truth or fulfillment of which the validity of the entire contract must depend; but it is evident that the rule, if it be one, which is not admitted, must be subject to many exceptions, as otherwise the greatest injustice would be done to the insured by the modern practice of crowding policies of insurance with stipulations imposing almost innumerable conditions, covenants and agreements providing for a forfeiture of the indemnity, which were wholly unknown to such instruments until within a recent period, and which, it is to be feared, attract very little attention from the owner of the property insured, until they are set up by the insurer subsequent to the loss, to show that the losing party is not entitled to the indemnity for which the premium was paid. Borradaile v. Hunter, 5 M. & G., 639; Alston v. Ins. Co., 4 Hill, 329.

§ 1337. *Not a condition precedent in this case.*

Manifest injustice would be done in this case by holding that the condition in question is a condition precedent, as it would prohibit any repairs whatever which involved the necessity of employing a mechanic to work in the mill building. Justice to the defendants, however, makes it proper for the court to say that they do not contend for any such rule. They admit that small repairs may be made, but insist that the repairs made were greater than the law of insurance allows, where the policy contains such a condition as that exhibited in this case, which, of itself, is an admission that the particular condition must receive a reasonable construction not repugnant to the nature and purpose of the contract, nor inconsistent with the due and customary use and enjoyment of the property by the insured. Insurable property is intended for use, and it is not the intent of a policy of insurance to impair the right of

use nor to deprive the owner of the customary enjoyment of the property; and nothing of the kind should be inferred nor admitted, unless it be in obedience to a condition precedent, expressed in explicit and unambiguous terms to that effect. Mills and dwelling-houses almost constantly need repairs, and if they cannot be made, the property is liable to become untenable and unsafe and unfit for use, and in many cases the property would be exposed to the danger of destruction by fire or flood. Owners of property must have the right to repair defects which render the property untenable, or which expose it to the danger of destruction from fire or flood, else the inevitable effect of a policy of insurance would be, where defects of the kind happen or become known, to render the property comparatively valueless, and of course to deprive the owner of the due and customary use and enjoyment of the property.

Small repairs, such as taking out a broken slate and putting in a new one, or replacing a broken pane of glass, or stopping a leak in a chandelier or other gas fixture, or mending a leaky cistern, or repairing a defective chimney, stove-pipe or furnace, it is properly conceded may be made; but the effect of that concession is to admit that the condition in question is subject to a reasonable construction not repugnant to the nature and purpose of the contract, nor inconsistent with the due and customary use and enjoyment of the property. Necessary repairs of the house, whether small or great, could not be made by the working of mechanics in the premises without avoiding the policy, if it be held that the condition under consideration applies in such cases, as the language of the condition, if taken literally, would forbid everything of the kind; but we are of the opinion that the condition, if construed to exclude all right of making such repairs, would be void as repugnant to the nature and purpose of the contract as expressed both in the written and printed words of the policy. Stipulations of the kind, however, in a policy of insurance, may be held valid, if, by a reasonable construction, the objection to the literal operation of the instrument may be avoided, even though, if taken literally, they would be invalid. Authorities to support that proposition do not appear to be necessary, as the rule is well established that courts of justice in the construction of all written instruments will seek to uphold the instrument, if it can be done by a reasonable construction. *Harper v. Ins. Co.*, 17 N. Y., 198.

Apply that rule to the present case and it follows, in the opinion of the court, that the condition in question does not prohibit the insured from remedying defects in the premises or machinery insured, which arose subsequently to the granting of the policy without his fault, or which were wholly unknown to him at that time, provided such defects were of a character to endanger the safety of the property insured or to render the same untenable and unsafe, and unfit to be occupied for the purposes and uses described in the policy, unless it appears that the repairs made were unreasonable and increased the risk, or that the fire was in some respect attributable to the repairs or to the work done in making the repairs. Viewed in the light of that proposition, it is clear that the second defense must also be overruled, as the agreed statement distinctly shows that the boiler and chimney were found to be cracked and in a dangerous condition, so that it was necessary to repair or change them, and that there was no increase of the risk, and that the fire was in no way attributable to the changes made or to the work that was done. Sufficient has already been remarked to show that there was nothing unreasonable done in putting in a horizontal boiler in place of the upright one

which was taken out, as the latter reached through the floor into the room above, evidently showing that it was more dangerous to the premises than the new one put in its place. Nor is it necessary to add anything to show that no objection can be taken to the structure erected to cover the projecting end of the boiler and the fire-place, and to afford shelter to the attendant, as the parties have agreed that it was reasonable, necessary and proper for the purpose. When conditions in a contract impose burdens or disabilities on one of the parties, they are to be construed strictly against the party for whose benefit they are introduced. *Catlin v. Ins. Co.*, 1 Sumn., 440; *Hoffman v. Ins. Co.*, 32 N. Y., 414.

Where property is insured in contemplation of its use for a known and specified purpose, the contract imports, *ex vi termini*, a license to keep the articles and employ the agencies incidental and essential to the beneficial enjoyment of the property for the use proposed; and many courts of high authority hold that a license of this nature, so implied from the language employed in the written portion of the policy, will not be overruled by a printed prohibition contained in some other portion of the same instrument. *Harper v. Ins. Co.*, 11 N. Y., 197; *Bryant v. Ins. Co.*, 17 id., 201. Decisions to that effect are quite numerous, and most of them are based upon the theory that an insurance upon a stock in trade used in a particular business covers all such articles as are necessarily and ordinarily used in such business. 1 Phil. Ins. (4th ed.), § 489; *Delonguemare v. Ins. Co.*, 2 Hall, 621.

Courts of justice agree that the intent of the parties is the primary rule of construction in ascertaining the meaning of a policy of insurance as well as interpreting other contracts, and that it is to be gathered, if possible, both from the written and printed portions of the policy, giving effect to both as far as may be; but they differ widely where certain conditions are found in the printed part of the policy, which are repugnant to the written words contained in the same instrument. None of them, however, support the proposition that a condition in the printed part of the policy, which is repugnant to the nature and purpose of the contract, and inconsistent with the due and customary use and enjoyment of the property insured, is a warranty of a condition precedent, which will avoid the policy, unless the condition is framed in such explicit and unambiguous terms as clearly to show that such was the intention of the parties. Instead of that they all support the opposite theory, that such a condition will not avoid the policy unless its terms are such that the condition, even when compared with every other part of the policy, is not susceptible of any other reasonable construction. Many courts hold that when there is a repugnancy in that behalf between the written and the printed portions of the policy, that the former shall prevail over the latter. *Harper v. Ins. Co.*, 11 N. Y., 198.

§ 1838. *Authorities reviewed.*

Express decision to that effect was made in the case of *Harper v. Ins. Co.*, 11 N. Y., 198, in which the opinion was given by the chief justice of the highest court in that state, where he said the plain meaning of the written part should prevail, and printed clauses, if repugnant, must yield, or they must be construed so as to avoid a conflict of intention. Exactly the same rule has been laid down by the same court, in two other cases, in the first of which it is stated that when a policy of insurance is upon a building and a stock of goods, such as is usually kept in country stores, it covers all articles of mer-

chandise coming within such description, even though it include articles generally prohibited except at special rates. *Pindar v. Ins. Co.*, 36 N. Y., 649; *Steinbach v. Ins. Co.*, 54 N. Y., 95.

Insurance was granted to the plaintiff in the second case, "on his stock of fancy goods, toys, and other articles in his line of business," and "as a German jobber and importer," with the privilege "to keep fire-crackers on sale." It was stipulated in the policy that if the premises should be used for keeping goods denominated specially hazardous, except as provided in the policy, the policy, so long as the store was so used, should be of no effect. Fire-works were in the class referred to, and it was stated in the policy that insurance thereon added fifty cents per \$100. Plaintiff kept fire-works, and by their accidental ignition the loss happened. Held, that if, as matter of fact, the keeping of fire-works was in the line of the plaintiff's business, they were embraced in the description of the property and were covered by the policy. Different views are certainly expressed by the supreme court in the case of *Steinbach v. Ins. Co.*, 13 Wall., 185; but it is unnecessary, in this case, to remark upon that difference, as it is obvious that the latter contains nothing inconsistent with the conclusion herein stated, that the stipulation in question is neither an affirmative warranty nor a condition precedent; and if neither, then the authorities are all one way, that it is open to a reasonable construction. Decided support to the view that the stipulation is open to a reasonable construction is also derived from the following cases, to which many more might be added. Insurance was granted to the plaintiff upon his wagon-maker's shop. By the conditions of the policy the company were not to be liable for damages resulting from explosions caused by gunpowder, gas or other explosive substances, or for damages occasioned by the use of camphene, spirit gas or burning-fluid, unless otherwise expressly provided. In the building insured was a shop containing paints and a half barrel of benzine, which caught fire and caused the burning of the property. Held, that though the paints and benzine, disconnected and by themselves, would belong to the class of articles excluded by the terms of the policy, yet, as it was proved that they were materials usual and customary in the manufacture of wagons, and were generally kept in the same shop where wagons were made, they were covered by the terms of the policy. *Archer v. Ins. Co.*, 43 Mo., 439.

Where an insurance was effected on "groceries," and there was evidence that the insurer was informed that alcohol and spirituous liquors constituted a part of the stock, it was held that the question whether those articles were included in the term groceries was a question of fact for the jury; and that where a stock of goods was insured under the general description of groceries, which stock included some of these hazardous articles, the policy was not avoided, because the right to keep such articles was not indorsed in writing on the policy, as required by one of the conditions. *Niagara F. Ins. Co. v. De Graff*, 12 Mich. 134.

Spirituous liquors were also classed as hazardous articles in the following case, in which the insurance was effected on a dwelling-house, and the condition of the policy was that the building should not be used for the purpose of storing therein any of the articles denominated hazardous in the policy, and the defendants proved that a tenant used it as a boarding-house, and that she had a regular bar, where liquors were kept in open view and were sold by retail, and they insisted that the breach of the condition avoided the policy; but

the court held that the keeping of liquors in the building insured for the purposes of consumption or for sale by retail to boarders and others is not a storing within the meaning of the policy. *Rafferty v. Ins. Co.*, 17 N. J., 482.

Substantially the same rule was applied in the following case, which was an insurance on a stock of goods and merchandise contained in plaintiff's store, one of the conditions being that the keeping of gunpowder for sale or on storage upon or in the premises insured shall render the policy void. *Leggett v. Ins. Co.*, 10 Rich. (S. C.), 206. Powder was always kept in the store for sale by retail, both before and after the date of the policy, and the court held that the keeping and sale, in that way, of small quantities of powder did not vitiate the policy, as it was part of the stock of goods insured.

Cotton in bales, in the following case, was classed as a hazardous article, and one of the conditions of the policy was that, if the building should be used for keeping or storing goods denominated hazardous, then and from thenceforth, so long as the same shall be so used, the policy shall cease and be of no effect. *Moore v. Ins. Co.*, 29 Me., 100. Bales of cotton were subsequently kept in the store for sale; but the court held that such a condition did not avoid the policy, it being intended merely to protect the insurer against the store being used as a depository of such goods as a sole or principal business. *Phoenix Ins. Co. v. Taylor*, 5 Minn., 492.

Direct support to the conclusion that the condition in question does not avoid the policy in this case is found in the following case, in which the defense set up by the insurance company was based upon the exact same condition. *Ins. Co. v. Chicago Ice Co.*, 36 Md., 121. Insurance in that case was effected upon a large building used for storing ice, the policy containing the exact same condition as that under consideration. Instead of conforming to the terms of the condition, the president of the ice company testified that he always kept a crew of men and a carpenter or two about the building the year round, and that they were constantly making repairs, and in that way kept the building in a thorough condition. Based on that testimony, the defense was that the policy was avoided; but the court decided otherwise, holding that, by a fair and reasonable interpretation of the stipulation, it cannot be understood as referring to the casual patching up of the building; that it can only be understood as prohibiting such hazardous use as is generally denominated builder's risk, which arises from placing the building in the possession or under the control of workmen, for rebuilding, alteration, or repairs, and in support of that theory the court said that such a construction as that assumed, if applied, would defeat the intent of the parties, and would be repugnant to the written clause of the policy insuring the building, upon which, looking at its size, structure and use, they must have reasonably contemplated the necessity of such repairs as the witness described as indispensable to the proper conduct of the business. Such a building, so constructed, say the court, would necessarily be constantly liable to be injured and damaged by the use for which it was intended, rendering it indispensable for the prosecution of the business that breakages should be repaired as they should occur, all of which was known to the insurers; and it must be presumed that the necessity for such repairs was in their contemplation at the time the contract was made, and that permission for that purpose was given by the written terms of the policy insuring the premises as an ice-house. *Ins. Co. v. Davison et al.*, 30 Md., 107.

§ 1339. *Greater effect to be given to the written than to the printed portions of a contract.*

Text-writers usually adopt the rule laid down in the case of *Robertson v. French*, 4 East, 136, that where part of the contract is written and part printed, and there arises any reasonable doubt as to its meaning, the greater effect is to be attributed to the written words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, whereas the printed words are a general formula adapted equally to the case in contest, and that of all other contracting parties in respect to similar subject-matters. 3 Kent, Com., 260; 1 Arn. Ins. (2d ed.), 79; 1 Phil. Ins. (4th ed.), § 125; id., § 883; Flanders, Ins., 70; 2 Pars. Ins. (5th ed.), 516; Angell, F. & L. Ins., 12, 67; Sm. Merc. Law (3d ed.), 419; *Alsager v. Dock Co.*, 14 M. & W., 797; *Coster v. Ins. Co.*, 2 Wash., 51; *Coit v. Ins. Co.*, 7 Johns., 390; *Park, Ins.*, 4; 1 Duer, Ins., 64; *Bryant v. Ins. Co.*, 21 Barb., 154; *Cushman v. Ins. Co.*, 34 Me., 495.

§ 1340. *Policy imports license to do what is required for beneficial enjoyment of the property insured.*

Adjudged cases, where insurance is granted upon property in contemplation of its use for a known and specified purpose, have decided that such a policy imports, *ex vi termini*, a license to keep the articles and employ the agencies incidental and essential to the beneficial enjoyment of the same for the use proposed; and many of those cases go further, and hold that a printed prohibition in some other portion of the instrument will not be allowed to prevail against such a license so implied from the language used in the written portion of the policy. *Hayward v. Ins. Co.*, 2 Abb. App. Cas., 351.

All of the adjudications upon the subject appear to sustain the first branch of the proposition there laid down, that such a policy implies a license to keep the articles and employ the agencies incidental to the due and customary use and enjoyment of the property; but the following cases, to wit: *Lee v. Ins. Co.*, 3 Gray, 590; *Macomber v. Ins. Co.*, 7 Gray, 259; and *Whitmarsh v. Ins. Co.*, 2 Allen, 582, may perhaps be regarded as recognizing an exception to the latter branch of the proposition, where the written terms of the policy are repugnant to the provisions contained in the printed part of the policy, if the latter are clear, explicit and unambiguous.

Support to that view is also derived from the case of *Steinbach v. Ins. Co.*, 13 Wall., 183, and from the case of *Ins. Co. v. Brinckley*, 2 Ins. J., by Potter, 842; but the court here does not find it necessary to examine that subject, having come to the conclusion to rest the decision in the case upon the ground that the condition in question, when reasonably construed, does not prohibit ordinary repairs, nor such as become indispensably necessary to remedy defects on the premises, which endangered the safety of the property, and which occurred without the fault of the insured, provided it appears that neither the repairs made nor the work done in executing the repairs increased the risk, and that the fire was in no respect attributable to the repairs or the work that was done. Having come to that conclusion, it is unnecessary to decide whether the printed part of the policy is or is not overruled in case it is repugnant to the written part; as, when the whole instrument is properly construed, there is not any such necessary repugnancy in this case as is supposed. Such conditions prohibiting repairs which increase the risk, it is held by some courts, are operative only when the increased risk is in existence, and that the policy becomes effectual as soon as the increased risk terminates.

Schmidt v. Ins. Co., 41 Ill., 298; *Ins. Co. v. McDowell*, 50 Ill., 129; *Ins. Co. v. Westmore*, 32 Ill., 245.

Enough has already been remarked to show that the court here prefers to rest its decision upon a different ground, but it may not be amiss to add that the ground assumed in those cases would necessarily lead to the conclusion that the plaintiff is entitled to recover. Judgment for the plaintiff, as stipulated in the agreed statement, with costs.

§ 1841. **Alterations — Single change — More than one change.**— If there is a change in the premises, such as a new use, or if there is an alteration in them, it is for the jury to say whether the risk is increased. If there are two or more changes, unconnected with each other, and one has increased the risk, it is no answer for the assured to say that another has decreased it. *Albion Lead Works v. Williamsburg Ins. Co.*, 2 Fed. R., 489 (§§ 1213-20).

§ 1842. **Same — Construction.**— A policy provided that if the "premises shall at any time be occupied or used so as to increase the risk, or the risk be increased . . . by any means whatever within the control of the assured," the contract should become void. In the same connection there were other provisions against acts of a voluntary nature by the assured. *Held*, that the quoted language, taken with the context, did not refer to mere negligence on the part of the assured, however gross, or however affecting the risk, such as the failure to repair a pump, but to some permanent change, purposely undertaken, in the structure, or in the use or occupation of the premises. *Ibid*.

§ 1843. **Same.**— Property does not cease to be operated for a particular purpose within the terms of a policy of insurance if it was not operated for that purpose when the policy was effected. *Humphrey v. Hartford Ins. Co.*,* 15 Blatch., 504.

§ 1844. A policy contained the following provision: "If the above mentioned premises shall be occupied or used so as to increase the risk, or if the risk be increased by the erection of buildings, or by any means whatever within the control of the assured." *Held*, that this referred to some essential increase of risk. *Crane v. City Ins. Co.*,* 2 Flip., 576.

§ 1845. The relations of a mere insurance broker, not in the employ of the underwriter, granting a policy of insurance, cease with the delivery of the policy; and the underwriter is not chargeable with knowledge of his acquired thereafter in regard to repairs. *Ibid*.

§ 1846. **Same — Separation of buildings.**— A policy of insurance against fire was taken out upon a stone building, with a stone addition on one side and a frame addition attached to the stone building on the other side. After the insurance and before the fire, the insurer, without consent of the insurance company, cut off eighteen feet of the frame addition next to the stone building, and placed the same at the rear end of the frame building addition, thereby detaching the frame addition from the stone building, but leaving the remainder of the frame addition unmoved. It was admitted that the risk of loss by fire was not increased by the alteration. There was no express provision in the policy against alterations, or requiring the assent of the insurer to improvements. *Held*, that the separation of the two buildings did not avoid the policy. *Dorn v. Germania Ins. Co.*,* 4 Am. Law Rec., 445.

§ 1847. That in the absence of express stipulation in the policy prohibiting repairs and alterations of the premises, there was an implied engagement that the assured would not alter the premises or business described in the policy, so as thereby to increase the risk and liability of the insured. *Ibid*.

§ 1848. **Same.**— The right to repair and alter buildings is incident to ownership; and such repairs and alterations as do not change the risk may be made by the insured, without consent of the insurer, if such assent is not expressly required in the policy. The alteration or enlargement of a building will not avoid the policy of insurance unless the risk is thereby increased. *Ibid*.

§ 1849. A fire insurance policy contained this condition: "If the above premises shall become vacant and unoccupied, and so remain with the knowledge of the assured, . . . without notice to and consent of this company in writing, . . . this policy shall be void." At the time of the fire the premises had been vacated by the tenant, and had been unoccupied about thirty-three days with the knowledge of the assured, and without notice to or consent of the insurance company. During that time the premises were not abandoned, but the plaintiff was all the time endeavoring to obtain a tenant for the house. *Held*, that the company was liable whether the words *and so remain* be construed as having in view an abandonment of the premises as untenable property, or a vacancy for an unreasonable length of time. *Kelly v. Home Ins. Co.*,* 2 Cent. L. J., 478.

§ 1850. A condition in a policy insuring a mill, avoiding the contract if the premises "become unoccupied," means something more than a temporary suspension of work in the mill, as for five days. *Albion Lead Works v. Williamsburg Ins. Co.*, 2 Fed. R., 489 (§§ 1213-20).

IX. OTHER INSURANCE.

SUMMARY—*Requirement of notice*, §§ 1351-1355.—*Knowledge of underwriter's agent*, §§ 1356-1359.

§ 1351. The clause in an insurance policy requiring notice of other insurance refers to valid effectual insurance. Where other insurance is afterwards obtained by a policy which declares that the existence of insurance not notified to the underwriter shall render the contract invalid, that policy is not binding without notice, and hence notice of such second policy need not be given to the underwriter, it seems. *Allison v. Phoenix Ins. Co.*, §§ 1360-61.

§ 1352. *Quere*, whether, after insurance on a stock of goods, subsequent insurance on household furniture is "other insurance" within the meaning of a clause in the first policy requiring notice of other insurance. *Ibid.*

§ 1353. An insurance on property by the owner does not pass upon a mortgage of the premises to the mortgagee, but remains, when still valid, to the mortgagor. Hence, if an owner of property insure the same by a policy which requires notice of other insurance by him upon the property, he must give notice of any other insurance so obtained by him, notwithstanding the fact that the premises have been mortgaged, and that the other insurance has been made payable to the mortgagee, if such other insurance is still for the benefit of the mortgagor. *Carpenter v. Providence Ins. Co.*, §§ 1362-73.

§ 1354. Misrepresentation of facts to the underwriters will not render a policy issued by them void; it will only render the policy voidable at the election of the underwriters. The policy will be valid until such election. Hence, notice of such policy is necessary under the terms of another policy requiring notice of other insurance, unless the policy to be notified has already been avoided. *Ibid.*

§ 1355. A requirement of notice of other insurance to be indorsed upon the policy requiring the notice is not complied with by evidence of knowledge by the underwriter of the latter policy of the existence of other insurance. *Ibid.*

§ 1356. A policy of insurance contained the following provisions: "If the assured shall have any other insurance on the property hereby insured, without the consent of the company written hereon, this policy shall be void;" "\$3,000 other concurrent insurance permitted." "Any person other than the assured, who may have procured this insurance, shall be deemed to be the agent of the assured, and not of this company." *Held*, that knowledge by an agent in the service of the company of the existence of insurance to the amount of \$6,000, at the time the policy was effected, was a waiver of the provisions concerning other insurance. *Putnam v. Commonwealth Ins. Co.*, §§ 1374-78.

§ 1357. Consideration of the evidence whether the agent knew of the existence of insurance to the extent of \$6,000. *Ibid.*

§ 1358. P., plaintiff's agent, was asked at the trial, upon a question of other insurance, what was said between him and C., defendant's agent, as to the amount of insurance P. wished on the property. The question was objected to on the ground that the conversation related to a surrendered policy, not the policy in suit. *Held*, that the question was proper. *Ibid.*

§ 1359. The agent of the assured for effecting the insurance may (in explanation of a prior communication in regard to the amount of other insurance upon the property in question) state that he did not read certain policies delivered to him other than the one in suit, that he did not examine the policy in suit when delivered, and that he first noticed a provision as to the amount of other insurance allowed after the loss. *Ibid.*

[NOTES.—See §§ 1379-1385.]

ALLISON v. PHENIX INSURANCE COMPANY.

(Circuit Court for Iowa: 3 Dillon, 480-486. 1873.)

STATEMENT OF FACTS.—Plaintiff took out a policy with the defendant for \$2,000 on his stock of goods and \$200 on his household furniture. There was a provision in the policy that if there had been or should hereafter be any "other insurance" on the same property, without the consent of defendant, then the policy was to be void. Subsequently plaintiff effected \$500 insurance on his store and dwelling-house and \$200 on his household furniture in the Hawkeye Insurance Company, with the same conditions in this policy as to "other insurance." The same fire destroyed everything insured in both

companies. There was a verdict conditioned on a point of law, and both parties move to set it aside.

Opinion by DILLON, J.

There are two questions here. One is whether the subsequent policy on the *furniture* in the Hawkeye Company, supposing it to be a valid and binding insurance, avoids the policy in suit as respects the *stock of goods*, which was separately valued, there having been no notice to the defendant of the Hawkeye policy.

The other is whether the subsequent policy in the Hawkeye Company was such "other insurance" as contravenes the provision in the defendant's policy in that regard, the Hawkeye Company having been informed by the plaintiff's application that there was no other insurance on the furniture, but after the loss, having compromised with the plaintiff in respect to its policy, not having had before the fire any knowledge of the policy issued by the defendant or ratifying its own policy with knowledge of the prior policy. The Hawkeye Company insisted that its policy was not binding on it because of the misrepresentation as to prior insurance, but the policy covered other risks, and the controversy was closed by the payment to the plaintiff of a sum less than the sum insured.

Under these circumstances it is clear that the second policy, as respects the furniture, at all events, could not have been enforced against the Hawkeye Company, and, if not, can it be set up by the defendant as constituting other or additional insurance in violation of the condition in that respect, contained in the policy now in suit?

§ 1360. *To avoid the first policy, second must be valid.*

The general, but not uniform, opinion of the courts is, that to avoid the first policy the second policy must be valid, that it must constitute an effectual insurance; and we are inclined to so hold, if this can be done consistently with *Carpenter v. Providence Ins. Co.*, 16 Pet., 495 (§§ 1362-73, *infra*). The case last cited has been subjected to much criticism (see *Clark v. New England, etc., Ins. Co.*, 6 Cush., 342, 350; *Hubbard v. Hartford Fire Ins. Co.*, 33 Ia., 325; *May on Insurance*, sec. 365, and the authorities there collected), and it may be conceded that, though not unsupported, it does not, at least in its reasoning, accord with the prevailing view. But if the case at bar falls within its principle, it is our duty implicitly to apply that principle to it. That case holds that the company which issued the second policy (the Providence Company) was entitled to notice of the prior insurance in the American Company, though the policy in that company had been "procured by misrepresentation of material facts," and the reason given (which has been criticised and its soundness denied) is that such a policy is not "to be treated, in the sense of the law, as utterly void *ab initio*, but merely voidable, and as one that may be avoided by the underwriters upon the proof of the facts, but until so avoided, to be treated for all practical purposes as a subsisting policy."

The *decision* would make it the duty of the plaintiff to have disclosed the prior insurance in the defendant company to the Hawkeye Company, and if he did not, but stated that there was no such prior insurance, the policy in the Hawkeye Company, if not ratified, would be void. And it does not establish that the policy in the Hawkeye Company is to be considered as in all respects a valid policy unless avoided by that company before the loss.

We are therefore of the opinion that the policy in the Hawkeye Company, so far at all events as respects the furniture, was invalid; that it did not in

fact and in law constitute any insurance, and therefore the defense based upon the ground that other insurance was procured contrary to the provisions of the policy in suit, fails. This view is, in our opinion, consistent with the real point in judgment in the case of *Carpenter*, though it may not consist with all the reasoning of the learned justice who delivered the opinion of the court.

§ 1361. *Conflict of authority in regard to the insurance of goods if that on furniture in the other company were valid.*

This makes it unnecessary to decide whether, if the Hawkeye policy had been valid as respects the *furniture*, this would have avoided the defendant's policy as respects the *stock of goods*. On this point the cases cannot be reconciled. That it would not thus avoid the policy as to the goods, see *Lockner v. Home Ins. Co.*, 16 Mo., 247; S. C., affirmed, 19 Mo., 628; *Phoenix Ins. Co. v. Lawrence*, 4 Metc. (Ky.), 9; *Clark v. New Eng., etc., Ins. Co.*, 6 Cush., 342, explained, May on Insurance, sec. 278, note on p. 303; *French v. Chenango Ins. Co.*, 7 Hill (N. Y.), 123 (compare *Wilson v. Ins. Co.*, 2 Selden, 53); *Sloat v. Royal Ins. Co.*, 47 Penn. St., 12; *Davis v. Boardman*, 12 Mass., 79; *Howard Ins. Co. v. Scribner*, 5 Hill (N. Y.), 298.

But on the other hand, that it would avoid the policy entirely, see *Smith v. Empire Ins. Co.*, 25 Barb., 497, 504; *Kimball v. Howard Ins. Co.*, 8 Gray, 30, 33 (compare with *Clark v. New Eng. Ins. Co.*, *supra*); *Associated Fireman's Ins. Co. v. Assum*, 5 Md., 165; *Barnes v. Union, etc., Ins. Co.*, 51 Maine, 110. In this last case, where there was the usual provision against alienation, or material change of title, and an insurance was effected by the plaintiff on an undivided half of a dwelling-house, and afterwards, on the petition of his cotenant, a partition was decreed, this was held to be equivalent to an alienation and purchase, and avoided the policy as to the building; and it was further held that the policy being void as to the building, the plaintiff could not recover for the loss of furniture therein insured in the same policy, and separately valued, the ground of decision being the supposed entirety of the contract, as that if it became void in part it was void *in toto*. I doubt the soundness of this decision, as to the furniture, but as it is not essential, the court gives no opinion as to the point whether a second valid insurance of furniture, there being no fraud, would avoid the first policy, as to the other and distinct property, separately valued.

Judgment for the plaintiff.

CARPENTER v. PROVIDENCE INSURANCE COMPANY.

(16 Peters, 495-512. 1842.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This is a writ of error to the circuit court for the district of Rhode Island. The original action was brought by Carpenter, the plaintiff in error, against the Providence-Washington Insurance Company, the defendants in error, upon a policy of insurance underwritten by the insurance company of \$15,000, "on the Glenco Cotton Factory, in the state of New York," owned by Carpenter, against loss or damage by fire. The policy was dated on the 27th of September, 1838, and was to endure for one year. Among other clauses in the policy are the following: "And provided further, that, in case the insured shall have already any other insurance on the property hereby insured, not notified to this corporation, and mentioned in or in-

dorsed upon this policy, then this insurance shall be void and of no effect." "And if the said insured or his assigns shall hereafter make any other insurance on the same property, and shall not, with all reasonable diligence, give notice thereof to this corporation, and have the same indorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease and be of no further effect. And in case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the insured shall not in case of loss or damage be entitled to demand or recover on this policy any greater portion of the loss or damage sustained than the amount hereby insured shall bear to the whole amount insured on the said property." "The interest of the insured in this policy is not assignable, unless by consent of this corporation, manifested in writing; and in case of any transfer or termination of the interest of the insured, either by sale or otherwise, without such consent, this policy shall henceforth be void and of no effect." Annexed to the policy are the proposals and conditions on which the policy is asserted to be made, and among them is the following: "Notice of all previous insurances upon property insured by this company shall be given to them, and indorsed on the policy, or otherwise acknowledged by the company in writing, at or before the time of their making insurance thereon, otherwise the policy made by this company shall be of no effect."

The declaration averred that during the continuance of the policy, he, Carpenter, was the owner of the property by the policy insured, and was interested in said property to the whole amount so insured by the company; and that on the 9th of April, 1839, the factory was totally destroyed by fire, of which the company had due notice and proof. The cause came on for trial upon the general issue, and a verdict was found for the defendants. The plaintiff took a bill of exceptions to certain instructions refused, and other instructions given by the court in certain matters of law arising out of the facts in proof at the trial, and judgment having been given upon the verdict for the defendants, the present writ of error has been brought to ascertain the validity of these exceptions.

The facts which were in proof at the trial were very complicated; but those which are material to the present inquiry will be, as briefly as they may be, here stated. The premises were originally owned in equal moieties by Egbert and Epenetus Reed. In June, 1835, Epenetus Reed conveyed his moiety to H. M. Wheeler, who gave a bond and mortgage on the premises to secure \$8,000 of the purchase money to Epenetus Reed. On the 17th of October, 1836, Egbert Reed sold his moiety of the premises to Samuel G. Wheeler, and the latter thereupon gave a bond and mortgage for the sum of \$10,000 (purchase money) to Epenetus Reed; and on the same day, he, Wheeler, made an additional agreement under seal with Epenetus Reed, by which he covenanted that he would effect a policy of insurance upon the property in the name of himself, or himself and Henry M. Wheeler, for the sum of at least \$10,000, and assign the same to him, Reed, as collateral security to the said last bond and mortgage, and would annually renew the policy, or effect a new one, and keep each assigned to Reed as security, in such way and manner as that the said property shall be insured for at least the sum of \$10,000, and the policy held by him as collateral security as aforesaid; and if he neglected so to insure and assign for the space of ten days, then that Reed might do the same at the expense of Wheeler, and add the premium which he might be compelled

to pay with interest thereon to his said bond and mortgage, and to collect the same therewith, or that Wheeler would pay the same to him in such other way as he might desire.

From the 17th of October, 1836, to the 6th of December, 1837, Henry M. Wheeler and Samuel G. Wheeler continued to own the factory in equal moieties, and transacted business under the firm of Henry M. Wheeler & Company. On that day Samuel G. Wheeler sold his moiety to Jeremiah Carpenter. On the 18th of April, 1838, Henry M. Wheeler sold and conveyed his moiety to Carpenter, who thus became the sole owner of the entire property. The last conveyance declared the property subject to a mortgage on the premises from Henry M. Wheeler and wife, dated in June, 1835, to Epenetus Reed, on which there was then due \$6,000, which Carpenter assumed to pay. There had been a prior policy on the premises in the Washington Insurance office, which, upon Carpenter's becoming the sole owner, the company agreed to continue for account of Carpenter, and, in case of loss, the amount to be paid to him. That policy expired on the 27th of September, 1838, the day on which the policy, upon which the present suit is brought, was effected.

It is proper further to state that other policies on the same factory had been effected and renewed from time to time, from December 12, 1836, for the benefit of the successive owners thereof, by another insurance company in Providence called the American Insurance Company, and among these was a policy effected by way of renewal, on the 14th of December, 1837, in the name of Henry M. Wheeler & Company, for \$6,000, for the benefit of Henry M. Wheeler and Carpenter (who were then the joint owners thereof), payable in case of loss to Epenetus Reed. The sale by Henry M. Wheeler to Carpenter, on the 18th of April, 1838, of his moiety having been notified to the American Insurance Company, the latter agreed to the assignment, and the policy thenceforth became a policy for Carpenter, payable in case of loss to Epenetus Reed. And on the 23d of May, 1838, Carpenter transferred all his interest in the policy to Epenetus Reed. The policy thus effected on the 14th of December, 1837, was (as the Washington Insurance Company assert) not notified to them at the time of effecting the policy made on the 27th of September following, and declared upon in the present suit; nor was the same ever mentioned in or indorsed upon the same policy, and upon this account the company insist that the present policy is, pursuant to the stipulations contained therein, utterly void.

Subsequently, namely, on the 11th of December, 1838, the American Insurance Company renewed the policy of 14th of December, 1837, for Carpenter, and at his request, for one year. This renewed policy was never notified to the Washington Insurance Company, nor acknowledged by them in writing; nor does it appear ever to have been actually assigned to Epenetus Reed, down to the period of the loss of the factory by fire. On this account also the Washington Insurance Company insist that their policy of the previous 27th of September, 1838, is, according to the stipulations therein contained, utterly void.

It seems to have been admitted, although not directly proved, that a suit was brought upon the policy of the 14th of December, 1837, at the American Insurance office, after the loss, by Carpenter, as trustee of or for the benefit of Reed, for the amount of the \$6,000 insured thereby, and that at the November term, 1839, of the circuit court, the company set up as a defense that

there was a material misrepresentation of the cost and value of the property in the factory insured made to them at the time of the original insurance; and it being intimated by the court that, if such was the fact, it would avoid the policy, the plaintiff acquiesced in that decision, and discontinued or withdrew the action before verdict.

The instructions prayed and refused, and also the instructions actually given by the court, are fully set forth in the record. It does not seem important to the opinion, which we are to pronounce, to recite them at large, *in totidem verbis*, since the points on which they turn admit of a simple and exact exposition.

The first instruction asked the court, in effect, to say that the original policy of the American Insurance Company, made in December, 1836, and the several renewals thereof, although made in the name of the Wheelers (the mortgagors), being in fact for the use and benefit of Epenetus Reed, the mortgagee, were for all substantial purposes the policy of Reed, and could never inure to the benefit of the Wheelers, or of Carpenter; and that neither the Wheelers nor Carpenter had any such interest therein as rendered it incumbent on them to give any notice of its existence to the Washington Insurance Company; and that it was to all intents and purposes as if Reed had effected the said policy in his own name upon his specific interest as mortgagee. This instruction the court refused to give; and, on the contrary, instructed the jury that as, by the memorandum made on that policy on the 14th of December, 1837, the policy was by the consent of all the parties interested therein, and of Carpenter, to be for the benefit of Carpenter, he, Carpenter, became interested therein legally or equitably; and that, notwithstanding the assignment thereof by the Wheelers to Carpenter, and of Carpenter to Reed, the policy and the renewals thereof ought to have been notified to the Washington Insurance Company, at the time when the policy declared on was underwritten, if the policy was then a subsisting policy, and was so treated by Carpenter and the American Insurance Company, and Carpenter had a legal or equitable interest therein, and was entitled to the benefit thereof.

§ 1362. *Policy to a mortgagee is insurance of his debt. Underwriter entitled to take his place on paying the loss.*

The question, then, is here broadly presented, whether the policy of the American Insurance Company is under all the circumstances to be treated as a policy exclusively for Reed, the mortgagee, or whether it is to be treated as a policy on the property of and for the benefit of the mortgagors. No doubt can exist that the mortgagor and the mortgagee may each separately insure his own distinct interest in the property. But there is this important distinction between the cases, that where the mortgagee insures solely on his own account, it is but an insurance of his debt; and if his debt is afterwards paid or extinguished, the policy ceases from that time to have any operation, and even if the premises insured are subsequently destroyed by fire, he has no right to recover for the loss, for he sustains no damage thereby; neither can the mortgagor take advantage of the policy, for he has no interest whatsoever therein. On the other hand, if the premises are destroyed by fire before any payment or extinguishment of the mortgage, the underwriters are bound to pay the amount of the debt to the mortgagee, if it does not exceed the insurance. But then, upon such payment, the underwriters are entitled to an assignment of the debt from the mortgagee, and may recover the same amount

from the mortgagor, either at law or in equity, according to circumstances; for the payment of the insurance by the underwriters does not, in such a case, discharge the mortgagor from the debt, but only changes the creditor.

§ 1363. — *otherwise where mortgagor has insured his own interest merely.*

Far different is the case where an insurance is made by the mortgagor on the premises on his own account; for notwithstanding any mortgage or other incumbrance upon the premises, he will be entitled to recover the full amount of his loss, not exceeding the insurance, since the whole loss is his own, and he remains personally liable to the mortgagee or other incumbrancer, for the full amount of the debt or incumbrance.

§ 1364. *Assignment of policy by mortgagor no displacement of his interest.*

These principles we take to be unquestionable, and the necessary result of the doctrines of law applicable to insurances by the mortgagor and the mortgagee. If, then, a mortgagor procures a policy on the property against fire, and he afterwards assigns the policy to the mortgagee with the consent of the underwriters (if that is required by the contract to give it validity), as collateral security, that assignment operates solely as an equitable transfer of the policy, so as to enable the mortgagee to recover the amount due in case of loss; but it does not displace the interest of the mortgagor in the premises insured. On the contrary, the insurance is still his insurance, and on his property and for his account. And so essential is this, that if the mortgagor should transfer the property to a third person, without the consent of the underwriters, so as to divest all his interest therein, and then a loss should occur, no recovery can be had therefor against the underwriters, because the assured has ceased to have any interest therein, and the purchaser has no right or interest in the policy. Another essential difference between the case of a mortgagor and that of a mortgagee (which has been already hinted at) is, that the latter can insure for himself, at most, only to the extent of his debt, whereas the mortgagor can insure to the full value of the property, notwithstanding any incumbrances thereon, for the reasons already stated.

§ 1365. *Interest in the premises not the same thing as interest in the policy.*

Some of these principles are completely illustrated by the terms of this very policy of the American Insurance Company, and the like clauses are to be found in the policies of the Washington Insurance Company, now under consideration. Thus, although it is expressly provided "that the assured may assign this policy to Epenetus Reed," yet it is at the same time provided, that "the interest of the assured in this policy is not assignable unless by the consent of this corporation, manifested in writing; and in case of any transfer or termination of the interest of the insured, either by sale or otherwise, without such consent, this policy shall from thenceforth be void and of no effect." Now, the interest here last spoken of, manifestly, is the interest of the owner in the premises insured, and not merely his interest in the policy.

§ 1366. *Effect of assignment of policy further considered.*

But, independently of any special clauses of this sort, it is clear, both upon principle and authority, that an assignment of a policy by the insured only covers such interest in the premises as he may have at the time of the insurance and at the time of the loss. It is the property of the insured, and his alone, that is designed to be covered; and when he parts with his title to the property, he can sustain no future loss or damage by fire, but the loss, if any, must be that of his grantee. The rights of the assignee cannot be more extensive under the policy than the rights of the assignor; and as to the grantee

of the property, he can take nothing by the grant in the policy, since it is not in any just or legal sense attached to the property or an incident thereto. This doctrine was laid down in very expressive terms by Lord Chancellor King, so long ago as in the case of *Lynch v. Dalzell*, 4 Bro. Parl. Rep., 431, edit. Tomlins, 2 Marsh. Insur., b. 4, ch. 4, 803, which was an insurance against fire. "These policies," said he, "are not insurances of the specific things mentioned to be insured, nor do such insurances attach on the realty, or in any manner go with the same as an incident thereto by any conveyance or assignment, but they are only special agreements with the persons insuring against such loss or damage as they may sustain. The party insured must have a property at the time of the loss or he can sustain no loss, and consequently can be entitled to no satisfaction." "These policies are not in their nature assignable, nor is the interest in them ever intended to be transferable from one to another, without the express consent of the office." Now, this case is the stronger, because it was a case where not only the policy, but the premises, had been assigned to the very parties who sought the benefit of the insurance. The same doctrine was asserted by Lord Hardwicke, in the case of *The Saddlers' Company v. Badcock*, 2 Atk., 554, where there had been an assignment of the policy, after the insured ceased to have any interest in the premises. Upon that occasion Lord Hardwicke said: "I am of opinion [that] the assured should have an interest or property at the time of the insuring, and at the time the fire happens." "The society are to make satisfaction in case of any loss by fire. To whom or for what loss are they to make satisfaction? Why, to the person insured and for the loss he may have sustained; for it cannot properly be called insuring the thing, for there is no possibility of doing it, and therefore must mean insuring the person from damage;" and he cited with approbation the very language of Lord King, already stated, in *Lynch v. Dalzell*. The authority of these cases was fully recognized and acted upon by this court in the case of *The Columbia Insurance Company of Alexandria v. Lawrence*, 10 Pet., 507, 512, where the court said: "We know of no principle of law or of equity, by which a mortgagee has a right to claim the benefit of a policy underwritten for the mortgagor, on the mortgaged premises, in case of a loss by fire. It is not attached or an incident to his mortgage. It is strictly a personal contract for the benefit of the mortgagor, to which the mortgagee has no more title than any other creditor."

For these reasons it is apparent that Epenetus Reed, as mortgagee, and merely in that character, can have no interest in or right to the policy in the American office now under consideration. The insurance is not made by him, or in his name, or upon his account. The policy was originally made in December, 1836, for Henry M. Wheeler & Company, who were then the owners of the factory, and by its very terms it is an insurance for them against loss or damage by fire. When the policy was renewed in December, 1837, it was so renewed for the benefit of Henry M. Wheeler and Jeremiah Carpenter, who had then become the joint owners thereof. When, subsequently, in April, 1838, Carpenter became the sole owner of the premises, the company agreed to the transfer and assignment of the entirety to Carpenter, so that henceforth it became a policy upon his sole property, for his account and benefit, in the same manner and with the same legal effect as if the policy had been renewed in his own name.

But it is said that there is a clause in the original policy, and it is equally applicable to the renewals, "that the assured may assign this policy to Epe-

tus Reed." And the argument is that this liberty to assign, when the assignment to Reed was actually executed, transferred the whole interest in the property insured, as well as in the policy, to Reed, and made the policy, to all intents and purposes, a policy for the sole benefit of Reed as mortgagee, as much as if the insurance had been made in his own name.

To this suggestion several answers may be made, each of which is equally fatal to the construction contended for. In the first place, although an assignment to Reed was authorized by the policy, it was never disclosed to the American Insurance Company for what purposes or objects the assignment was to be made; whether to Reed as trustee or agent of the insured, or for fugitive and temporary purposes, or as security for debts, or whether it was designed to be absolute and unconditional. Neither was it disclosed to the company that Reed was in point of fact a mortgagee, nor were the company requested to insure his interest as mortgagee or to make the insurance exclusively upon his interest and for his account. Now, as has been already seen, an insurance for a mortgagor, and one for a mortgagee, involve very different considerations, responsibilities, rights and duties, and the company might be well willing to make an insurance upon the property on account of the mortgagors, when they might be unwilling to make any on account of the mortgagee.

§ 1367. *Mortgage a special interest, and to be insured should be made known to underwriter.*

And it is clear, upon principle, that no policy can or ought to be deemed a policy exclusively upon the interest of the mortgagee unless the company have notice that it is so designed, and they assent to it. A mortgage interest is, without doubt, an insurable interest, but then it is a special interest, and should be made known to the underwriters. Mr. Marshall, in his Treatise on Insurance against Fire, says: "It is not necessary, however, in all cases, in order to constitute an insurable interest, that the insured shall in every instance have the absolute and unqualified property of the effects insured. A trustee, a mortgagee, a reversioner, a factor, an agent with the custody of goods to be sold upon commission, may insure, but with this caution, that the nature of the property be distinctly specified." 2 Marsh. Insur., b. 4, ch. 2, p. 789. This language was quoted with approbation by this court in the case of *The Columbia Ins. Co. v. Lawrence*, 2 Pet., 25, 49 (§§ 1124-30, *supra*), and the reason for it is there given by the court. "Generally speaking," said the court, "insurances against fire are made in the confidence that the assured will use all the precautions to avoid the calamity insured against, which would be suggested by his interest. The extent of his interest must always influence the underwriter in taking or rejecting the risk, and in estimating the premium. So far as it may influence him in these respects, it ought to be communicated to him. Underwriters do not rely so much upon the principles as on the interest of the assured; and it would seem, therefore, to be always material that they should know how far this interest is engaged in guarding the property from loss." Now, since there is no pretense to say that the interest of Reed as mortgagee was disclosed to the company, or that the company agreed to insure his interest as mortgagee, and that only, it would seem to follow that the policy cannot be construed to operate in the manner propounded by the instruction prayed by the plaintiff.

§ 1368. *Policy in this case not an insurance of the mortgages.*

In the next place, the policy itself upon its very terms admits of no such interpretation, and, indeed, requires a different interpretation to give due effect

to those terms. The policy, as has been already stated, is in the name of the owners, and for their account, and on their property. If it was designed solely for Reed, why was he not named, and he alone named, as the insured? How can any court be at liberty, without other explanatory words, to construe a policy made by A. in his own name, on his property, to be not a policy on his own interest, but on the interest of B., who is a stranger to the policy? The language of Lord King, and Lord Hardwicke, and of this court, in the cases already cited, show conclusively that policies of this sort are not deemed in their nature incidents to the property insured, but that they are mere special agreements with the persons insuring against such loss or damage as they may sustain, and not the loss or damage that any other person having an interest, as grantee, or mortgagee, or creditor, or otherwise, may sustain by reason of a subsequent destruction thereof by fire. It would seem, then, repugnant to the terms of this policy to construe it to be not what it purports to be, an insurance for the owner of the property, but an insurance for an undisclosed creditor or mortgagee. It would materially change the language, the objects and the obligations of the parties thereto.

In the next place, it would, in our judgment, be inconsistent with the manifest intention, as well of the insured as of Reed, to give it such an interpretation. The agreement between Samuel G. Wheeler and Reed, of the 17th of October, 1836, demonstrates in the clearest manner that the policy was to be effected by the Wheelers as owners, and to be assigned after it was effected by them to Reed, as collateral security for his bond and mortgage; and it was only upon their neglect to procure such insurance and assign the policy, that Reed was to be at liberty to do the same at their expense. The language of the instrument is: "I do hereby agree with Epenetus Reed, etc., that I will effect a policy of insurance upon the said property in the name of myself, or of myself and Henry M. Wheeler, for the sum of at least \$10,000, and assign the same to him as collateral security to said bond and mortgage; and that I will annually renew the said policy, or effect a new one, and keep each assigned to him as security, etc., and the policy held by him as collateral security; and if I neglect so to insure and assign for the space of ten days, then that said Reed may do the same at my expense," etc. Now, language more direct than this can scarcely be imagined to express the intentions of the parties, that the insurance was to be made in the name of the owners, upon their interest in the property, and for their account, and the policy to be assigned as collateral security to Reed. Not one word is said that the insurance was to be solely and exclusively for Reed, as mortgagee; for in such a case he would hold the policy as a principal, and not as a collateral security. It is obvious from the language, also, that Reed was not to be the absolute owner of the policy, as he would be, if made for him exclusively as mortgagee, but he was to hold it as collateral security. If, then, the debt of Reed should be paid or extinguished in the whole or in part, would not the right of the owners correspondently attach to the policy? If the whole debt was paid, would they not be entitled to a re-assignment thereof? Yet, unless in such a case the policy attached to the property for their own account and benefit, the re-assignment would be a mere nullity. To us it seems beyond all reasonable doubt that the policy under this agreement was designed by the parties to be on account of the owners and for their benefit, and that it was to be only collateral security to Reed to the extent of any interest he might have therein in case of loss by fire. In this view it operated as a security to the owners against the entire loss. In any other

view, they would only change their creditors upon any loss, from Reed to the underwriters.

§ 1369. *Interest at inception of policy necessary.*

Besides, on point of fact, the policy must have its effect and operation from the time of its execution, and not otherwise. The language of the policy is, "that the assured may assign this policy to Epenetus Reed," not that this policy shall now be for Epenetus Reed or on his interest. The owners, then, had an option whether to assign or not. If they never had assigned the policy to Reed at all, and a loss had occurred, would not the loss have been payable to the owners? In point of fact, the policy, although made on the 12th of December, 1836, was not assigned to Reed until the 21st of January, 1837. In whom did the interest then originally, and in the intermediate time, vest, under the policy? Clearly in the owners, for they and they only had an interest in the property or the policy until the assignment was made. The authorities all hold that the party insured must have an interest at the time of the making of the policy, as well as at the time of the loss; and if Reed had no interest, upon which the policy would attach by its terms when the insurance was made, but acquired it afterwards, and the policy had been made upon his sole account, it would have been a mere nullity. The subsequent renewals were to the same effect, and for the same purposes and parties as the original policy. Carpenter, after he became sole owner, did not assign the policy to Reed until the 23d of May, 1838, more than five months after the renewal, and more than one month after the conveyance of the whole property to himself. Now, the question may be here again asked, whether, if the loss had occurred before these assignments, a recovery upon the policy might not have been had by Carpenter, in his own name, and for his own account? We think that the question must be answered in the affirmative; and if so, then it demonstrates that the policy made in the name of the owners was for their account and benefit; and payment only was, in case of loss, to be made to Reed.

For these reasons we are of opinion that the first instruction asked of the court was rightly refused, and that the instruction given was entirely correct.

The second instruction asked proceeds upon the ground that, although the policy of the American Insurance Company of the 6th of December, 1836, was good upon its face, yet if, in point of fact, it was procured by a material misrepresentation by the owners of the cost and value of the premises insured, it was to be deemed utterly null and void, and therefore, as a null and void policy, notice thereof need not have been given to the Washington Insurance Company at the time of underwriting the policy declared on. The court refused to give the instruction; and, on the contrary, instructed the jury that if the policy of the American Insurance Company was, at the time when that at the Washington Insurance office was made, treated by all the parties thereto as a subsisting and valid policy, and had never in fact been avoided, but was still held by the assured as valid, then that notice thereof ought to have been given to the Washington Insurance Company, and if it was not, the policy declared on was void.

§ 1370. *Policy procured by misrepresentation not void, but voidable; hence good till legally avoided.*

We are of opinion that the instruction, as asked, was properly refused, and that given was correct. It is not true that, because a policy is procured by misrepresentation of material facts, it is therefore to be treated in the sense of the law as utterly void *ab initio*. It is merely voidable, and may be avoided

by the underwriters upon due proof of the facts; but until so avoided it must be treated, for all practical purposes, as a subsisting policy. In this very case the policy has never to this very day been avoided or surrendered to the company. It is still held by the assured, and he may, if he pleases, bring an action thereon to-morrow; and unless the underwriters should at the trial prove the misrepresentation he will be entitled to recover. But the question is not how the policy may now be treated by the parties, but how was it treated by them at the time when the policy declared on was made. It was then a subsisting policy, treated by all parties as valid and supposed by the underwriters to be so. The misrepresentation does not, then, seem to have been known to the American Insurance Company. It was an extrinsic fact; and if known to the American Insurance Company, it certainly was not known to the Washington Insurance Company. How were the latter to arrive at any knowledge of the facts of misrepresentation, and how were they to avail themselves of the fact, if the American Insurance Company should not choose to insist upon it? Nor is it immaterial in the present case, as was suggested at the bar, that the present plaintiff now seeks to avail himself of his own misrepresentation, or that of those under whom he claims, to protect himself against his own laches in not giving notice of the policy to the underwriters. And it may well be doubted whether a party to a policy can be allowed to set up his own misrepresentations to avoid the obligations deducible from his own contract.

§ 1371. *Notice of the existence of a voidable policy necessary as "other insurance." Object of notice.*

Be this as it may, it is, in our judgment, free from all reasonable doubt that notice of a voidable policy must be given to the underwriters; for such a case falls within the words and the meaning of the stipulations in the policy. It is a prior policy, and it has a legal existence until avoided.

Indeed, we are not prepared to say that the court might not have gone further and have held that a policy — existing and in the hands of the insured, and not utterly void upon its very face, without any reference whatever to any extrinsic facts — should have been notified to the underwriters, even although by proofs, afforded by such extrinsic facts, it might be held in its very origin and concoction a nullity. And this leads us to say a few words upon the nature and importance and sound policy of the clauses in fire policies, respecting notice of prior and subsequent policies. They are designed to enable the underwriters, who are almost necessarily ignorant of many facts which might materially affect their rights and interests, to judge whether they ought to insure at all or for what premium; and to ascertain whether there still remains any substantial interest of the insured in the premises insured as will guaranty on his part vigilance, care and strenuous exertions to preserve the property. To quote the language of this court in the passage already cited, the underwriters do not rely so much upon the principles as upon the interest of the assured. Besides, in these policies there is an express provision that in cases of any prior or subsequent insurances, the underwriters are to be liable only for a ratable proportion of the loss or damage as the amount insured by them bears to the whole amount insured thereon. So that it constitutes a very important ingredient in ascertaining the amount which they are liable to contribute towards any loss; and whether there be any other insurance or not upon the property, is a fact perfectly known to the insured, and not easily or ordinarily within the means of knowledge of the underwriters. The public, too, have an interest in maintaining the validity of these clauses, and giving

them full effect and operation. They have a tendency to keep premiums down to the lowest rates and to uphold institutions of this sort, so essential in the present state of our country for the protection of the vast interests embarked in manufactures, and on consignments of goods in warehouses. If these clauses are to be construed with a close and scrutinizing jealousy, when they may be complied with in all cases by ordinary good faith and ordinary diligence on the part of the insured, the effect will be to discourage the establishment of fire insurance companies, or to restrict their operations to cases where the parties and the premises are within the personal observation and knowledge of the underwriters. Such a course would necessarily have a tendency to enhance premiums, and to make it difficult to obtain insurances where the parties live, or the property is situate, at a distance from the place where the insurance is sought.

But be these considerations as they may, we see no reason why, as these clauses are a known part of the stipulations of the policy, they ought not to receive a fair and reasonable interpretation according to their terms and obvious import. The insured has no right to complain, for he assents to comply with all the stipulations on his side, in order to entitle himself to the benefit of the contract, which, upon reason or principle, he has no right to ask the court to dispense with the performance of his own part of the agreement, and yet to bind the other party to obligations which, but for those stipulations, would not have been entered into. We are, then, of opinion that there is no error in the second instruction. On the contrary, there is strong ground to contend that the stipulations in the policy as to notice of any prior and subsequent policies were designed to apply to all cases of policies then existing in point of fact, without any inquiry into their original validity and effect, or whether they might be void or voidable.

§ 1372. *Questions of the kind pertain to general commercial law.*

We have not thought it necessary upon this occasion to go into an examination of the cases cited from the New York and Massachusetts reports, either upon this last point or upon the former point. The decisions in those cases are certainly open to some of the grave doubts and difficulties suggested at the bar, as to their true bearing and results. The circumstances, however, attending them, are distinguishable from those of the case now before us, and they certainly cannot be admitted to govern it. The questions under our consideration are questions of general commercial law, and depend upon the construction of a contract of insurance, which is by no means local in its character, or regulated by any local policy or customs. Whatever respect, therefore, the decisions of state tribunals may have on such a subject, and they certainly are entitled to great respect, they cannot conclude the judgment of this court. On the contrary, we are bound to interpret this instrument according to our own opinion of its true intent and objects, aided by all the lights which can be obtained from all external sources whatsoever; and if the result to which we have arrived differs from that of these learned state courts, we may regret it, but it cannot be permitted to alter our judgment.

§ 1373. *Notice to be given according to the requirements of the policy.*

The third instruction prayed the court to instruct the jury that if the Washington Insurance Company had notice, in fact, of the existence of the policy in the American office, that "was in law a compliance with the terms of the policy." The court refused to give the instruction as prayed, but instructed the jury that, at law, whatever might be the case in equity, mere parol notice

of such insurance was not, of itself, sufficient to comply with the requirements of the policy declared on; but that it was necessary, in case of any such prior policy, that the same should not only be notified to the company, but should be mentioned in or indorsed upon the policy; otherwise the insurance was to be void and of no effect. We think this instruction was perfectly correct. It merely expresses the very language and sense of the stipulation of the policy; and it can never be properly said that the stipulation in the policy is complied with, when there has been no such mention or indorsement as it positively requires, and without which it declares the policy shall henceforth be void and of no effect.

The fourth and last instruction given by the court stands upon the same considerations as those already mentioned; and it would be a useless task to repeat them. If the other instructions given by the court were correct, it is admitted that this cannot be deemed erroneous. Upon the whole, our opinion is that the judgment of the circuit court ought to be affirmed, with costs.

PUTNAM v. COMMONWEALTH INSURANCE COMPANY.

(Circuit Court for New York: 18 Blatchford, 368-383. 1880.)

Opinion by BLATCHFORD, J.

STATEMENT OF FACTS.—(1) The defendants contend that the evidence shows that the insured property was burned by the fraudulent practices of the assured. The question is one of fact. The referee has found that the fire arose "from some cause unknown." His finding will not be disturbed except in a case where the finding of a jury on the same question would be disturbed. This is not such a case. On the contrary, on the evidence, a finding that the property was burned by the fraudulent practices of the assured would be set aside by the court.

(2) The defendants contend that the plaintiff, through his authorized agent, was guilty of fraud in swearing to and presenting the proofs and claim that he did in respect to the value of the goods burned. The evidence does not establish that the plaintiff knew that the goods were worth less than the value of them stated in the proofs of loss. The referee has found, in the first case, that the value of the goods at the time of the fire was "upwards of \$12,000;" and in the second case, that their value at that time was "\$12,000." It must be established not only that the goods were worth less than the plaintiff set forth, but that the plaintiff made a fraudulent valuation of them. The evidence is not sufficient to establish either of these facts.

(3) The defendant in the first case contends that its policy was void when issued. It contains a printed provision that, "if the assured shall have, or shall hereafter make, any other insurance on the property hereby insured, or any part thereof, without the consent of the company written hereon, . . . this policy shall be void." The policy contains this clause, in writing: "\$3,000 other concurrent insurance permitted." When the policy was issued there was \$6,000 other insurance on the property, which continued in force until the fire. The application for the policy in suit was made to an agent of the company in Utica (N. Y.), the company being established in Boston (Mass.). The policy was signed by the officers in Boston, and was countersigned by the agent in Utica, and was delivered in Utica by him to the agent of the assured. The policy contains this attestation clause: "In witness whereof the Commonwealth Insurance Company have caused these presents to be signed by

their president and attested by their secretary, in the city of Boston. But this policy shall not be valid unless countersigned by the duly authorized agent of said Commonwealth Insurance Company." Below that are these words: "Countersigned at Utica this 16th day of October, 1877. J. Carr & Son, agents." The policy contains this provision: "11. It is a part of this contract, that any person other than the assured, who may have procured this insurance to be taken by this company, shall be deemed to be the agent of the assured named in this policy, and not of this company, under any circumstances whatever, or in any transaction relating to this insurance." The plaintiff claims that the evidence shows that the policy was issued and delivered by J. Carr & Son with full knowledge that there was already \$6,000 other insurance on the goods; that the issuing and delivery of the policy with such knowledge was a waiver of any prohibition against more than \$3,000 other insurance; and that J. Carr & Son had authority, as the agent of the company, to make such waiver, notwithstanding the eleventh clause. The referee has found, as a fact, that at the time the policy was delivered to the plaintiff by the defendant's agent, the fact that the plaintiff had other insurance on the merchandise, to the extent of \$6,000, was known to the agent of the defendant. He has found, as a conclusion of law, that the delivery of the policy "by the defendant to the plaintiff, with the knowledge of \$6,000 of existing insurance upon said stock of merchandise, was a waiver of the implied prohibition contained in the condition in said policy permitting \$3,000 additional insurance." The defendant excepted to the finding of fact, "that, at the time of the delivery of its policy, the fact that there was \$6,000 other insurance on the property insured was known to its agent," and to the conclusion of law, "that the delivery of its policy was a waiver of the prohibition contained in the condition in said policy permitting \$3,000 additional insurance."

The defendant contends that the finding that the agent knew of \$6,000 other insurance was not warranted by the evidence. The plaintiff's agent, A. S. Putnam, who applied for the insurance, says that at the time he did so, he told the defendant's agent, Carr, that the plaintiff already had \$6,000 insurance and wanted \$2,000 more. Two policies of \$1,000 each were then issued by Carr & Son to the plaintiff, on these goods, one by the defendant and the other by a Pennsylvania company, each dated October 16, 1877. A month or less after that the two policies of \$1,000 each were given up by the plaintiff to Carr & Son, and the policy in suit was issued in their place, bearing the same date and running for the same time, from October 16, 1877. The \$1,000 policy issued by the defendant and so given up contained the words: "\$3,000 other concurrent insurance permitted." It also contained the same clauses as to the policy becoming void, and as to agency, and as to countersigning, as the \$2,000 policy afterwards did, and it was countersigned "J. Carr & Son, agents," October 16, 1877, at Utica. Carr testifies that when the original application was made, which resulted in the two \$1,000 policies, "nothing particular was said," except that A. S. Putnam gave an order for \$2,000 insurance on the goods. Carr says that he issued the two policies for \$1,000 each and delivered them to Putnam. He adds: "I don't remember anything being said as to the amount of other insurance at that time." Carr further says that, when the policy in suit was issued, he asked Putnam "how much other insurance he had; he said \$2,000 with one agent named Symonds and \$1,000 with Hoyt & Butler, and I wrote the policy accordingly." The fact was that there was one policy of \$1,000 with Hoyt & Butler and two

policies of \$2,500 each with Symonds, and that Carr, instead of writing the \$3,000 in the \$2,000 policy for the first time, had written it before in the \$1,000 policy. Carr further says: "I consented to the amount of insurance. He did not at that time, or at any time, inform me that he had \$6,000 insurance. Nothing of the kind was said. I did not say, on his telling me that he had \$6,000 insurance, that I would give him \$2,000 more; nothing of the kind. What I have testified to is all that was said." "I did not know that Putnam had \$6,000 other insurance. I first knew that fact after the fire." On his cross-examination Carr says: "When these first two policies were issued I do not remember certainly whether anything was said as to the amount of the insurance. Mr. Putnam did not say, in the second conversation, that he had one policy with Hoyt & Butler and two with Symonds; no such thing. He said he had \$2,000 with Mr. Symonds. This was previous to the second policy having been delivered." In rebuttal, Putnam says: "I did not say to Mr. Carr, at the time the two policies were surrendered and the one in suit given, that I had \$1,000 with Hoyt & Butler and \$2,000 with Symonds; did not say that at any time."

§ 1374. *Report of referee equivalent to finding of jury.*

It is a well settled rule that the report of a referee as to the facts is, like the verdict of a jury, conclusive, as a general rule, in a case of conflict of evidence, and is, like such verdict, to be set aside only where the finding of fact is clearly against the weight of evidence. There is here one witness on each side. The burden is on the defendant to set aside the finding of the referee. The referee had the witnesses before him. On the part of the defendant, it is urged that the fact that Carr wrote \$3,000 is evidence that he so understood it; that he had no motive, if he knew it was \$6,000, to put in \$3,000; and that Putnam may have had the motive to say \$3,000 in the fear that he would not be able to get \$2,000 more if it were known there was \$6,000 already. On the part of the plaintiff it is urged (which is the fact) that the plaintiff had permission, in the three policies amounting to \$6,000, to insure \$19,000 more in other companies, and could have had no motive to conceal the \$6,000. A. S. Putnam testifies that he did not read the first two policies when they were delivered to him, and did not examine the policy in suit when it was delivered to him, and that he first noticed the provision as to other insurance when the policy in suit was being used, after the fire, to make proofs of loss. On the whole evidence, the case is not one for disturbing the finding of the referee that the fact of the existence of \$6,000 other insurance was known to the agent of the defendant when he delivered the policy in suit to the plaintiff.

§ 1375. *Waiver of clause against insurance above a certain amount, by knowledge that such insurance exists.*

This fact being so, it must be held that the conclusion of law thereon by the referee was correct. The case of *Whited v. Germania Fire Ins. Co.*, 76 N. Y., 415, decided in March 1879, is a direct authority in point. The policy there contained provisions that, if the property should be sold, or if the interest of the assured should not be truly stated, the policy should become void; that any less than a distinct specific agreement, indorsed on the policy, should not be construed as a waiver of any condition therein; and "that any person other than the assured, who may have procured the insurance to be taken, shall be deemed to be the agent of the assured, and not of the company, under any circumstances whatever, or in any transaction relating to this insurance." The

policy was issued in 1869, signed by the officers of the company and countersigned "O. J. Harmon, agent," and was for one year. In 1870 it was renewed for one year, the renewal certificate being signed by the officers and containing the words, "not valid unless countersigned by the duly authorized agent of the company at Oswego," and being countersigned there "O. J. Harmon, agent." Like proceedings took place on a renewal in 1871, for one year. During that year the plaintiff conveyed the premises, and took back a mortgage on them. Before the year expired he applied to Harmon for a renewal, and then told Harmon, "the person who had, as defendant's agent, countersigned the policy and the two renewal certificates," that the premises had been sold and to whom, and showed him the mortgage and paid the premium. Harmon said to the plaintiff that he would "make it all right," and gave him a renewal certificate signed and countersigned like the former ones. Harmon was the duly authorized agent of the company at Oswego, and did all the business of it there except settling losses. In the present case, Carr says: "I received applications for policies and had authority to write and issue policies without writing to the company." In the *Whited* case the interest of the plaintiff in the premises as a mortgagee was not stated in the policy or in the renewal certificates. The defendant contended that the policy was void. The plaintiff contended that there had been a waiver of the requirement that the change of interest of the plaintiff should be indorsed on the policy. The defendant replied that Harmon could not bind the defendant by any such waiver.

The court say: "Upon the facts in the case, as settled by the verdict, there was a parol waiver of the conditions rested upon by the defendant, and a parol consent to keep on foot the insurance of the plaintiff, in his new *status* of mortgagee, if Harmon was the agent of the defendant in the dealing for the last renewal, and not the agent of the plaintiff. *Fish v. Cottenet*, 44 N. Y., 538; *Shearman v. Niagara Fire Ins. Co.*, 46 id., 526; *Pechner v. Phoenix Ins. Co.*, 65 id., 195; *Van Schaick v. Niagara Fire Ins. Co.*, 68 id., 434; *Bidwell v. No. West. Ins. Co.*, 24 id., 302." Then, referring to the clause representing agency, the court say: "That clause we have held to be forceful in *Rohrbach v. Germania Fire Ins. Co.*, 62 N. Y., 47, and *Alexander v. Same Defendant*, 66 id., 464. We have not held it so as yet further than the scope of the facts in those cases. The case in 66 N. Y. hangs upon the case in 62 N. Y. In the latter case it was held, that, as the insured had contracted that the person who procured the insurance should be deemed his agent, he must abide by his agreement; and that though, through fault or mistake, that person had, in the application for a policy, misstated to the company the declarations of the assured, whereby there had been wrought an untrue representation, yet that, as he had been agreed upon as the agent of the insured, the insured must suffer for the error or the wrong. That case dealt with matters before the issuing of the policy. It is so that the clause in the policy is broad, and takes into the fold of its wording any circumstances whatever, and any transaction relating to the insurance. In its verbal scope it has to do with acts as well after, as before and at the time of, the giving out of the policy. But, if the insured is to be now bound as having thus contracted, there must be mutuality in the contract. No man can serve two masters. If the procurer of the insurance is to be deemed the agent of the insured, and Harmon is to be deemed such procurer, he may not be taken into the service of the insurer as its agent also; or, if he is so taken, the insurer must be bound by his acts and words, when

he stands in its place, and moves and speaks as one having authority from it; and, *pro hac vice* at least, he does then rightfully put off his agency for the insured, and put on that for the insurer. Hence it was that in *Sprague v. Holland Purchase Ins. Co.*, 69 N. Y., 128, we held that the same clause, in the policy there put out by that defendant, did not make the insured the principal. . . .

"In the case in hand the defendant has declared, over the hands of its president and secretary, that a renewal certificate from it will not be valid unless countersigned by the duly authorized agent of the company, at Oswego, New York. It had before sent two such certificates to Harmon, which he had countersigned as such agent and delivered to the plaintiff. The plaintiff had paid to him the premium for those renewals and he had sent them to the defendant. The defendant treated these two certificates as valid, because countersigned by Harmon. Thereby it asserted that Harmon was its duly authorized agent. It held him up to the plaintiff as such. It knew, then, that those certificates had been put out and taken as valid; and it must have known that it was so because Harmon thought, and the plaintiff thought, and that both had reason, from the conduct of the defendant, to think, that Harmon was the duly authorized agent of the defendant. It is too late, after letting those two go out as valid, and the third like certificate has been issued and premium paid, for it to say that Harmon is not the agent of the defendant therein, and that he is the agent of the plaintiff. The defendant must have some living, sentient touch of those doing business with it; and when it reposes confidence in the actor therein, and gives him discretionary power to bind and loose, it is idle to say that he is not its agent thereto. The law is too severe to brook such an absurdity. Nor will it hold the plaintiff so strictly to the contract he made, as to permit the defendant to ignore it and take his agent as its agent, and yet make him suffer for all the shortcomings of that person while acting between them, and while under authority from the defendant to act for it. Should it be granted that Harmon was the agent of the plaintiff, even then comes in the rule that one employing the agent of another cannot take advantage from the acts and omissions of that agent to the harm of his principal. It is a rule that if one principal to a contract deal surreptitiously with the agent of the other principal, it is a fraud upon the other principal. The defrauded one, if he comes in time, is entitled, at his option, to have the contract rescinded; or, if he elects not to have it rescinded, to have such other adequate relief as the court may think right to give him. *P. & S. P. Tel. Co. v. Ind. Rub. Gut. Perch. & Tel. W. Co.*, 10 Chy. App. Cas., 526. The principle should be applied, in the case in hand, to the aid of Whited. The case, then, is that of the holder of a policy asking for a renewal of it, and making known to the agent of the insurer the facts which have made, or will make, a breach of some of the conditions in it, and thereupon receiving from that agent a written renewal certificate, after payment and receipt of the premium, and having from him a promise that he would 'make it all right.' The powers of the agent were such, as that the transaction with him was the same as if done with the defendant; it is bound as fully as if it were so. There was thus a perfect waiver of those conditions of the policy; and it remained a valid contract for another term. When the loss insured against happened, the defendant became liable to pay, and has shown no real defense against the action."

The case of Whited was decided with the concurrence of all the judges of

the court of appeals. The present case cannot be distinguished from it. The fact that, in the *Whited* case, Harmon said that he "would make it all right" does not make this case any weaker than that one. The delivery of the policy by Carr to the plaintiff, as a valid contract of insurance, was an act of Carr, as the agent of the defendant, asserting such validity, and asserting, in effect, that the policy was issued in view of the statement of A. S. Putnam, that there was \$6,000 other insurance, and that any statement of a different amount of other insurance, in the policy, was a mistake, and not in accordance with the fact, as known to both parties, and that any provision in the policy making it void because the \$6,000 was not written in it was then and there waived. Carr had authority to issue policies without writing to the defendant, and must be held to have been the agent of the defendant in receiving the information as to the \$6,000 other insurance, and in making the waiver which, on the facts, was made.

No distinction can be drawn between this case and a case where, under like circumstances, a party might have stated to the agent correctly the amount of other insurance and yet nothing was said in the policy as to how much other insurance was permitted. In the *Whited* case there was, it is true, an entire absence from the policy of any statement of the change of interest, while here there is a statement permitting \$3,000 other insurance. But the absence of the statement of the true other insurance is no different from the absence of the statement of the true interest of the insured, although some sum be named in the policy for other insurance. Nor does it make a distinction that the other insurance existed at the time and was not put on after the policy was issued. In the *Whited* case the change of ownership occurred before the last renewal.

The *Whited* case is the most recent decision on the subject in the highest court of New York. It was the unanimous decision of the seven judges, in view of all former decisions. Regarding it as a sound exposition of the law, and as applicable to this case, I must follow it.

§ 1376. *Clause forbidding the keeping of naphtha, and the like, construed.*

(4) The defendant in the second case contends that its policy was avoided "by the use of naphtha and gasoline." The policy contains these provisions: "If, in said premises, there be kept gunpowder, fire-works, nitro-glycerine, phosphorus, saltpeter, nitrate of soda, petroleum, naphtha, gasoline, benzine, benzole or benzine varnish, or there be kept or used therein camphene, spirit gas, or any burning fluid or any chemical oils, without written permission in this policy, then, and in every such case, this policy shall become void." "4. If, during this insurance, the above-mentioned premises shall be used for any trade, business or vocation, or for storing, using or vending therein any of the articles, goods or merchandise denominated hazardous, or extra hazardous, or specially hazardous, in the class of hazards adopted by the New York Board of Fire Underwriters, and printed on the back of this policy, . . . then and from thenceforth, so long as the same shall be so appropriated, applied or used, this policy shall cease and be of no force or effect." On the back of the policy is a list of articles, under the head of "Classes of Hazards," the word "special" meaning "specially hazardous." The following are marked "special:" "Oil, petroleum and products other than specified." "Naphtha." "Benzine and benzole." "Gunpowder." "Fire-works." "Phosphorus." "Saltpeter." "Nitrate of soda, when stored with other merchandise." "Camphene, stocks of." "Spirit gas, making or selling or use of." "Burning fluid,

stocks of." The following is on the back of the policy: "The use of kerosene oil permitted, on condition that the same be drawn and the lamps be trimmed and filled by daylight only, provided the quality is of the standard required by the laws of the state in which this policy is issued, but in no case below the United States standard of 110° Fahrenheit."

The referee found that, during the occupation of the store by the plaintiff, he used kerosene and naphtha for the purpose of lighting the same, using naphtha for the first week he was there and kerosene for the remainder of the time; that naphtha was also used in said store by a stranger named Sayles, on two occasions, to show off a naphtha-burning stove for the sale of which he had an agency; that there was no naphtha on the premises at the time of the fire, neither was there any kerosene on the premises at that time, except a small quantity, a gallon or two, kept for the purpose of replenishing the lamps used to light the store. As conclusions of law on this subject the referee found: "2. The use of naphtha or gasoline and kerosene on the premises in question, in the manner hereinbefore described, was not a violation of any of the conditions of said policy. The use of kerosene, if of a certain quality, is expressly permitted. There is nothing in the case to show that the kerosene was not of the quality allowed. The clause under which it is claimed the articles were prohibited is as follows: 'If, in said premises, there be kept . . . petroleum, naphtha, gasoline, benzine, benzole or benzine varnish, or there be kept or used therein camphene, spirit gas, or any burning fluid, or any chemical oils.' The said articles were not kept on the premises, within the true intent and meaning of the first part of said clause, as the term 'kept' is clearly employed in contradistinction to the term 'used,' in the concluding portion of the clause, and evidently means the keeping of such articles as objects of merchandise or manufacture. It is quite obvious that the last part of the clause, in speaking of 'camphene, spirit gas, or any burning fluid,' does not refer to the products of rock or mineral oil, such as naphtha, kerosene, etc. The terms 'camphene,' 'spirit gas' and 'burning fluid' are well known to commerce and chemistry, and have a well understood meaning. Thus, 'camphene' is turpentine purified by repeated distillation; 'burning fluid' is a mixture of camphene and alcohol, and 'spirit gas' is a mixture of the same ingredients in different proportions. This clause should be construed, not only from the actual signification of the words used, but the evident intent of the whole sentence, according to the maxim '*noscitur a sociis*.' The character of the prohibition as to rock oils and their products is clearly intended to be provided for in the first part of the sentence, and other volatile oils and substances in the last part; and it is absurd to say that the contracting parties intended to repeat in the same sentence a prohibition which had been clearly and carefully expressed before. Even if this were not so it would seem that, under subdivision 4 of this policy, it is very doubtful whether there would ensue a forfeiture unless the loss occurred during the actual use of the article prohibited upon the premises in question. That clause simply provides for a suspension of the liability of the company while a prohibited article is being used in the premises, and, if its use ceases, the policy would seem to revive by the force of the agreement itself." The defendant excepted to the finding of fact, "that there was no naphtha or kerosene oil on the premises at the time of the fire, except a small quantity of kerosene," and to the second conclusion of law, "that the use of naphtha or gasoline on the premises, in the manner described, was not a violation of any

of the conditions of its policy; that the articles were not kept in the premises, within the meaning and intent of the condition of its policy; that the term 'any burning fluid,' used in its policy, does not refer to naphtha;" and, generally, "to the whole of the second conclusion of law and each part thereof." The exception as to the finding of fact in respect to naphtha and kerosene oil is not insisted on.

The referee does not find, as a fact, that any kerosene or naphtha was ever kept on the premises, other than such keeping as is necessarily involved in the facts found, that kerosene and naphtha were used, as found, to light the store, and that naphtha was twice used in the store to show off a naphtha-burning stove. There is no exception by the defendant to a failure to find any other keeping, or any other use, of kerosene or naphtha. The question is, whether the use in fact found avoided the policy. The policy permits the use of kerosene oil of a certain quality, and on a specified condition. It is not found that this permission was departed from. As to naphtha, the prohibition is against keeping naphtha, by name. Other dangerous articles are classed with naphtha and forbidden to be "kept." Then there is a prohibition against keeping or using certain other articles. Presumably, naphtha being forbidden to be kept, by name, in the first description, was not intended to be included among the articles forbidden to be kept in the second description; and, not being included among the articles in the second description, is not forbidden to be used, if the use does not involve the keeping, within the meaning of the word "kept" in the first description. The use of the kerosene or the naphtha to light the store, or its presence or burning in lamps therein used for lighting the store, cannot be considered as a keeping of the naphtha in the store, in the sense of the word "kept" in the first description. No other keeping is found. Neither naphtha nor kerosene is camphene or spirit gas or a chemical oil, or within the expression "any burning fluid." "Burning fluid, stocks of," is endorsed on the policy as specially hazardous. It does not mean any fluid which will burn, but it means a recognized article known as "burning fluid," and a different article from naphtha or kerosene. Nor does the word "any" change the meaning. There may be several articles, each known as "burning fluid" or "a burning fluid," and each not naphtha or kerosene, so as to make it proper to say "any burning fluid." Naphtha being specified in the first description, it should have been shown that it was known as "burning fluid," in order to bring it within the second description. Kerosene being allowed to be used, the same thing should have been shown and found as to the particular kerosene used there. Further, the whole policy must be construed together. Although naphtha was indorsed as specially hazardous, and was used, and so was within clause 4, its use both for lighting the store and for showing off the stove had ceased before the fire occurred, and there was no naphtha on the premises at the fire. By clause 4 the policy was to be of no force so long as the forbidden use continued, but only so long. Such is the meaning of clause 4. The policy is suspended only while the forbidden use continues and revives when it ceases. In this view, and to give proper and harmonious effect to all the clauses of the policy on the subject, the clause in regard to keeping and using the enumerated articles should be construed as affecting the policy only so long as the articles are kept or used.

§ 1377. *Evidence of agent tending to show knowledge of amount of prior insurance.*

(5) A. S. Putnam, the plaintiff's agent, was asked, on his direct examina-

tion, as to what was said between him and Carr, the defendant's agent, as to the amount of insurance A. S. Putnam wished on the property, at the time he applied for insurance, when the two \$1,000 policies were issued to him by Carr. The question was objected to by the defendant, on the ground that the conversation was in reference to a surrendered policy, not the policy in suit, and was therefore immaterial. The question was allowed and answered. The evidence was competent. It tended to show the knowledge possessed by Carr as to the prior amount of insurance on the goods in question, and to prove the defense which is held good.

§ 1878. *Ignorance of contents of policy may be shown for some purposes.*

A. S. Putnam was allowed to give evidence, under the defendant's objection, showing that he did not read the two \$1,000 policies when they were delivered to him, that he did not examine the policy in suit when it was delivered to him, and that he first noticed the provision as to other insurance, in the policy in suit, after the fire. This evidence was competent, as, if he did not read and know the contents of the defendant's \$1,000 policy and \$2,000 policy in respect to other insurance, his prior communication of the amount of other insurance to Carr was left to operate in full force. The natural inference, that he would have read the policies and thus have seen the mistake, was negatived, and it was proper thus to negative it. The contents of the Hoyt & Butler policy were properly excluded. No other exceptions in regard to evidence seem to be insisted on by the defendant.

The motion for a new trial is denied in each case, and judgment is ordered in each case on the report of the referee, with costs.

§ 1879. **Power of agent.**—The agent of an underwriter may waive a clause in a policy of his principal, limiting the amount of insurance to be allowed upon property. A policy of insurance on a building for \$1,000 allowed \$500 additional insurance on the property; obtaining other insurance not consented to by the underwriter was to render the policy invalid. Two other insurances for \$500 each were obtained, the second of which was not consented to. All the insurance, including that in suit, was effected through the same agent. The court charged the jury that if the agent, when he issued the last policy, knew of and had in mind the policy in suit, the underwriter could not object to the over-insurance. *Geib v. Insurance Co.*,* 1 Dill., 443.

§ 1880. **A party under mistake in regard to other insurance obtains a policy upon the same property, which policy is canceled by the underwriter on discovery of the fact, the policy containing a provision that it shall be void in case of prior insurance not disclosed.** *Held*, that the earlier policy was not avoided by "subsequent insurance." *Wilson v. Queen Ins. Co.*,* 5 Fed. R., 674.

§ 1881. **Meaning of subsequent insurance — Special case.**—The assured, being a debtor of A., sells the property insured to him, A. agreeing to resell to the assured within a certain time; the transaction being intended to secure A. in the amount due him from the assured. The policy required notice of any "subsequent insurance." A. having subsequently obtained insurance upon the property, the court instructed the jury that if the insurance obtained by A. nominally covered the whole property, and not merely his interest in it, and he was in any way authorized by the debtor so to insure, or if there was any agreement between the debtor and A., that the former would pay the cost of insuring the special interest of A., or any part of it, there was subsequent insurance within the meaning of the policy. *Holbrook v. American Ins. Co.*, 1 Curt., 193; 1 Am. L. Reg., 18 (§§ 1898-1401).

§ 1882. **Insurance made by a mortgagee, at expense of the mortgagor, is subsequent insurance by the mortgagor.** *Ibid.*

§ 1882a. **On a question of prior insurance where two policies bear the same date, if one was executed in point of fact before the other, the plaintiff can only recover on the one first executed, if it cover the whole loss. But the burden of proof in such case is on the defendants to show a prior policy.** *Potter v. Marine Ins. Co.*,* 2 Mason, 476.

§ 1882b. **If two policies are executed concurrently, the insured may recover his whole loss upon either, and the company not sued will be liable for contribution.** *Ibid.*

§ 1383. **Denial of notice.**—The denial on oath of the president of an underwriting corporation, "to the best of his knowledge and belief," that the corporation ever received notice of certain other insurance upon the property in question, after he has examined the files and records of the corporation so as to know if any letter of notification appears to have been received, may be received, though he was not president of the corporation at the time of the alleged giving of notice of the second insurance. *Carpenter v. Providence Ins. Co.*,* 4 How., 185.

§ 1384. Consideration of the evidence whether notice of other insurance was given and received. The fact that a witness states that he wrote a letter of notice and probably mailed it is not enough to show notice of other insurance. *Ibid.*

§ 1385. It seems unnecessary for an underwriter to acknowledge the receipt of a letter containing notice of other insurance. *Ibid.*

X. ALIENATION AND ASSIGNMENT.

SUMMARY—*Alienation between partners*, §§ 1386, 1387.—*Bankruptcy*, § 1388.—*Mortgage*, § 1389.—*"Assign,"* § 1390.—*Consent of underwriter*, §§ 1391, 1392.

§ 1386. A policy of insurance insured T. & Co. "upon whisky, their own, or held by them on commission, including a government tax thereon for which they may be liable, contained in the warehouse of D." T. & Co. were sureties on D.'s distillery bond; the whisky was owned by them. One of the firm of T. & Co. sold his interest after the insurance was effected to his copartner, and a third person was taken into the firm. The policy provided that "if the property be sold or transferred, or any change take place in title or possession," it should be void. *Held*, that T. & Co. were entitled to the insurance. *Insurance Cos. v. Thompson*, §§ 1393-94.

§ 1387. A fire insurance policy provided that "if the property should be sold or conveyed," without consent, it should be void. *Held*, that the admission of a person into a partnership, whose property is insured, is not within the provision. (a) *Scanlon v. Union Ins. Co.*, § 1395.

§ 1388. A fire insurance policy provided as follows: "If the title to the property is transferred or changed, this policy shall be void." "If, without the written consent of the company, this policy shall be assigned, it shall be void." *Held*, that a transfer of the policy and property to an assignee in involuntary bankruptcy was not within the language. Such provisions are to be strictly construed. (b) *Starkweather v. Cleveland Ins. Co.*, §§ 1396-97.

§ 1389. A transfer of title of property insured amounting only to a mortgage is not "a termination of the interest of the insured." *Holbrook v. American Ins. Co.*, §§ 1398-1401.

§ 1390. The word "assign," in a provision against assignment of the policy without notice, does not apply to an absolute purchaser of the property who does not become the assignee of the policy; nor does it apply to one who acquires merely a lien or other interest by way of mortgage. *Ibid.*

§ 1391. A fire insurance policy provided that if the property should be sold or conveyed, the contract should terminate, unless the consent of the underwriter was obtained and indorsed thereon. The property was sold to the plaintiff, the insured writing thereon "Payable in case of loss to" the plaintiff. The secretary of the underwriter wrote thereunder, "Consent is hereby given to the above indorsement." *Held*, that this did not imply a consent to the sale of the property; the words "payable in case of loss" to the plaintiff not clearly importing a sale. *Bates v. Equitable Ins. Co.*, §§ 1402-3.

§ 1392. The agent of an insurance company was informed that A. J. P., who with his wife was the assured, had given up his interest to his wife, and this was followed by an assignment on the back of the policy of all his right and interest to her, with the written assent of the company. *Held*, that this was a compliance with a condition that if the property was sold, or the policy assigned without written consent of the company, the risk should cease. *Perry v. Mechanics' Ins. Co.*, §§ 1404-7.

[NOTES.—See §§ 1408-1419.]

(a) *Acc. Hobbs v. Memphis Ins. Co.*, 1 Sneed, 444. But see *Tillon v. Kingston Ins. Co.*, 5 N. Y., 405.

(b) But see, as to voluntary bankruptcy, *Adams v. Rockingham Ins. Co.*, 20 Maine, 292; *Young v. Eagle Ins. Co.*, 14 Gray, 150.

INSURANCE COMPANIES v. THOMPSON.

(5 Otto, 547-551. 1877.)

ERROR to U. S. Circuit Court, District of Kentucky.

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.—The defendants in error recovered in the circuit court of the United States for the district of Kentucky, a joint judgment for \$3,317.58 on a policy of insurance issued by the Germania Fire Insurance Company, The Hanover Fire Insurance Company, The Niagara Fire Insurance Company, and The Republic Fire Insurance Company, on whisky in a distiller's bonded warehouse. The distillery and the warehouse were owned and conducted by George H. Dearen, but the spirits were distilled for and owned by the defendants in error at the time the policy was issued. They were also sureties on Dearen's distillery bond to the United States, and as such were liable for the tax on the whisky if not paid by Dearen, or made out of the whisky. It will be thus seen that Thompson & Walston had two distinct interests in the whisky, namely, the general ownership of it, and their liability for the tax on it which Dearen had assumed to pay, and which, if he did not pay, might fall upon them in either of two ways, to wit, by a seizure and sale of the whisky for the tax by the government, or by a suit on the bond on which they were sureties. The policy, which was manifestly designed to protect both these interests of the assured from loss or damage by fire, was for that reason peculiar and special in its provisions. By its terms the companies bind themselves to "insure Messrs. Thompson & Co. against loss or damage by fire to the amount of \$8,000, for the term of one year, upon whisky, their own or held by them on a commission, including government tax thereon for which they may be liable, contained in the log bonded warehouse of G. H. Dearen."

After the whisky was burned, these companies paid their share with others of the loss of the value of the whisky apart from the tax; but by the receipt which they took it was stated that the claim for liability on account of tax remained undecided. Thompson & Co. were sued on their bond with Dearen for this tax; and they notified the insurance companies of the suit, and asked them to defend it, which was declined. Judgments were obtained in each case on the bonds, and Thompson & Co. replevied the judgments. By this is meant that they gave bail which operated as a stay of execution for the period which the law of Kentucky allowed in such cases. The present action was brought by Thompson & Walston to recover the amount of these judgments.

On the trial evidence was given tending to show that before the fire Walston had sold to his partner, Thompson, all his interest in the partnership, and that Hite Thompson had become interested with the other Thompson in the business to the extent of one-fifth. And, on the hypothesis that the jury believed this, the counsel for the companies asked the court in several forms to instruct the jury that plaintiffs could not recover. This proposition was based on a provision in the policy that it should be void "if the property be sold, or transferred, or any change take place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance."

The refusal of the court to do so, and the charge of the court to the effect that this change in regard to the ownership, if true, did not defeat the right to recover the amount of the judgments against plaintiffs for taxes, are the errors on which a reversal is asked.

The argument of counsel on the effect of a mere change in the title by one

partner selling to another his interest in the property insured, and the authorities presented on both sides, are very able and full, and the decisions are conflicting. So, also, the effect of the introduction of a new part-owner, in a case like the present, where the possession and care of the goods remain unchanged, are well considered; but in the view we take of the case it is not necessary that this court should decide these questions.

§ 1393. *Insurance ordinarily an indemnity for loss. Interest of surety on distiller's bond.*

We are of opinion that a careful consideration of the facts of this case, in their relation to some of the most elementary principles of the contract of insurance, will enable us to dispose of it without much difficulty. It is to be observed, that, whether insurance be against fire, or marine loss, or loss of life, it is neither the property nor the life that is insured. Nor does the contract propose or intend to say that there shall be no destruction of the property or loss of life. In point of fact, the obligation of the insurer is designed to come into operation after the loss either of the property or life has occurred, and to give compensation to some one interested in the life or the property, for the loss of that life or injury to the property.

In regard to property this compensation is intended by the fundamental principles of insurance to bear a direct relation to the moneyed value of the interest which the party insured had in the property. Where the only interest of the assured is the full and perfect ownership of the property, that is the interest insured; and the amount to be recovered on the policy of insurance is that full value or such sum less than that as the insurer stipulates to be liable for.

But it often occurs that the interest of the party insured is not that of full ownership. His interest may be that of a trustee, or executor, or some other representative character, in which case the recovery will be in accordance with the nature of the contract. The policy before us is a striking illustration of this. The interest of the plaintiffs in the whisky which is insured is three-fold,—their own, or held on a commission, and the government tax, for which they may be held liable. If the makers of this policy intended to insure no other interest of Thompson & Co. in the whisky than their proprietary interest, the interest which at the time of the loss they had as owners of the whisky, the enumeration of the two other interests was useless and misleading. The facts already stated show that they had another interest; and, since they insured it, it must be presumed that it was known to the insurers. The whisky which they owned was liable to the government for a tax; and this Dearen was primarily liable for and had promised to pay, but, if he did not, the whisky could be sold for it. They had also become bound with him on his bond for the payment of this tax. In the event of the whisky being destroyed by fire, the danger of their personal liability was greatly increased. They were, therefore, right in wishing to be secured against this loss also, if the whisky was burnt. It is impossible to give any other construction to the policy than that the company agreed to furnish this indemnity. The language, when brought into relation with the conceded facts of the case, admits of no other.

This interest was an insurable interest, as much as freights at sea or profits in an adventure. The whisky stood between them and their loss. The whisky when in the warehouse was loaded with this tax. It would sell for as much less as the tax, unless the tax was paid. So long as it was in the warehouse, plaintiffs were not liable for the tax. The moment it was lost they be-

came liable. This was a fair subject of insurance. *Fireman's Fire Insurance Co. v. Powell*, 13 B. Mon. (Ky.), 311; *Gordon v. Massachusetts Fire & Marine Insurance Co.*, 2 Pick. (Mass.), 249; *Rohrbach v. Germania Fire Insurance Co.*, 62 N Y., 47.

§ 1394. *Alienation of partnership interest.*

In regard to this interest, Walston had never parted with it. His sale of the partnership interest did not release him from his liability on Dearen's bonds; nor did the subsequent purchase of Hite Thompson of one-fifth interest in the whisky have that effect, or destroy Walston's interest to that extent in the whisky. As to him, it is very clear that he had the strongest interest that the whisky should be secure from fire until the tax on it was paid, since its continued existence was his best, if not his only, security against liability on the bonds.

It is to be observed that no other interest of Thompson & Co. is in issue in this suit. They never held the whisky on commission, and the loss in regard to the proprietary interest had been paid by the companies. This was another and a different interest in the same property. A man might insure his interest in property as an executor, and his interest as a legatee. His removal from the office of executor by the proper court might, within the terms of this policy, prevent his recovering in that character; but if his interest in the property as legatee was one-sixth, would the change of executorship bar his recovery as legatee? This would hardly be asserted by any one.

It is objected further to a recovery that plaintiffs have not actually paid the judgment. The answer to this, if any were necessary, is that by the law of Kentucky, the replevin bond is a satisfaction of the judgment. It is as to this obligor a debt discharged. It is said that, in case of a loss like this the government cannot collect the tax from the bondsmen. The answer is, that the government has sued and obtained judgment for the tax; and defendants were asked to defend that suit and declined to do so.

Judgment affirmed.

SCANLON v. UNION FIRE INSURANCE COMPANY.

(Circuit Court for Illinois: 4 Bissell, 511, 512. 1869.)

STATEMENT OF FACTS.—After the policy in this case was issued plaintiff formed a partnership with other parties, and put the insured property in as assets. The company claimed that this vitiated the policy under a provision that if the property should be sold or conveyed the policy should be null and void.

Charge by DRUMMOND, J.

The question is whether there was, within the meaning of this clause in the policy, a sale or conveyance of the property, in such a way as to render it void.

§ 1395. *Transfer of part interest not within clause forbidding sale.*

It is to be observed that the language of this condition is general, "That if the said property shall be sold or conveyed," etc. It is not, that if the property, or any part of it, or any undivided interest in it, shall be sold or conveyed, the policy shall be void; it is not that if there is any change in the condition of the property, or in the interest of the plaintiff, the policy shall be void; but simply "if the property shall be sold or conveyed." The question is, whether the true construction of this clause is not that, in order to vitiate the policy, it is essential that the whole of the interest of the insured

in the property shall be sold or conveyed; and such, I think, is the true construction of the condition. In order to avoid the policy, he must sell the whole of his interest in the property, and so long as he holds an interest in the property the policy is binding. It was competent for the insurers to declare that if a part of it were sold, that should avoid the policy. It was also competent for them to declare that if there was any change in the condition or title of the property, the policy would be void; but that is not this condition. Therefore, I think the policy covers whatever interest Scanlon owned in the property insured after he entered into the articles of copartnership, and at the time of the loss. It is for you to determine what that interest was. (Verdict for plaintiff.)

STARKWEATHER v. CLEVELAND INSURANCE COMPANY.

(District Court for Ohio: 2 Abbott, 67-78. 1870.)

Opinion by SHEEMAN, J.

STATEMENT OF FACTS.—The petition states that on February 7, 1870, Newton Wells, on the petition of his creditors, was declared by default a bankrupt, and that the petitioner was thereupon duly appointed his assignee. That on July 25, 1868, the defendants issued to Newton Wells, the said bankrupt, a policy of insurance in the sum of \$1,500 on his house in Concord, Lake county, Ohio, for the period of three years from that date. That on May 8, 1880, and within the life of the policy, but after Wells was adjudicated a bankrupt and the assignee appointed, the premises were destroyed by fire.

The answer of the insurance company does not deny the loss or the sufficiency of the proofs, but bases its defense on two clauses in the policy which read thus: "If the title to the property is transferred or changed this policy shall be void." And secondly, "If, without the written consent of the company, this policy shall be assigned, it shall be void." The direct question presented the court for adjudication is this: Is the assignment of the register to the assignee both of the policy and of the property insured a violation of these two covenants in the policy, and does it exonerate the company from liability? It is claimed by the petitioner that his assignment and transfer were not the voluntary acts of the bankrupt, but merely an assignment by operation of law, and that there is a broad distinction recognized by the authorities between the voluntary and the involuntary assignments and transfers of the policy and title. It is claimed by the defendants that a policy of insurance is a contract of personal indemnity, in no manner incident to the estate, nor running with it, and that the language of this policy is broader than the common and usual clauses against alienation, and includes in it any involuntary change or transfer of title.

§ 1396. *Transfer under bankruptcy not within clause against assignment without consent.*

It may be premised that as the covenants in this policy are in restraint of alienation, and entail a forfeiture, they may be strictly construed. Though a contract voluntarily entered into by the parties, no other meaning should be given to the language used than a most rigid and literal interpretation permits. 15 Johns., 276; 2 Wils., 234. The clause against the assignment of the policy, and against the transfer and change of title, may be considered together. The rules that apply to either apply to both. These covenants are common to all insurance contracts. All policies have the same clause forbid-

ding the assignment of the policy. The covenant against change or transfer of title in different policies varies somewhat in phraseology. In some policies the language used is, "sold or conveyed, in whole or in part;" in others, "shall not be alienated by sale or otherwise;" or, as in this, "the title shall not be changed or transferred." All these expressions are in substance the same. To sell and convey, to alienate, or transfer the title, means an act whereby a thing is made another man's; an act whereby a change in the ownership of property is made from one person to another. And whether these words are used in the active or passive sense can make no difference in their construction. These covenants, therefore, on the part of the assured, are that he will not assign the policy, or in any manner change his title to, or the ownership of, the property insured.

It is not to be doubted that the petitioner, by virtue of the adjudication in bankruptcy and his appointment as assignee, has the control of this policy and of the property therein insured. What rights and what title did he thereby acquire? Assignees, according to 1 Bouv. L. Dic., 132, are of two kinds: one in fact, and one in law. An assignee in fact is one to whom an assignment has been made in fact, by the party having the right to assign. An assignee in law is one in whom the law vests the right and control in the property. To the latter class an assignee in bankruptcy belongs. He is like an administrator, executor or guardian, upon whom, when appointed by the proper authority, the law confers the right and power to control the property thus committed to his charge, paramount to all others. But it does not give to, or vest in, him the absolute ownership in his own right to the property. He is a mere trustee, accountable under the law to the *cestui que trust*. He holds the property assigned to him in trust — of all leases and policies, as well as other property. In leases with covenants against alienation without consent, etc., it has always been held that the leases pass to the assignee, and this is true of the bankrupt law. Nay, more; it has been held (2 Chitty, 600) that in such case the assent of the lessor to such assignment is to be presumed from the law itself. This doctrine is nothing but the simple enunciation of the principle laid down by Lord Ellenborough, in *Copeland v. Stevens*, 1 Barn. & Ald., 592. In substance, he declares that the assignee is a mere agent for the bankrupt and for his creditors. He says: "An assignment by the commissioners of bankruptcy is the execution of a statutory power given them for a particular purpose, namely, the payment of the bankrupt's debts. Nothing passes from them, for nothing ever vested in them. Whatever passes, passes by force of the statute, and for the purpose of effecting the object of the statute. . . . The object of the statute and of the assignment is the payment of the bankrupt's debts, and the assignee is trustee only for that purpose."

Again, in 9 Vesey, 100, and 13 id., 186, the lord chancellor declares that assignees are not considered as having the same rights as purchasers for a valuable consideration, and that they are placed in the same class as personal representatives of intestates. Of course I need not quote authorities to show that Wells dying, this policy, notwithstanding its covenants, would pass to and vest in his administrator. From these cases the principle is clearly deduced, that an assignee in the case of involuntary bankruptcy is only a trustee, an agent, standing in the shoes of the bankrupt, with only power to do what the bankrupt ought to have done, namely, pay the debts out of his assets. By the provisions of the bankrupt law the register makes the assignment and not

the bankrupt. The latter makes no paper and performs no act to divest him of the title. But the control of the property, merely and solely by the judgment of the court, is taken from him and vested in the assignee, who has merely the power to do what the general as well as the bankrupt law requires, namely, to appropriate the bankrupt's property to the payment of his debts. In other words, that the assignee is a mere agent of the debtor to use his property in the payment of his debts. It therefore follows from this that the bankrupt remains as much interested in watching over and guarding the insured property after as before bankruptcy, and that the assignee does not acquire such an interest in the policy, nor in the insured property, as to work the forfeiture contemplated by the clauses in question. *Phill. Ins.*, 107.

§ 1397. *Authorities reviewed.*

This conclusion will be further strengthened by a review of the cases upon the effect of an involuntary act of bankruptcy upon the breaches of covenant in insurance and other like contracts. Parsons, in his work on Contracts, vol. 2, p. 451, says: "On general principles, that where property, insured against fire, is taken into the possession of the law for the benefit of creditors, the insurance will remain valid until the property is sold by the assignee." The case of *Bragg v. New England Ins. Co.*, 5 Fost., 289, was a suit brought on a policy which contained a clause that, "If the property shall in any way be alienated, the policy shall be void." The property was mortgaged at the time, and this fact communicated to the company. During the life of the policy, the mortgage was foreclosed, and the property sold. But the court said, "that the title that became vested in the mortgagee by the foreclosure was brought about by the operation of the law. There was no act of conveyance or transfer, by the mortgagor or mortgagee. We cannot therefore regard the foreclosure and sale as an alienation."

In the case of *Smith v. Putnam*, 3 Pick., 220, there was a lease of a farm, with a covenant not to carry off any hay under a forfeiture of \$10 per ton. Hay was attached and carried off by the creditors of the lessee, and without his consent. In this suit for the forfeiture the court said "that the general principle to be deduced from all the cases was that covenants not to assign, transfer, etc., are broken only by a voluntary transfer by the lessee. That the removal of the hay, by sale or execution, was not a voluntary act of the lessee, and therefore no breach of the covenant." The leading case in England will be found in 8 Term, 57. Suit was brought on a lease which contained a covenant that the lessee "should not set over, assign, transfer, or in any way dispose of the lease, without the written consent of the lessor." The lessee confessed judgment, and upon execution issued thereon the lease was sold. Lord Kenyon said: "I adopt the distinction between these acts which the party does voluntarily, and those that pass *in invitum*. Judgment in contemplation of law always passes *in invitum*, and therefore there is no breach." The same doctrine was held thirty years before, and will be found in 3 Wils., 234.

In the case of *Wilkinson v. Wilkinson*, 10 Eng. Ch., 258, a father by will gave his son the rents and profits of certain premises, with a proviso that if the son assigned or disposed of, or otherwise incumbered the property, he should forfeit the estate. The son afterwards became bankrupt. Sir W. Grant, in deciding the case, says: "Now courts of law have held that an assignment by operation of law, which bankruptcy is, is not an alienation within the meaning of a restraint against alienation."

Hilliard, in his work on Bankruptcy, p. 141, sums up the law in these words: "Property may be limited or leased to be void or revert back in the event of bankruptcy, and if a lease to a trader contain such a proviso, the term does not pass to his assignee, but reverts back. But to prevent its passing there must be an express proviso to that fact. The usual covenant or proviso not to let, assign or transfer without consent, etc., will not be sufficient. The commissioners may still assign the lease to the assignees without such consent, and such consent is presumed by operation of law. The distinction, however, is taken in England, that unlike bankruptcy, which is an involuntary proceeding, insolvency being a voluntary proceeding on the part of the debtor himself, is a breach of the covenant against assignment, and works a forfeiture."

On these authorities, it seems clear to me that the clauses in this policy forbidding its assignment, and the change and transfer of the title to the property, have no more effect than similar words in leases. Both are contracts between two persons, with this difference, that leases are under seal, and therefore of a higher nature. The cases cited establish the doctrine that bankruptcy and judgments are involuntary, and do not avoid covenants against assignments and transfers, either in leases or policies of insurance.

In this case the bankruptcy of Wells, the owner of the policy and the property, was involuntary. By operation of the law the policy and the property were taken out of his custody and control and placed in the hands of the assignee, as the agent of the law, to sell the same and pay his debts. The entire interest in the property is sold under the law by the assignee. The loss provided for in this policy accrued while the property was in this condition. It was still in law Wells' property, but by operation of law, in the hands of the assignee for the sole purpose of selling and applying the proceeds for Wells' benefit. Decree for petitioner.

HOLBROOK v. AMERICAN INSURANCE COMPANY.

(Circuit Court for Rhode Island: 1 Curtis, 193-201. 1852.)

STATEMENT OF FACTS.—Action on a policy of fire insurance issued by the defendant on the movable machinery and stock of a cotton mill, for \$7,500. The defendant relied upon two clauses in the policy, one against further insurance without notification to the company, and its indorsement thereof upon the policy, and the other against assignment of the assured's interest in the policy without the written consent of the company; a failure in either respect to avoid the policy.

In April, 1850, and while the policy was in force, plaintiffs assigned a large part of their stock to Shepherd, Wright & Ripley, their factors in New York, to whom they were indebted in the sum of \$20,910. At the same time Shepherd & Co. executed an instrument whereby they leased such property, so assigned to them, to the plaintiffs, for the term of five years, at an annual rental of \$2,000; and further agreed to resell, at any time within said five years, said stock so purchased and leased, at the fixed price of \$20,910, with interest at seven per cent. from the date of the prior sale. The plaintiffs were to enjoy peaceful possession of said stock only and so long as they paid the taxes, insurance, etc., and kept the same in good repair.

Ripley, of the New York firm, testified further, that the accounts of the firm had not been changed by this transaction, but that it was carried out merely to secure them their claim. That, unbeknown to plaintiffs, they had

insured their interest in said stock in the sum of \$10,000 in two other companies, both of which had already paid them, after the loss. One of the two policies had first described them as mortgagees, but the word was afterwards erased. In filing their proofs of loss, the plaintiffs had not treated themselves as mortgagees, but owners in fee, subject to a prior mortgage to some third person.

The other material facts are set forth in the opinion of the court.

§ 1398. *A clause against assignment of interest not affected in this case by transfer of property unless it terminate the insurable interest.*

Opinion by CURTIS, J.

The clause in the policy which declares the interest of the insured therein not to be assignable has no application to this case, unless the insured, by making such a transfer of the property as deprived them of their insurable interest therein, have worked "a termination of the interest of the insured in this policy" within the meaning of this clause; and the inquiry is, has there been such a termination? The first reason why their interest in the policy is not terminated is found in the fact that only a part of the property insured was conveyed to Shepherd, Wright & Ripley. The policy continued to cover so much as remained. But at the same time, if a part of the property insured was sold, it ceased thereby to be at the risk of the underwriters; and in adjusting the loss on the residue, the amount thus sold must be treated as if not put at risk, and the sum insured reduced proportionably; and as these plaintiffs claim to recover the whole amount insured in this policy, it becomes necessary to consider the effect of the conveyance they made. It was not a legal mortgage, for that requires a defeasance, which, on performance of the condition, would revert the legal title in the grantors. The indenture contains no such defeasance. But in equity, a conveyance of property, by way of security for a debt, is treated as a mortgage, whatever form the parties may have adopted to effect that object. In this case they have described, in words, a conditional sale, with a right of repurchase; but as it clearly appears that the sole consideration was a debt due from the grantors to the grantees, that the debt was not extinguished, and that the only object the parties had in view was to give and take security for that debt and the interest which should accrue thereon, the conveyance could not be allowed to operate otherwise than as a mortgage between the parties. *Russell v. Southard*, 12 How., 139 (Conv., §§ 491-509). There remained, therefore, in the plaintiffs the same insurable interest as before; for the property standing as security only for their debt, the loss to them by its destruction would be the same as if no such mortgage interest had been created. *Higginson v. Dall*, 13 Mass., 96; *Bartlett v. Walter*, 13 Mass., 267; *Gordon v. Massachusetts Fire and Marine Ins. Co.*, 2 Pick., 249; *Lazarus v. Commonwealth Ins. Co.*, 5 Pick., 76; *S. C.*, 19 Pick., 81; *Gilbert v. North American Fire Ins. Co.*, 23 Wend., 43; *Swift v. Vermont Mutual Fire Ins. Co.*, 18 Vt., 305; *Tittlemore v. Same*, 20 Vt., 546.

§ 1399. *Quære, whether the change in title was material per se?*

Independent of this clause in the policy, and of other facts presently to be mentioned, it might have been necessary to submit to the jury the question whether this change in title was material to and did work a change in the risk. In the case of *The Columbian Ins. Co. v. Lawrence*, 2 Pet., 25 (§§ 1124-30, *supra*), the supreme court held that the difference between absolute legal title and a conditional equitable title might be material to the risk, and that it could not be declared, as a legal result, that one was in substance the same

as the other, as a subject of insurance. But in this case the underwriters inquired, before making the insurance, whether the property was under mortgage, and for how much, and to whom, and whether the mortgagee had insurance; to these inquiries the insured replied in writing, that "the property is mortgaged, and the mortgagee has no insurance, to our knowledge." Having been satisfied with this answer, and content to effect the policy without knowing the amount of the incumbrance, it would be difficult for them now to complain of the creation of an incumbrance on the property, the possession and custody and substantial interest of the insured remaining the same. But however this might be, I consider this express clause in the policy as governing the rights of both parties in this particular. It provides only for a termination of the interest of the insured. Nothing short of that is to avoid the policy; and I do not think it is open to the insurer to say that though less than this has occurred, the policy is void. If it was intended to have a change in the legal title, which worked no change in the insurable interest, affect the policy, they should not have declared that a termination of the interest of the assured should have that effect, and been silent as to all other changes of interest. I am of opinion that there is no defense to any part of the claim, under this clause of the policy.

§ 1400. *Meaning of word "assigns" as used in a policy of fire insurance.*

Under the other clause of the policy it has been argued that the word "assigns" means any one who takes an interest in the property from the insured, and that as Shepherd, Wright & Ripley did take such an interest, and procured insurance on the property, and no notice was given to the defendants, this policy ceased and became void. I do not think this is the meaning of the word *assigns*, in this connection. This policy may be assigned to a purchaser of the property, with the assent of the underwriters. Being thus owner of the property and the policy, such purchaser would stand in place of the insured, and ought to be subjected to the same restraint, as to subsequent insurance, intended to be placed on the latter by this clause. Yet it may well be doubted whether he would have been within the restriction, if not expressly named; and for this reason only, I consider, he was named. The word does not apply to an absolute purchaser of the property, who does not become the assignee of the policy with the assent of the office, for such a purchase, of itself, puts an end to the policy. It does not apply to one who acquires merely a lien, or other interest by way of mortgage, because he is not properly the assign of the insured, whose interest and property have not passed to him, but who, by virtue of his general property, has created a qualified and special interest only, and conveyed that. Moreover, unless the mortgagee insures for the account of the mortgagor, a case which will be presently noticed, insurance by him is not within the mischief intended to be guarded against, which is, such further insurance as would lessen the interest of the insured in the preservation of the property. If the insured can have no benefit from the subsequent insurance it can have no such effect, and he can have no benefit from it, if procured by the mortgagee for his own account and at his own expense.

§ 1401. *Subsequent insurance, to avoid the policy, must have been effected for benefit and at expense of assured.*

We must therefore consider whether the insurance effected by Shepherd, Wright & Ripley was subsequent insurance effected "by insured in his policy." And there are two events in which I am of opinion it is to be so treated. In the first place, Shepherd, Wright & Ripley held the legal title. It was com-

pentent for them to cover by insurance, not merely their own special interest in the property, but the property itself. Viewed as trustees, or as mortgagees, they might do so. *Lucena v. Craufurd*, 2 Bos. & Pull. N. R., 324; *Irving v. Richardson*, 2 B. & Ad., 193; S. C., 1 M. & Rob., 153; *Carruthers v. Sheddon*, 6 Taunt., 17.

If, in point of fact, they did cover the whole property, and were in any manner authorized by the plaintiffs to do so, then, in my judgment, there was subsequent insurance made by the plaintiffs; for it is wholly immaterial in whose name it was done. It is the thing, and not any particular form of doing it, which this clause was intended to guard against, and that thing is such subsequent insurance on the property as would lessen the interest of the insured in its preservation, and this includes all subsequent insurance, which, when recovered, will go to the benefit of the insured in the first policy. And so if the mortgagees did, in fact, cover their own special interest as mortgagees, and the mortgagors agreed to pay the expense of obtaining the insurance, then, although the mortgagees would have a lien on the insurance money as security for their debt, yet the mortgagors could compel its application to the payment of the debt, and any surplus would belong to themselves. In these cases the subsequent insurance, being effected by the authority of the insured, for their benefit, and at their expense, must be deemed to be effected by them, within the meaning of this clause in the policy.

Whether this case comes within the interpretation of the policy is a question of fact for the jury. There is nothing decisive in the instrument executed by the plaintiffs, and Shepherd, Wright & Ripley. What is there said concerning the payment for insurance is introduced as a qualification of the covenant of the lessors. It may be evidence that there was some understanding between the parties on that subject, but in itself it only qualifies the lessors' covenant. So the testimony of Ripley, though it proves the insurance money is now intended to be credited hereafter to the plaintiffs, does not enable the court to say that the insurance effected by them was for account of the plaintiffs. I shall submit to the jury the questions of fact, in substance as follows:

If the insurance obtained by Shepherd, Wright & Ripley nominally covered the whole property, and not merely their interest in it, and they were in any manner authorized by the plaintiffs so to insure, or if there was any agreement between the plaintiffs and Shepherd, Wright & Ripley, that the former would pay the costs of insuring the special interest of Shepherd, Wright & Ripley, or any part of it, then there was subsequent insurance within the meaning of the policy, and the plaintiffs cannot recover.

BATES v. EQUITABLE INSURANCE COMPANY.

(10 Wallace, 33-38. 1869.)

ERROR to U. S. Circuit Court, District of Rhode Island.

STATEMENT OF FACTS.—Defendant insured certain goods by a policy which provided that it should be void if the property should be sold or conveyed or policy assigned without consent of the company; but in case of sale upon notice the company would refund a proportion of the premium, or the policy to continue for the benefit of the purchaser, the consent of the company to be evidenced by a certificate of the fact or by indorsement on the policy. The insured sold the property to plaintiff, and indorsed on the policy, "Payable, in case of loss, to E. C. Bates." The secretary of the company then wrote under

this indorsement, "Consent is hereby given to the above indorsement." Thereafter the property was destroyed by fire, and Bates brought suit. The defense was that the insured had ceased to be the owner when the loss happened, and the consent of the company was not given.

Opinion by MR. JUSTICE MILLER.

One of the conditions of the policy was that if the property insured should be sold or conveyed, the risk assumed ceased and the policy became void; and there can be no doubt that, looking to both the provisions of a policy, such as this one contained, and which are cited in the statement of the case, it ceases to be binding when the assured parts with his interest in the property insured, unless the company be notified of the sale. When this is done before a loss happens, the company is bound to refund a part of the prepaid premium, to be apportioned in reference to the unexpired time for which the policy was given.

If, however, the purchaser and the assured ask it, and the company consent to it, the policy may continue for the benefit of the purchaser. This latter proposition is founded upon the knowledge of the sale, and upon the consent of the company to accept the purchaser as the party whose interest is insured, instead of the vendor who was originally insured. As there is no evidence, outside of the two indorsements already quoted from the policy, that there was any consent to accept Bates, the purchaser, as the party whose interest was insured, and as the presumption, if there is one arising from those indorsements of a notice of sale, is not supported by anything else, it becomes important to determine what those indorsements imply on those two points.

If Philbrick could not, in law or in fact, have directed the payment of the loss, if one should occur to him as owner of the property, to another party, with the consent of the company, then it would be a reasonable inference that the indorsement made by him implied a sale of his interest. But if he could make, with the consent of the company, a valid appointment that any loss covered by the policy should be paid to a third person, though he remained the owner of the goods and the loss was his loss, then the indorsement of Philbrick does not necessarily convey the idea of a sale, nor the consent of the company imply a consent to a sale.

§ 1402. *The insured may direct the loss under a fire policy to be paid to a third person, without transferring the property.*

Now, it is a well known and frequent thing in insurance business for a person to insure his life or his property, and either in the policy itself, or by indorsement at the time it is made, or by subsequent indorsement, to which the consent of the company is generally required, to direct the loss to be paid to some third party. And this is done in language similar, if not identical, with that used in this case. It is a mode of appointing that the loss of the party insured shall be paid by the company to such third person. This transaction is a very common mode of furnishing a species of security by a debtor to his creditor, who may be willing to trust to the debtor's honesty, his skill and success in trade, but who requires indemnity against such accidents as loss by fire, or the perils of navigation. The property of the debtor at risk being thus insured for the benefit of the creditor gives him this indemnity.

§ 1403. — *such act indorsed on policy no evidence of consent to alienation or to insure purchaser, when.*

In the face of this frequent use of the two indorsements on the policy, it cannot be held that they imply of themselves a knowledge of the sale or a consent to insure the purchaser. If it could be shown that it had been the

course of dealing, between these particular parties, to recognize the indorsement of the party first assured as evidence of a sale, and the indorsement of the company as a consent to the sale; or if it could be shown that by custom and usage, in any particular place, these indorsements were so treated, the case might be different; but, in the absence of such usage or custom, we can see in these indorsements nothing more than the direction of Philbrick, and the consent of the company, that any loss sustained by Philbrick, covered by that policy, should be paid to Bates. As Philbrick did not have any interest in the goods when the fire occurred, he sustained no loss, and the policy covered none.

The analogy of the effect of such indorsements on promissory notes, in assigning the notes to the indorser, is very imperfect. In such case the sum mentioned in the note is payable absolutely, and without regard to the interest of the original payee in any other matter. It is all contained in the note, whose contents, to use the language of the judiciary act, are thus made payable to the indorsee, and the indorser necessarily parts with his interest in the subject-matter of the contract.

These views are well supported by recently adjudged cases in this country. *Fogg v. Middlesex Manuf. Co.*, 10 Cush., 346; *Hale v. M. & F. Ins. Co.*, 6 Gray, 169; *Young v. Eagle Ins. Co.*, 14 id., 153; *Grosvenor v. Atlantic Ins. Co.*, 17 N. Y., 391; *State Fire Ins. Co. v. Roberts*, 31 Penn. St., 438.

Judgment affirmed.

PERRY v. MECHANICS' MUTUAL INSURANCE COMPANY.

(Circuit Court for Rhode Island: 11 Federal Reporter, 478-482. 1882.)

Opinion by COLT, J.

STATEMENT OF FACTS.—This is an action upon a policy of fire insurance, and the case was heard by the court, jury trial having been waived. The policy insures Ellathea Perry and A. J. Perry in the sum of \$500 on a barn upon their farm in Barrington, Rhode Island. It is dated January 21, 1880, and runs five years. It is in evidence that the fire occurred September 24, 1880, and that the building was totally destroyed. It further appears from the testimony that in 1877, when the title to the whole farm was in Ellathea Perry, she and her husband, John A. Perry, made a verbal agreement with their son, Adelbert J. Perry, to convey to him one-half of the estate; the understanding being that he was to live upon the farm and erect a house and barn upon his portion. The son entered into possession. A cottage was built on the land called his. The barn covered by this policy of insurance was also built, one-half being situated on the land considered as his, and the other half on the land of his mother, Ellathea Perry. The son, according to the evidence, paid for the cottage and one-half the barn. He first advanced \$1,000 and then from \$400 to \$500. He afterwards built an addition to the house. From 1877 until the summer of 1880 he remained in possession of the premises including the house and one-half of the barn. Then it was decided and agreed that he should give up his interest in the estate to Ellathea Perry, in exchange for some property in Providence.

As part of this transaction we find, under date of September 3, 1880, an assignment on the back of the policy, by A. J. Perry, of all his right, title and interest in the policy to Ellathea Perry; and an indorsement of assent by the company through Snow & Barker, agents.

§ 1404. *Parol contract to convey lands by married woman void ab initio.*

The company now resists payment on several grounds. It is contended that the parol agreement or contract to convey being made by a married woman, even with the husband's consent, and though the person pays the purchase money, enters into possession and makes improvements, is absolutely void under the laws of Rhode Island, which provide that a married woman may convey real estate by deed in which her husband joins; and that consequently A. J. Perry, at the time the policy was taken out, had no insurable interest in the property, and that therefore the policy is void, at least to the extent of this claim under it. But admitting that this agreement is void, as it appears to be (*Bishop, Married Women*, vol. 1, § 601, and vol. 2, § 180; *Pitcher v. Smith*, 2 Head, 208; *Lane v. McKeen*, 15 Me., 304; *Warner v. Sickles, Wright*, 81; *Miller v. Hine*, 13 Ohio St., 565); and admitting further that no insurable interest can exist under a contract which is *ab initio* void and not enforceable in law or equity, as it seems is the law (*May, Ins.*, § 96; *Stockdale v. Dunlop*, 6 M. & W., 224; *Steinback v. Fenning*, 6 Eng. L. & Eq., 41; *Tuckerman v. Home Ins. Co.*, 9 R. I., 414; *Columbian Ins. Co. v. Lawrence*, 2 Pet., 25, 47; §§ 1124-30, *supra*),—still it does not follow that because one of the parties to a policy has no insurable interest it thereby becomes invalid.

§ 1405. *Insurable interest not vitiated by joinder in same policy with alleged interest not insurable.*

Insurance without interest, if included in the same policy with interests which are insurable, does not vitiate the policy except as to the non-existent interest. It remains valid for so much as constitutes a legitimate insurable interest. *May, Ins.*, § 74; *Peck v. New London Ins. Co.*, 22 Conn., 575.

If A. J. Perry, therefore, had no insurable interest, Ellathea Perry could still recover to the extent of her interest; and in this case it so happens that if no interest in the land or buildings passed to A. J. Perry under the agreement and subsequent proceeding, all right and title to the whole premises, and so to the whole of the barn insured, remained with Ellathea Perry, and consequently her insurable interest would cover the whole of the property, and she could recover the full amount of the claim. This would clearly be so in the absence of any condition in the policy requiring the true title or interest of the assured to be stated, which is the case here. That one of the assured should prove to have a good title to the whole of the property can hardly be considered the concealment of a material fact, for it is difficult to see how it affects the risk. On the other hand, if we assume that an insurable interest of some kind in the building existed in A. J. Perry at the time the policy was made, which is doubtful under the authorities, still we are of the opinion that the assignment was a valid transfer to Ellathea Perry of that interest, so that she thereby became the holder of the right to the whole policy. *Fogg v. Middlesex Mut. Fire Ins. Co.*, 10 Cush., 337.

§ 1406. *Assignment of policy. Effect on insurable interests.*

We are also of the opinion, the testimony being that the agent of the company was notified that A. J. Perry had given up his interest in the property insured to Ellathea Perry, followed by the assignment on the back of the policy of all his right, title and interest to her, with the written consent of the company that this was a substantial compliance with that condition in the policy which provides, among other things, that "if said property is sold (except when payable to a mortgagee), or if this policy is assigned without the written consent of the said company, or if the assured makes any attempt to

defraud said company, that in every such case the risk thereupon shall cease and determine, and the policy be null and void unless confirmed by a new agreement written thereupon, after a full knowledge of such facts or circumstances." The form of assignment is the kind adopted where the property is alienated, and the purchaser desires all rights under the contract transferred to him. Upon such an assignment the contract becomes an insurance on the property of the assignee, and ceases to be an insurance on the property of the assignor. It is different from another species of assignment where, in case of loss, payment merely is to be made to a third party, for there the insurable interest in the property must belong to the assignor at the time of the loss. *Fogg v. Middlesex Mut. Fire Ins. Co.*, 10 Cush., 337.

As to failure to furnish proof of loss, the evidence of John A. Perry and A. J. Perry, standing uncontradicted to the effect that an agent with full powers specifically agreed to a waiver, is conclusive. After making such a verbal agreement, upon the faith of which the assured may have acted, the company cannot now deny any waiver upon the ground that a written stipulation for arbitration, afterwards signed but never carried out, says that the agreement to arbitrate shall be subject to the terms and conditions of the policy.

§ 1407. *Practice in federal courts. Parties.*

It is true that in our view of the case, Adelbert J. Perry, trustee, has no interest in the subject-matter of the suit, and that he is, therefore, improperly joined as plaintiff. But the United States courts conform, as near as may be, to the practice, pleadings and modes of procedure in civil causes, other than equity and admiralty, of that of the states in which such courts are held. R. S., § 814. And it is provided in the Public Statutes of Rhode Island (1882), page 555, section 33, that no action shall be defeated on account of the misjoinder of parties, if the matter in controversy can be properly dealt with and settled between the parties before the court, and the court may order any party improperly joined in any action to be stricken out.

The name of Adelbert J. Perry, trustee, may be stricken out, and judgment entered in favor of the other plaintiffs for the amount of the policy, with legal interest from November 24, 1880.

§ 1408. The execution of a deed of conveyance of land, acknowledged but not delivered, does not work a change of title or possession. *Humphry v. Hartford Ins. Co.*, 15 Blatch., 85 (§§ 1122-23).

§ 1409. A lessee can insure nothing more than his leasehold interest, and if he parts with that before loss, he cannot recover. *Hidden v. Slater Ins. Co.*,* 2 Cliff., 206.

§ 1410. The fact that an owner of premises, in possession when insurance was granted to him, afterwards moved out and let the premises, is not a defense within a condition rendering the policy void "if any change take place in title or possession." *Rumsey v. Phoenix Ins. Co.*, 17 Blatch., 527; S. C., 2 Fed. R., 429 (§§ 1221-23).

§ 1411. Sale for taxes.—A policy provided that if the property insured should be sold or transferred, or any change take place in the title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance, the insurance should be void. *Held*, that a sale of the property for taxes, if valid, was within the provision. *Runkle v. Citizens' Ins. Co.*, 6 Fed. R., 143.

§ 1412. Sales of goods.—Insurance upon a stock of goods in trade is not affected by partial sales of the stock from time to time, followed by new supplies, though the contract provide that the policy shall be avoided by an alienation of the property without consent of the underwriter. *Bates v. Equitable Ins. Co.*,* 3 Cliff., 215.

§ 1413. Consent.—The following indorsements, the first by the assured, the second by the underwriter, appeared upon a policy of insurance: "Payable, in case of loss, to E. C. B." "Consent is hereby given to the above indorsement," referring to the first. *Held*, that the second indorsement was not sufficient evidence of the consent of the underwriter to a sale of the property insured. *Ibid*.

§ 1414. *Mortgage*.—When a contract of insurance, payable to a mortgagee, is made with a mortgagor for the insurance of his interest, the mortgagee can recover only where the mortgagor could, had the money been payable to him; he cannot recover where the mortgagor has broken a condition of the contract against alienation. But where the contract is with A. to insure his interest, no alienation by another of the property in respect of which the insurance is effected can affect the rights of A. under the contract. *Humphry v. Hartford Ins. Co.*,* 15 Blatch., 504.

§ 1415. A policy of insurance contained the provisions that the liability should cease in a case of a total or partial assignment of the policy, without the consent of the company indorsed upon it, and that the policy should become void in case of any transfer or termination of the interest of the insured. The property at the time being under mortgage, the mortgagor subsequently assigned his interest in the policy to the mortgagee, and the policy was afterwards renewed, the agent's receipt for the premium being indorsed directly under the assignment to the mortgagee. Afterwards, and without notice to the company, the mortgagor conveyed the fee to the mortgagee. *Held*, that it was proper to instruct the jury that if the assignment was actually known to the company the act of renewal amounted to the consent required. *Bilson v. Manufacturers' Ins. Co.** 7 Am. L. Reg. (O. S.), 661.

§ 1416. But *held*, further, that the subsequent conveyance of the fee avoided the policy as to the mortgagor, and that the mortgagee could not recover by virtue of the renewal made after the assignment of the policy. *Ibid*.

§ 1417. Under a clause invalidating a policy upon any change in the title or possession of the property insured, a mortgage on insured property during the life of a policy does not invalidate it unless, by reason of the insolvency of the mortgagor, or in some other way, there has resulted a change of the beneficial ownership. *American Basket Co. v. Farmville Ins. Co.*,* 8 Hughes, 251.

§ 1418. *Local statute*.—Property insured in the Mutual Assurance Society of Virginia, and sold without notice, is not liable in the hands of the purchaser for the premium. *Mutual Assur. Soc. v. Faxon*,* 6 Wheat., 606.

§ 1419. *Consent—Renewal* of a policy of insurance, with full knowledge on the part of the insurers of the assignment of the policy, and the acceptance by them from the assignee of the amount of premium due on renewal, the assignment having been made in visual juxtaposition to the policy, though without the written consent of the insurers, required by the terms of the contract, constitutes a sufficient consent to the assignment. *Bilson v. Manufacturing Ins. Co.*,* 3 Phil., 547; 16 Leg. Int., 228.

XI. PROOFS OF LOSS.

SUMMARY — *False swearing*, § 1420.—*Time of action*, § 1421.—*Waiver*, §§ 1422, 1423.—*Particular account*, §§ 1424-1426.

§ 1420. A policy contained the following in regard to proofs of loss: "All fraud, or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture" of the insurance. *Held*, that this meant that any fraud, or attempt at fraud, however committed, and however small in amount, whether by a false oath or otherwise, would avoid the contract; but not so a false statement, though wilful, by which the company could not be defrauded, in the sense of being deceived to its injury. *Shaw v. Scottish Ins. Co.*, §§ 1427-28.

§ 1421. A policy of insurance contained a provision that notice of loss should be given immediately, and within fourteen days after loss a particular account thereof; also a provision that payment of loss should be made "within sixty days after satisfactory proof thereof shall have been made to the company in accordance with the conditions of the policy." *Held*, that there was no right of action in favor of the assured until both the delivery of satisfactory proofs and the lapse of sixty days thereafter. *Gauche v. London Ins. Co.*, §§ 1429-34.

§ 1422. The examination of the assured concerning the loss is not a waiver of a condition requiring other proofs of loss. *Ibid*.

§ 1423. There can be no waiver of compliance with the terms requiring proofs of loss where the underwriter gives notice to the assured that with respect to proofs the policy must be strictly complied with, and this position is constantly maintained. *Ibid*.

§ 1424. Consideration of the evidence whether the proofs of loss were sufficiently particular to answer a requirement of a "particular account." *Ibid*.

§ 1425. When the facts concerning the proofs of loss are before the court, their sufficiency is a question of law. *Ibid*.

§ 1426. A policy of fire insurance upon buildings required a "particular account of the loss or damage." The assured, after loss, notified the underwriter by letter that "the house [one

of the buildings insured] was burned on the evening of the 22d inst., and totally destroyed." The letter further stated that the assured had no other insurance, and had sustained a loss equal to the amount insured in the house. The shed and barn [insured by the same policy] were not destroyed. The statements were sworn. *Held*, sufficient, especially in view of the context, by which the contract required the "particular account" to be verified, "also, if required, by books of account and other proper vouchers." Such clause would be unmeaning if applied to the mode or cause of the loss. *Catlin v. Springfield Ins. Co.*, §§ 1435-42.

[NOTES.— See §§ 1443-1479.]

SHAW v. SCOTTISH COMMERCIAL INSURANCE COMPANY.

(Circuit Court for Maine: 1 Federal Reporter, 761-768. 1880.)

Opinion by LOWELL, J.

STATEMENT OF FACTS.— One Clement insured a stock of goods in the defendant company for \$4,500, and it was consumed by fire. The value of the whole stock had been stated to a sub-agent of the defendants, when the insurance was effected, at \$8,000, but no issue was raised concerning this representation. As part of the preliminary proof of loss a sworn schedule was furnished by Clement, in accordance with the conditions of the policy, in which the goods lost were valued at \$6,500. He also submitted to an examination on oath by an agent of the defendants, as required by the contract. There was evidence tending to show that some of his statements in the schedule and examination — but more especially in the former — were false, though it was not admitted or directly proved that they were wilfully so. The insured became bankrupt after this and the action was prosecuted by his assignees, and resulted in a verdict for the plaintiffs. One point of law reserved at the trial has been argued with so much zeal and ability, and is thought by the defendants to be of so great importance, that I have examined it with care, and shall give my views upon it at more length than its intrinsic difficulty may seem to require.

[Here the judge considered a minor point of practice, and then proceeded.]

§ 1427. *Fraud, deception to one's injury; attempt at fraud, attempt to deceive to one's injury.*

The main question of the case arises upon this clause among the conditions in the policy: "All fraud, or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture of all claim on this company under this policy." The instruction desired by the defendants was that this condition had the same meaning as one which is often inserted in policies, that any fraud or false swearing shall defeat the claim, and that, under either of these stipulations, a wilfully false oath to a material fact would work a forfeiture of the whole claim.

I gave an instruction that any fraud, or attempt at fraud, however committed, and however small in amount, whether by a false oath or otherwise, would have the effect contended for; but not a false statement, though wilful, by which the company could not be defrauded. The example which I gave of an attempt at fraud was that the plaintiffs should attempt to recover more than was due. I defined a fraud to be the deception of a person to his injury, and an attempt at fraud to be an attempt to deceive a person to his injury; so that I, in effect, required the jury to find an attempted injury, as well as a false statement, if they should find for the defendants on this point.

The insured was the principal witness for the plaintiffs, and he was contradicted in several particulars; and I gave the jury full opportunity to reject his evidence altogether, if they found him to be a perjured witness, or to infer from the whole testimony that he was attempting an actual fraud. Their

finding, upon a matter so peculiarly within their province, I do not feel at liberty to set aside.

The particular misstatements which Clement was said to have made in his schedule of loss were very far below the amounts which would be necessary to operate an injury upon the defendants, by causing them to pay more than was due, and very much less than overestimates, which the courts have repeatedly held not to be in themselves sufficient evidence of wilful misstatement to set aside a verdict, even when false swearing was a substantive defense and when the overestimate tended directly to injure the defendants. It became very important, therefore, for the defendants to put a construction upon the policy which would render any wilfully false statement fatal, and the question is whether that is the sound construction.

In construing a contract the first and by far the most important witness is the English language. Adjudged cases, which resemble the case at bar to a greater or less extent, cannot often supply the place of the universal and overruling precedent of the common usage of mankind in their daily speech, excepting as they explain terms which have acquired a technical meaning. The only technical word in the condition under examination is fraud, and the authorities are entirely agreed that the word means, in law, what I ruled it to mean. Not that it may not be often used *obiter*, so to speak, in a more loose and general sense; but whenever it needs to be defined, and a case depends upon it, that is its meaning, and, so far as I know, without exception. I understand, therefore, the phrase "fraud" or "attempt at fraud," by false swearing or otherwise, to mean an injury or attempted injury of the defendants, by immoral means, such as false swearing, that being one instance or example of many possible means.

The defendants contend that the phrase makes all false swearing to be a fraud, or an attempt at fraud, so that it would read: "All false swearing or other fraud or attempt at fraud." But this is a forced and non-natural construction, because it requires not only a transposition of the words but also a change of the usual meaning of one of them.

The ruling also comports with the general law of insurance, which holds the insured to a rigid line of fair dealing, and gives the underwriter an advantage not given to the parties to most contracts, in that it defeats an honest claim if it has been dishonestly exaggerated. To go further would be to make a law beyond the general law of the land, and beyond the usual meaning of the words of the contract, besides committing the injustice of visiting a crime against morals only with a forfeiture of property in favor of one who could not have been injured by it. To give to the word "fraud" a loose and latitudinarian meaning is inadmissible in such a case.

A safe test of an attempt at fraud is to inquire whether, if it had succeeded, the person who had paid money in consequence of it could recover back the money. No one would contend, I suppose, that these defendants, if they had paid the \$4,500, could have successfully maintained an action to recover it back, upon proof that the schedule had exaggerated the loss, which, however, was much greater than \$4,500.

Most of the cases which I have seen, including those cited in the briefs, appear to be cases where the *claim* was exaggerated, and, therefore, where every dollar that was falsely added tended directly to defraud the underwriter. For instance, in *Geib v. Ins. Co.*, 1 Dill., 443, the charge was: "If you find from the evidence that the plaintiff, in the proofs of loss, knowingly and

falsely made a fraudulent overvaluation of the property with a view to deceive the insurance company, and to induce them to pay more than the value of the building, then he cannot recover." In a case in this court a verdict was rendered for the defendants and sustained upon proof of a wilful misstatement of about \$1 in an insurance of several hundreds, where the dollar was part of the claim of loss. The rulings in all the following cases, from some of which general remarks concerning the good faith required of the assured are cited in the defendants' brief, will be found, when carefully examined, to relate to an overvaluation of the same character. *Huchberger v. Home Ins. Co.*, 5 Biss., 106 (§§ 100-102, *supra*); *Howell v. Hartford Ins. Co.*, 3 Ins. L. J., 659; *Haigh v. De La Cour*, 3 Camp., 319; *Levi v. Baillie*, 7 Bing., 349; *Chapman v. Pole*, 22 L. T., N. S., 306; *Goulstone v. Royal Ins. Co.*, 1 F. & F., 276; *Britton v. Royal Ins. Co.*, 4 F. & F., 905.

A more common form of condition than that used in this policy is that any fraud or false swearing shall destroy the claim. The courts hold that this means wilfully false swearing in some material particular, and they sometimes speak of it as fraudulently false swearing; and the defendants insist that this ruling makes fraud and false swearing identical in insurance cases. But it is plain that if the parties choose to contract that any wilfully false swearing to a material fact shall defeat the claim, the courts may hold them to their agreement without a violation of principle, and may, perhaps, look to the policy as a whole, to ascertain what the parties consider a material fact.

There are a few cases in which perjury in respect to facts required to be disclosed, such as title, etc., has been held to work a forfeiture, under the contract of the parties, although no court or jury could have said that any attempt to defraud the company had been made. If the courts have used the word "fraudulent" in qualifying such a statement, they must be understood by the context as using the word, in a somewhat loose sense, for dishonesty, in a material particular, without intending to change the definition of fraud, which did not enter into the question. I do not know whether there are many such cases. Even in construing this broad condition, the distinction between perjury and fraud has sometimes been insisted on, as in *Marion v. Great Republic Ins. Co.*, 35 Mo., 148. I do not think it necessary to inquire whether the preponderance of authority is one way or the other on this point, when there is a distinct stipulation against false swearing.

§ 1428. *Authorities reviewed.*

Two cases are cited by the defendants as laying down the rule which they say should govern this case. In *Park v. Phoenix Ins. Co.*, 19 Q. B. (Upper Canada), 110, £2,500 were underwritten on buildings and machinery by the defendants and others who were to contribute, and the loss was sworn at £3,750. The condition of the policy avoided the claim "if there appears any fraud, overcharge or imposition, or any false swearing." Page 119. The sixth plea averred an "overcharge," in that £3,750 was said to be the loss, when in truth it was but £1,500. The seventh plea averred fraud in this: that, with the intent to impose on the defendants and procure them to pay more than the loss, which was £1,500, they delivered a false and fraudulent account. The eighth plea set up false swearing in stating the loss at £3,750, when it was only £1,500. The chief justice charged the jury that, in order to defend successfully under either the sixth or seventh plea, "it was necessary to prove that there was a designed overvaluing, with a view to obtaining a larger sum than the actual amount of the loss sustained would enable the

party to recover;" and "reminded" them "that there was really no ground for supposing that the plaintiff or Beemer intended, by overvaluing the property, to obtain more than the actual amount of the loss, unless it was clear that such actual loss was less in amount than the £2,500 insured." He added the remark, relied on by the defendants, "that where the insured in any such case named a larger sum as his loss than it really amounted to, it might have the effect of leading the insurers to be less careful in inquiring into the fact than they otherwise would have been, and that a designed misstatement, with such a view, would, of course, be fraudulent."

The defendants understand the learned judge to charge in this last sentence that a false statement, with a view to induce the insurers to be less careful in investigating the loss, would be a fraud, when he had just before charged that there could be no fraud unless the loss was less than the amount insured. If this were his meaning it would be impossible to reconcile the contradictions of the charge. The policy provided against fraud and false swearing as two distinct things, and I understand him to say that there could be no overcharge or fraud under pleas 6 and 7, unless the loss were less than the sum insured, but that there might be false swearing under plea 8, if an intentional falsehood was sworn to with intent to prevent investigation. I do not mean to say that this is very clearly expressed, but it is the fair construction, and the only one which makes the ruling intelligible or which is consistent with the pleas, which do not charge fraud excepting as thus understood. So, in *Seghetti v. Queen Ins. Co.*, 10 Low. Can. Jur., 243, the condition was against fraud or false statement, and the pleas were—First, fraud in stating the loss at £2,129.77, when it was only £500 (£800 having been insured); second, a false statement by the insured.

The other case is *Sleeper v. New Hampshire Ins. Co.*, 36 N. H., 401, where the insurance was \$600, and the plaintiff swore to a loss of \$1,000. A referee found that the insured believed himself to have lost \$600, but not \$1,000, and that his motive for the falsehood probably was to obtain a speedy settlement. Two of the three learned judges held that this was an attempt at fraud under a clause exactly like that now in question. With unfeigned respect for the opinion of a very able and learned court, I think they permitted an abhorrence of falsehood to induce them to give to the word "fraud" a meaning beyond its true and legal meaning. I am unable to see that it is a fraud to induce one to pay a just debt by immoral means. Falsehood is bad, but so is injustice, and it is not just to deprive a perjurer of his property merely because he is a perjurer. "It is not indictable," says Mr. Bishop, "to induce one, by lying representations, to pay a debt he justly owes, because he is not thereby legally injured." Bishop, *Crim. Law*, § 525. That is, because fraud imports an injury, and perjury does not. There must be judgment on the verdict.

GAUCHE v. LONDON & LANCASHIRE INSURANCE COMPANY.

(Circuit Court for Louisiana: 10 Federal Reporter, 347-356. 1881.)

Opinion by BILLINGS, J.

STATEMENT OF FACTS.—This is an action upon a policy of insurance against loss by fire. The defendant pleaded special pleas, or, as under our Code of Practice they would be termed, dilatory exceptions, along with the plea to the merits. These pleas are to the effect that the conditions precedent estab-

lished by the policy have not been performed: (1) In that no proper preliminary proofs were furnished; and (2) that there had been no arbitration whereby the "amount of loss" must be determined, and that until these conditions have been performed no right of action in the plaintiff exists. The court ruled that the plaintiffs, having alleged performance by furnishing preliminary proofs, were confined to evidence in support of that allegation, unless they elected to amend and plead a waiver of that obligation; and the plaintiffs elected to stand upon the allegation that preliminary proofs were furnished. Under rule 3 of this court these 'special or dilatory pleas were first tried, and when the evidence on the part of the plaintiffs was finished, defendants' counsel asked the court to exclude the testimony from the consideration of the jury as being insufficient to show the delivery of preliminary proofs or any arbitration and award. The policy of insurance offered in evidence by the plaintiffs contains certain provisions which are declared therein to be conditions with reference to the preliminary proofs, and with reference to arbitration. These provisions are held to be conditions precedent by an unbroken line of authorities. Unless they are against the policy of the law, or have been waived, they must be proved to have been performed as stipulated, for they are the law of the case established by the parties themselves.

§ 1429. *Provisions as to preliminary proofs construed. Time of suit.*

1. First, as to the preliminary proofs. The stipulations on this subject are as follows: No. 8. "All persons insured by this company, sustaining any loss or damage by fire, shall immediately give notice to the company or their agents, and within fourteen days after such loss or damage has occurred shall deliver in as particular an account of their loss or damage as the nature of the case will admit of, and make proof of the same by their declaration or affirmation, and by their books of account, or such other proper evidence as the directors of this company or their agents may reasonably require; and until such declaration or affirmation, account and evidence be produced, the amount of such loss, or any part thereof, shall not be payable or recoverable."

And No. 10. "Payment of any loss or damage shall be made within sixty days after satisfactory proof thereof shall have been made to the company in accordance with the conditions of this policy, and in every case of loss the company will reserve to itself the right of reinstatement, in preference to the payment of claims, if it shall judge the former course to be most expedient."

These provisions are cumulative, and are to be construed together. Their meaning is that the assured's right of action shall not be exercised until there has taken place both the delivery of satisfactory proofs and the passage of sixty days thereafter. The assured, therefore, can in no case maintain an action until sixty days after he has rendered preliminary proofs, which either are *to be deemed* satisfactory because they are accepted by the insurers, or *are* satisfactory whether accepted or rejected by the insurers, because they perform the promise contained in the contract.

The fire and loss occurred on January 1st. Four papers, or sets of papers, were furnished to the defendants on behalf of the insured, as preliminary proofs, as follows: The first within a week after the fire; the second on January 24th; the third on February 11th; and the fourth on February 28th.

§ 1430. *Production of proofs not waived, when.*

In response to the first proffer an oral statement was made that it was unsatisfactory. To the second a reply was given in writing that the papers were

insufficient, and they added: "We notify you for your guidance that only such papers as comply in every respect with section No. 10 of the printed conditions of our policy can be accepted by us as proper proofs of said loss." To the third set of papers a written reply was given, returning them and repeating the substance of the second reply, but more fully expressed. To the fourth the written reply was given as follows: "We return the inclosed papers, purporting to be proofs of loss, which are incomplete and unsatisfactory."

It was proved that the insured were, during the time occupied by their successive offers of proofs, examined under oath at the instance of the defendants; that the following paper was executed by the insured on the one part, and by those who represented the defendants and the other insurers on the other part:

"STATE OF LOUISIANA, *Parish of Orleans*: This agreement, made on the 13th day of January, 1881, between Messrs. Isidore Levy & Co., of the first part, and the several insurance companies interested in their loss by fire January 1, 1881, of the second part, mutually agree that the merchandise saved from the front store, No. 24 Magazine street, has the present value of \$1,000; the condition of the stock being in such a condition that it is impossible to determine the first cost of the same.

[Signed]

"ISIDORE LEVY & Co.,

"By Isidore Levy.

"J. W. COVINGTON,

"C. N. WELCHANS,

"Committee for insurance company at interest."

And that the damaged goods were subsequently taken by the insured. The examination of the insured was entirely consistent with the demand for proper preliminary proofs. See *Columbian Ins. Co. v. Lawrence*, 2 Pet., 53 (§§ 1124-30, *supra*). The court there say: "Did the examination of the title, and the proceedings of the board respecting it, presuppose an examination of the preliminary proofs and an acquiescence in its sufficiency? We think not. The proof of interest, and the certificate which was to precede payment if the claim should be admitted, are distinct parts of the case to be made out by the assured. Neither of those parts depends on the other. The one or the other may be first considered without violating propriety or convenience. The consideration of the one does not imply a previous consideration and approval of the other. The language of the ninth rule does not imply that the proof it requires is first in order for consideration. After stating what shall be done by the assured, the rule requires the affidavit and certificate in question, and adds that until such affidavit and certificate are produced, the loss claimed shall not be payable. The affidavit and certificate must precede the payment, but need not precede the consideration of the claim."

The agreement that the value of the damaged and saved goods should be fixed at \$1,000 had no tendency—no direction—towards waiver. In fact, it rendered a full enumeration of the lost articles all the more necessary, as in case the defendants had elected to reinstate, the plaintiffs would have been debtors to them in that sum.

It was also urged by counsel for plaintiffs that so complete had been the proofs that the general objection of the defendants worked a waiver as being utterly groundless. I cannot assent to that reasoning. If one party to a contract insists it has not been performed, even if he be perverse and altogether

unsupported by reason or law, the answer to his demand for performance could never be that by unreasonable exaction he had waived any right, but he could be answered only by showing complete performance of the contract. It is not contended that there was any express waiver, nor has there been any evidence introduced tending to show an implied waiver. The doctrine upon which waivers of this clause have been implied is that of good faith, that neither by silence, nor by putting the refusal to pay upon grounds which seemingly admit or dispense with preliminary proofs shall the insurer mislead the assured into a belief that his proofs are proper, and afterwards be allowed to absolve himself from liability by showing defects in those proofs. This doctrine is not only the doctrine of the law; it is that of morals and of integrity. But it has no application to a case where, as here, from first to last, the insurer gave notice to the assured that with respect to proofs the terms of the stipulation must be exactly complied with. It can never be held that denial, even if it were excessive, amounts to affirmation. There is no evidence on this subject except that of constant, uniform, unwavering demand on the part of the defendants of an unrelaxed performance of this part of the contract. The law on this point is laid down with explicitness in *Kimball v. Hamilton Fire Ins. Co.*, 8 Bosw., 503. The court there say:

"Silence when they (preliminary proofs) are furnished, especially if accompanied with the plain assertion of a distinct ground of defense, or a general denial of their liability, will ordinarily amount to a waiver. And we see that the reason of this is the tendency to mislead the claimants. But I have not found a case—I doubt if any is to be found—holding that the assurer who apprises the assured that his papers are no proofs, and refers him to the policy, is bound to go further and specify the particular defects. No case has decided that if he apprises the insured that he will rely on the defect of proofs, he waives this objection by taking others which he insists will defeat the recovery."

In *Lycoming County Ins. Co. v. Updegraff*, 40 Pa., 324, the court say: "They (the insured) were given to understand that a particular statement was necessary. How it can be claimed they were released from the obligation to furnish it, we cannot discover."

§ 1431. *Suit is commenced when process is issued, not when it is executed.*

The question then is, did the plaintiffs furnish the proofs called for by the terms of the policy? The fourth set of documents could not be a basis for this suit. They were furnished not earlier than February 28th. This suit was instituted on April 25th. Sixty days must elapse, and there had elapsed only fifty-six. It is urged that though the petition was filed on April 25th, citation was not served till the 30th of that month. So far as interruption of prescription is concerned, the time dates from service of petition, because it is in that case treated by the statute as a question of time of notice to the defendant. But when, as here, the court is called upon to enforce an agreement of the parties that suit shall not be brought, the commencement of the suit is the issuance of the writ (here the citation), and the pleas and judgment have relation to that time alone. See *Bouv. Law Dict., verbiis* "Commencement of Suit," and the authorities there cited.

The fourth set of papers, therefore, need not be considered. The question here is, then: Were either of the first three papers or sets of papers, or all together, sufficient preliminary proof of loss within the meaning of the terms of the stipulations of this policy? The insurance is "on stock consisting of

china, glass, wood and willow ware, and general house-furnishing goods." The statement is to be as particular an account of their loss or damage as the nature of the case will admit of, and the company in every case reserves the right of the reinstatement, *i. e.*, of the substitution, of new articles in place of those destroyed.

The first paper, that of January 24th, is without affidavit or even signature, and consists of a reference to the books of the assured under the items of stock as per inventory, various "invoices, sundries, cash, and suspense," with an added total of \$95,928, from which are deducted total sales, profits, amount duties paid, the amount of ten invoices and traveling expense charged to merchandise, making in all the sum of deductions to be \$39,778.19, leaving a balance of \$56,149.82.

The second and third papers add nothing to the statement by way of particularity. The addition being an affidavit, a statement that all the books of the insured were in possession of defendants for two weeks after the fire, and the statement that some \$4,600 worth of goods were in other warehouses and insured by the La Confiance Insurance Company, and concludes, the Statement B, "annexed to our proof of loss (the first paper is above designated), contains a complete list of our stocks taken from our books, and is true and correct." And the second paper, that of the 24th of January, says the "insured claim as follows: On stock consisting of china, glass, wood and willow ware, and general house-furnishing goods, contained in three-story brick slated building aforesaid."

§ 1432. "*Particular statement*" of loss requires some detail, or effort to enumerate.

The question, then, is not whether the insured are exempted by destruction of sources of information from compliance with the stipulation to furnish a particular statement, but whether this is in itself a particular statement of the loss or damage to a company who are by the terms of the policy to have sixty days to reinstate, and by insured parties who have offered no evidence tending to show that they did not have unimpaired all of the appliances of wholesale dealers—such as books, invoices, and letters, from which to make a proper statement. It is to be observed that the statement never approaches detail, does not deal in a single particular as to kind or enumeration, and if it gives even the slightest notion of value, does it only by reference to the books and invoices in their own possession. The question is directed in this case to this statement free from all extrinsic matters, and the court is called upon to say whether this is a particular statement. I feel bound to say that it is in no sense a particular statement. It has not one element of such a statement. A particular statement should give accurately, if possible, or, if not possible, approximately, the *kind* and *value* of the articles lost. *Catlin v. Springfield Ins. Co.*, 1 Sumn., 437 (§§ 1435-42, *infra*).

It should also be at least an effort to enumerate. It should be in its aim of such a circumstantial character as to afford detailed, itemized information of the extent of the loss. All this is wanting. It gives the stock on hand in May, adds the invoices in gross, deducts the sales and profits, and presents the result in bulk, so to speak, as a sole means of arriving at the loss. It gives no weight, no measurement, no reckoning, no description, however general. This is no *particular account*. It is rather an *estimate without particulars*. Instead of enabling verification it would defy it. Instead of furnishing opportunity to substitute, it gives not even the most vague description. Precisely

this manner of statement was condemned as being not a particular account, first by the common pleas court by the court, and, on appeal, by the supreme court, in *Lycoming Ins. Co. v. Updegraff*, 40 Pa. St., 311. The court there said (p. 323): "We agree with the learned judge of the common pleas, that the paper which was furnished was not such a particular account of the loss as was required by the policy." The case is not varied by the fact that the insurers had had possession of the books containing the inventory and invoices to which reference was made. It was, nevertheless, the duty of the assured to carry on the process of searching for and finding the elements of a particular account in their own books, and they could not thus cast it upon the insurers. I do not mean to say that accounts no more particular than this have not been accepted by courts as sufficient, but it has been where the acts of the underwriters constituted a waiver, or where the fire which occasioned the loss also destroyed all means of identifying and describing the things destroyed. But where, as here, there is an absence of all evidence of estoppel on the part of the defendants, and of inability on the part of the insured, I know of no case which holds such a statement as was presented in this case to be a compliance with the stipulation to furnish a "particular account."

§ 1433. *Sufficiency of preliminary proofs a question of law.*

2. Is the question here presented one for the court or the jury? The answer depends upon whether the question be one of law or fact. If there had been evidence tending to show waiver of preliminary proofs, that would have been for the jury. If there had been evidence tending to show destruction of books, so that there could be no compliance with the stipulation requiring proofs, that would have been for the jury. In all the cases where courts have held that the sufficiency of preliminary proofs must go to the jury, there has been either the question of defective ones having been rendered sufficient ones because of waiver, or because of destruction of books or other inability to furnish proper proofs from some cause beyond the control of the assured. In those cases the question reaches out to matters extrinsic to the papers themselves, claimed as constituting proofs, and the question of sufficiency is for the jury. But this case finds neither evidence tending to establish waiver, nor destruction of books, nor other cause of inability. It presents simply the question whether, intrinsically judged, in and of themselves, the papers submitted constituted proofs. The decisions of the supreme court of the United States and of the supreme courts of the states have with well nigh unanimity defined with exactitude the principle which separates questions of law from questions of fact. The question which presents the closest analogy to the one before the court is, what constitutes due diligence in giving notice to an indorser of a promissory note of non-payment? and a long line of concurrent decisions has established the law as being that, when the facts are undisputed, what is due diligence is a question for the court. In the cases collated — 1 Brightly's Dig., *verbo* "Jury, 7" (a), No. 102, p. 511 — it is also held that when the facts are admitted or established, the question as to what is a reasonable time for the production of preliminary proofs is for the court. *Columbia Ins. Co. v. Lawrence*, 10 Pet., 507-513.

In the cases where, as here, nothing was before the court except the measurement of the papers proffered as preliminary proofs by the requirements of the contract — no extrinsic question — the court has uniformly determined as to the sufficiency of proofs. Justice Story did this in *Catlin v. Springfield*

Ins. Co., 1 Sumn., 437 (§§ 1435-42, *infra*); *Lycoming Ins. Co. v. Updegraff*, 4 Wright (Pa.), 311; *Beatty v. Lycoming Ins. Co.*, 66 Pa. St., 17; *Wellcome v. People's Equitable Fire Ins. Co.*, 2 Gray (Mass.), 480; *Norton v. Rensselaer & S. Ins. Co.*, 7 Cow., 645; and *Kimball v. Hamilton Fire Ins. Co.*, *supra*; 8 Bos., 503. As to the question whether the sixty days had elapsed since the service of the last set of papers, and before the institution of this suit, see ruling of Judge Duer. 7 Cow., 647. From an examination of the cases cited, and of all the cases I could consult, I am of the opinion that the question here presented is for the court to respond to, and the court declares that there had not been preliminary proofs furnished according to the conditions of the policy sued on sixty days prior to the commencement of this suit.

§ 1434. *Agreement to arbitrate, valid, and an attempt to do so a condition precedent to suit.*

3. The third special plea of the defendant is to the effect that it was a part of the contract of insurance, made a condition precedent to the right to maintain an action thereon, that in case of difference between the parties there should be an arbitration and award as to the amount of loss or damage; that there was a difference; that there has been no arbitration or award; and avers willingness at all times on the part of defendants to submit the amount of loss or damage to arbitration.

The stipulations as to award are as follows: (11) "If any difference shall arise with respect to the amount of any claim for loss or damage by fire, and no fraud suspected, such difference shall be submitted to arbitrators indifferently chosen, whose award, or that of the umpire, shall be conclusive."

And — (14) "It is further hereby expressed, provided, and mutually agreed, that no suit or action against this company, for the recovery of any claim by virtue of this policy, shall be sustainable in any court of law or chancery until after an award shall have been obtained, fixing the amount of such claim in the manner above provided."

It has been urged that this stipulation is void as being against the policy of the law, in that it withdraws the questions from the courts. I think the weight of authority is decidedly in favor of the conclusion that parties may legally by their own agreement refer the amount of damage under a contract to arbitrators, and by a proper covenant withdraw that one question from the courts. In *Scott v. Avery*, 5 H. of L. Cas., 811, this was decided in 1856, and that decision has been, so far as I can ascertain, acquiesced in both in Great Britain and in this country. The cases which seem to conflict with this case are those which were, or were thought to be, distinguishable from it. The doctrine there established has not been doubted. The cases to which I have been referred which were construed to be opposed to it are where there was no covenant not to sue until an award, but merely a covenant to refer. Those cases are in harmony with *Scott v. Avery*, as appears by the lucid statement of Baron Bramwell, in *Elliot v. Royal Exchange Assurance Co.*, L. R., 2 Exch. (1866-1867), p. 245, and adopted by Lord Coleridge in *Dawson v. Fitzgerald*, 1 Law Rep., Ex. Div. (1875-1876), p. 260. That statement is as follows:

"If two persons, whether in the same or in a different deed from that which creates the liability, agree to refer the matter upon which the liability arises to arbitration, that agreement does not take away the right of action. But if the original agreement is not simply to pay a sum of money, but that a sum of money shall be paid if something else happens, and that something

else is that a third person shall settle the amount, then no cause of action arises until the third person has so assessed the sum."

The cases where an action will not lie, and the case where an action will lie, are here precisely distinguished. It is the negative words contained in the fourteenth stipulation, that no suit or action for the recovery of any claim by virtue of this policy shall be sustainable until after an award, which place this case in the latter class of cases. That this plea is, in law, good, is well settled by authority. Under our system of pleading we have no written statement responsive to the pleas of defendants, except where they amount to a reconventional demand. But the plaintiffs may give in evidence any matter in disapproval or avoidance of the pleas, as if the practice of the courts allowed a responsive pleading and he had pleaded the same. The production of the policy by the plaintiffs maintains the substance of this plea, *i. e.*, the covenant not to sue; the stipulation is contained therein as is averred. That being so, there could be but two facts which could have avoided this plea,—either that it had been waived by defendants, or that insured had offered to perform, *i. e.*, had offered to arbitrate, and a refusal on the part of defendants. The plaintiffs have introduced no evidence tending to establish any fact in avoidance of the condition or covenant which the contract they sue upon contains. (Non-suit.)

CATLIN v. SPRINGFIELD FIRE INSURANCE COMPANY.

(Circuit Court for Massachusetts: 1 Sumner, 484-446. 1833.)

STATEMENT OF FACTS.—Action on a policy of insurance against fire issued by defendant to plaintiff (who was mortgagee of the property) on a house, barn and shed, occupied as a dwelling-house by Hayden and Hobart, but to be occupied as a tavern and "privileged as such." The policy contained a number of conditions, which, so far as material, are set forth in the opinion of the court.

The dwelling-house was burned down on February 22, 1830, while the policy was current, and the plaintiff immediately sent a letter, verified by affidavit before a justice of the peace, which stated the fact of the conflagration, that the plaintiff had no other insurance, and had sustained a loss equal to the amount insured on the house.

Defendant declined to pay on the grounds, among others, that the house was insured to be occupied, and had for a long time been vacant, and that the loss had been caused "by foul means." There was a verdict for the plaintiff and a motion for a new trial.

§ 1435. *The "particular account" specified in a policy does not mean a statement of the cause or manner of the loss, but refers to goods and chattels insured.*

Opinion by STORY, J.

A motion has been made and argued for a new trial upon various grounds. In the first place, that the court instructed the jury that the letter of the plaintiff to the defendants, giving notice of the loss, was a sufficient compliance with the eighth condition above stated, requiring "a particular account of the loss or damage." The argument is that the particular account here referred to should contain not only a statement of the amount of the loss, but of the manner and cause of the loss, verified by the oath of the party, so that it should appear that it did not fall within any of the exceptions of the policy. But it seems to me very clear that this is not the true interpretation or object

of the clause. If we look at the policy, it will be seen that the insurance company contemplate not only insurance upon houses, but upon goods and machinery. In cases of insurance upon goods, and in partial losses of all sorts, the particulars of the nature, quality and quantity of the goods, and of the damage or loss sustained, are most important to enable the company to decide on, and ascertain the damage or loss; and as these particulars are generally and almost exclusively within the knowledge of the assured, his oath or affirmation thereto is required as preliminary proof. The underwriters rely on and address the interrogatory to his conscience. But it surely could not have been expected that the assured should, in all cases, swear as to the mode and cause of the loss; for in many cases it would be impossible for him so to do, from the want of due knowledge or means of knowledge. He might know the fact of the loss by fire, but as to the precise mode in which the fire was kindled, he might be and ordinarily would be wholly ignorant. Surely, it could not have been required that any person should swear to facts or causes of loss which he could not know, and thus put his conscience in jeopardy or lose his insurance, although the whole was a case of sheer misfortune, without the slightest suspicion of fraud.

But, if we examine the context, it seems to me that every doubt must vanish, for it may be truly said, in such a case, *Noscitur a sociis*. The "particular account" is to be verified by the oath or affirmation of the assured, and "also, if required, by their books of account, and other proper vouchers." Now, this is all very natural, if the meaning be, as the court suppose it to be, a particular account of the articles lost or damaged; but it is wholly without meaning, if applied to the mode or cause of the loss or damage. No person could suppose that the books of account of the party, or other proper vouchers, could or would furnish the slightest proof of such facts. And yet the argument is just as strong, applied to the case of such books and vouchers, as it is to the requisites of the oath or affirmation; for in each case they are required *ad idem*. And I cannot but think that the company understood this clause as the court does. For in their reply they place their defense upon an entirely different ground, not suggesting this, as in all fairness they ought, if they meant to insist upon it.

§ 1436. *In stating a loss, sufficient to show that it occurred by a peril insured against.*

And then, again, as has been well observed at the bar, the oath of the party is not required, as an expurgatory oath, negating fraud or design on the part of the assured. For these, reliance is positively placed upon a more disinterested source,—upon the certificate of some magistrate, notary or clergyman, that the loss was real, and by misfortune, and without fraud or evil practice. As to negating by oath the exceptions in the policy, it is nowhere required by any express stipulation in the conditions; nor can it be inferred from any reasonable presumption of intent. It is true that it is said that "if there be any fraud or false swearing (in the alternative), the claimant shall forfeit all claim by virtue of this policy." But this is mere matter of defense by the company, and constitutes no part of the preliminary proofs of the plaintiff. And, as to the exceptions of losses from design, invasion, public enemies, riots, etc., they constitute matter of defense, and are referable to the trial, and are not to be negated on oath in the preliminary proofs; because the plaintiff must at the trial prove a case *prima facie* not within them. It might as well be contended that the plaintiff was bound to state under oath

every other fact upon which his recovery should depend. The true answer to all these suggestions is that the stipulation is not in the contract, and no court is authorized to add a single term to conditions in their own nature sufficiently onerous.

§ 1437. *Conditions strictly construed.*

Conditions are to be construed strictly against those for whose benefit they are reserved, when they impose burdens on other parties. The language of the clause is that the party is to "deliver a particular account of such loss or damage," in the alternative. He is to state an account of the loss, that is, of the thing or value lost; or of the damage, that is, of the amount of the injury sustained. But he is not required to state how the loss happened, or the cause or occasion of it.

§ 1438. *Not necessary for assured to negative exceptions.*

It is also said that the notice and statement of the loss must show it to be a loss within the risk of the policy, and that it is always so done in marine policies. Certainly, the loss must be shown by the notice to be by a risk within the policy; and it is so shown here, for the loss is stated to be by *fire*. But in the notice of a loss under a marine policy, no one ever supposed that it was necessary to state more than a loss by a peril insured against. Must the plaintiff go on and negative all exceptions, express or implied by law, which constitute the defense of the other side? Must he state that a loss by perils of the seas has been without any fraud, negligence, deviation or non-compliance with warranties? Practically speaking, I have entire confidence that allegations of this sort have never, hitherto, been deemed essential or pertinent.

§ 1439. *Construction of words "shortly to be occupied as a tavern;" no warranty that it shall be so occupied.*

The next objection is that the court instructed the jury that the words in the policy, "at present occupied as a dwelling-house, but to be occupied hereafter as a tavern, and privileged as such," did not import on the part of the plaintiff a warranty that they should be so occupied during the continuance of the risk. What the court did say to the jury on this point was that these words did not constitute a warranty that the house should, during the continuance of the risk be constantly occupied as a tavern; but that the language was, at farthest, a mere representation of the intention to occupy it as a tavern, and to secure for it the privileges of the policy as such. And I am, upon farther reflection, clearly of opinion that the direction was right. We must interpret these instruments in a reasonable manner, from the nature and objects of the parties. Here the assured was the mortgagee of the house; and he is so described in the policy. In the ordinary course of things, he could not be presumed, as mortgagee, to intend to take possession of the property and occupy it as a tavern; and of course, if occupied as a tavern, it must be by or under the mortgagors. In point of fact, as the survey, made by the company's own agent, and on which the policy itself was underwritten, states, it "was to be occupied, in the course of two or three days, by said Hayden and Hobart, for the purpose of keeping a tavern." In the mouth of the mortgagee, then, if the language were to be treated as his, it could fairly be understood to import no more than a representation that it was to be occupied as a tavern. And if so, then, as taverns are enumerated in the conditions of the company as among the *hazardous* risks for which an extra premium is to be paid, it would follow that the policy would be void for a fraudulent concealment, unless the

fact were disclosed, and the house privileged as a tavern. But the language cannot in strictness be treated as the language of the mortgagee. It occurs in an instrument executed by the company, and purporting, therefore, to contain their engagement. It occurs in the descriptive part of that instrument. Of the property insured, the company say that they insure the house now occupied "as a dwelling-house, and to be hereafter occupied as a tavern, and privileged as such." Privileged by whom? Clearly by the company,—to be used as a tavern. The company agree to take this *hazardous* risk, and permit the policy to attach, notwithstanding the house may be changed from a common dwelling-house to a tavern. They could have no motive for insisting that the house should always be as it is classed by the survey in the sixth class of hazards. If it had continued to be occupied as a common dwelling-house, the risk would have been far less, while the premium would have remained the same. It was not then a warranty of the assured, that it should be at all times during the risk occupied as a tavern; but a license or privilege granted by the company that it might be so occupied. The case is entirely different from that of a policy on a vessel to be engaged in the whale fisheries; for there the nature of the voyage ascertains and limits the language of the policy. Unless the vessel sails on a whaling voyage, the policy does not attach; and, if she engages during the voyage in other traffic, it is a deviation from the voyage. But, suppose a policy were on a coasting vessel generally for a twelvemonth, with liberty to engage in the whale fisheries; would that amount to a warranty, and tie up the policy to an employment solely in that trade? Or, suppose a policy on a vessel from Boston to Leghorn, and back, with the privilege of cruising as a letter of marque; would that amount to a warranty that she should so cruise? Certainly not in either case. The construction would be, not that the words restrained, but that they enlarged, the general words of the policy. Let me put another case. Suppose a policy against fire, underwritten on the house of A. in Boston, described as a dwelling-house, or as occupied as a dwelling-house; would the policy be void if the house should cease for a time to have a tenant? Such a doctrine has never to my knowledge been asserted; nor should I deem it maintainable.

The interpretation put by the court upon the words of the policy, "privileged as such," seems now admitted by the counsel for the defendants to be the true one, although at the trial it was contended that the meaning was, that the house was licensed by the municipal authorities as a tavern; and it constituted one of the grounds in support of the motion for a new trial. That point is now abandoned.

§ 1440. *Objection to evidence taken after verdict too late.*

Another objection is, that there was no evidence that there ever was any intention to occupy the house as a tavern. It may have been so; but no objection was then taken to the absence of such evidence; and it is quite too late after a verdict to take it, when the deficiency might have been within the power of the party to supply. But in fact, if the ground of defense was misrepresentation, the *onus probandi* was on the defendants. The plaintiff was not bound to prove the representation, if any was made, to be true; but the defendants were to show that it was false, and false in a point material to the risk.

§ 1441. *Loss by negligence of the insured not covered by the exception of "design in the insured."*

The last objection is to a supposed instruction of the court on the point,

what constitutes a loss by design within the meaning of the policy? I state it in this form, because the written motion does not accurately present the instruction of the court, or the language of the court, although it doubtless intended so to do. The line of argument in the defense at the trial did not impute to the plaintiff any direct or positive co-operation in the actual setting fire to the house, or any knowledge or connection with the parties who did it. But it was to this effect: that if the plaintiff by his negligence, and by leaving the house derelict, thereby exposed it to such destruction by mere trespassers, and was not unwilling that it should be so destroyed, that such negligence and laches avoided the policy, and constituted a loss by design within the meaning of the policy. The court, in commenting on this part of the case, said that the case was as clear, and lay in as narrow a compass on this point, as any which had ever come before it. The language of the policy is, that the company will make good any loss or damage "by fire, originating in any cause, except design in the assured, invasion," etc. So that the company make themselves liable for losses by negligence as well as by accident; for the exception of losses by design admits all losses not by design. I do not say that the defendants would be liable for every loss occasioned by the gross personal negligence of the plaintiff; for it might under circumstances amount to a fraudulent loss. But the English decisions clearly are, that on policies against fire generally, losses by the negligence of tenants are within the risks taken. And it is still more clear, that losses by the negligence of tenants, or by the criminal wantonness, or misconduct of mere trespassers, or intruders, or felons, are within the common policies against fire. But in the present policy there is no room for doubt on this point. The losses excepted are, not losses by design generally, but "losses by design of the assured."

The case then is reduced to the consideration of what constitutes a loss by design in the assured, within the meaning of the policy. I say, that it is not a loss by the mere negligence or laches of the party, where he has left the property exposed to the peril, but has not co-operated directly or indirectly with those who produced the loss. Design imports plan, scheme, intention, carried into effect. The loss, to be by design of the assured in the sense of the policy, must be by incitement, connivance or co-operation of the assured, directly or indirectly, with the persons who were the agents in the act. It is not sufficient that he is negligent in leaving the premises derelict, and thus exposing them to the wanton or criminal acts of intruders. Negligence is not design. We are here, as in other cases of insurance, to look, not to the remote cause, but to the proximate cause of the loss. *Causa proxima, non remota, spectatur*. How can it be truly said that the negligence of the plaintiff in this case was, in any just sense, the proximate cause of the loss, if he had no co-operation, knowledge or part in the act? Unless, then, the jury can, from the evidence, clearly see that the plaintiff was not merely negligent, but was directly or indirectly connected with the act, I am of opinion that it cannot be correctly deemed to be a loss by design of the assured. The defendants do not themselves impute to the plaintiff active co-operation or connection with the persons who set the house on fire. On the contrary, the argument supposes that it was set on fire by mere transgressors or felons, who were utter strangers to him, and of whose designs he was ignorant. It imputes to him only negligence and wishes or motives for the event, and undue exposure to the perils.

Such was in substance the direction to the jury. And now upon the farther

argument which has been had, I deliberately adhere to it. It appears to me that the doctrine contended for in the defense is untenable and dangerous, and would take away all security under policies of this sort. It in reality attempts to ingraft upon the words of the policy a new term and to exempt the underwriters from all losses which can be traced, however remotely, to the neglect or laches of the assured. If the latter were to leave open the front door of his house by night by gross negligence, and felons should enter and set it on fire, I do not perceive how the loss upon the argument could be recoverable. It might then be said, as it is now said, that he had his motives, wishes and expectations, though he was wholly ignorant of the design of the felons. I cannot but think that, under such circumstances, policies of this sort would hold out false lights and false securities to the assured, and would seduce them into the false confidence that design meant something widely different and contradistinguished from negligence.

§ 1442. *Legal design.*

Legal design, it is said, is to be imputed to a party where the consequences naturally flow from the act. That is true; but then they must *naturally* flow from it, not merely follow it. They must be connected with it as a cause and not as an occasion. The act and the negligence must be knit together by an indissoluble bond. The law properly holds that every man is presumed to intend what are the natural consequences of his act. But it does not presume that he intends everything which may possibly follow from his negligence or be remotely occasioned thereby. The case of *The Squib* (*Scott v. Shepherd*, 2 W. Black., 892) stands upon the very verge of the law, upon a sort of metaphysical subtilty; and, whether rightly or wrongly decided, it was decided, not upon mere negligence, but upon a direct and positive act which gave rise to an action of trespass, as a mediate if not an immediate act of force. In *Percival v. Hickey*, 18 John., 257, there was a direct and immediate act of force by running down the vessel of the party; and so the case of *Guille v. Swan*, 19 John., 381, was treated by the court.

But it is said that the court did not leave the question to the jury, whether there was fraud on the part of the plaintiff, or such gross negligence as was presumptive of fraud. No such ground is suggested in the written motion for a new trial; and of course it cannot, according to the rules of this court, be now taken notice of. But I may say that, if not put to the jury, it was because the point was not distinctly put by the defense for the consideration of the jury. The court certainly is not to be expected to supply matters of defense, which the counsel do not choose to insist upon at the trial.

Upon the whole, my judgment is that the motion for a new trial ought to be overruled; and it is accordingly overruled.

§ 1443. *Insanity.* — Proofs of loss, if sufficient in other respects, cannot be objected to on the ground that the party making them was insane. *Insurance Cos. v. Boykin*,* 12 Wall., 433.

§ 1444. If the insured is so insane at the time of loss as to be incapable of making intelligent proofs, that fact will excuse him from the necessity of so doing. *Ibid.*

§ 1445. *Immediate notice.* — A requirement that proofs of loss shall be furnished "as soon as possible" means within a reasonable time. The proofs in this case held to have been so furnished. *Columbia Ins. Co. v. Lawrence*,* 10 Pet., 508. See *Cashan v. Northwestern Ins. Co.*, 5 Biss., 476 (§§ 139-40).

§ 1446. *Service of copies of proofs of loss* is good if no objection that they are not the originals is made by the underwriter on receiving them. *Cashan v. Northwestern Ins. Co.*, 5 Biss., 476 (§§ 139-40).

§ 1447. The requirement of a detailed statement of loss of goods is excused if the assured was prevented from making it by the consumption of his invoices by fire, especially

when the underwriter's agent, upon notice, has gone to the scene of the fire, examined the same, and agreed with the assured upon an estimate of the extent of the loss. *Bassell v. American Ins. Co.*, * 2 Hughes, 531.

§ 1448. *Negotiations.*—If after notice of loss within reasonable time negotiations take place between the assured and the underwriter by which further proofs are required and given within reasonable time, and a promise or intimation is held out that the loss will be paid, and in consequence the assured is prevented from suing within the time specified in the policy, the underwriter cannot insist upon forfeiture. *Curtis v. Home Ins. Co.*, * 1 Biss., 485.

§ 1449. *Excuse.*—An objection that proofs of loss were not made in due time is waived if the underwriter or his agent had possession of the books of the assured, from which the loss was to be ascertained, and if by reason of that fact the assured was deprived of the means of making the proofs in time. The agent might also waive the matter by agreement. *Mack v. Lancashire Ins. Co.*, * 2 McC., 211.

§ 1450. *Waiver—Omission by an underwriter to offer objection to proofs of loss*, as required by a policy, is no waiver of their insufficiency, where the assured is notified that the claim to insurance will be resisted. Nor will an examination of the title by the underwriter, or a consideration of the merits of the claim of the assured, presuppose an examination into the sufficiency of such proofs and an acquiescence in them. Facts relating to this matter considered. (a) *Columbian Ins. Co. v. Lawrence*, 2 Pet., 25 (§§ 1124-30).

§ 1451. *Same—Acceptance.*—Where, in an action on an insurance policy, issue is taken upon a plea setting up that the proofs of loss were not furnished as required by the policy, the plaintiff may show that proofs, in some respects defective, were accepted by the company as sufficient, and such acceptance may be inferred from the failure of the company to object to the proofs, and its placing its refusal to pay upon other grounds. *Spratley v. Insurance Co.*, * 1 Dill., 392.

§ 1452. *Same—Acquiescence.*—If the jury find from the evidence that the property mentioned in the policy of insurance was totally destroyed by fire, and that Whittle, the insured, within a day or two gave notice of its destruction to the agent of the company from whom he got his policy, and requested him to make out his proofs of loss, which the agent did, but not in conformity to the requirement of the policy; and if they find further that the agent wrote to the company stating what he had done and asking the company to adjust and pay the loss, and that the company replied that they would adjust the same, and then stated what they would do, and that after the adjustment the insurance company refused to pay the loss on other grounds than the incompleteness of the proofs of the loss, and made no objection to them, then these are circumstances from which the jury may find that the company acquiesced in the sufficiency of the proofs, which, if the jury find, the informality of the proofs is not a bar to the plaintiff's recovery. *Whittle v. Farmville Ins. Co.*, * 8 Hughes, 431.

§ 1453. If at the time proofs of loss are made the underwriter's agent treat them as satisfactory in all respects, the underwriter cannot object to them at the trial, though they are not in fact what the policy calls for. *Miller v. Alliance Ins. Co.*, * 19 Blatch., 808; 7 Fed. R., 649.

§ 1454. *Same—An agent authorized to settle losses for an underwriter has power to waive requirements in regard to proofs of loss.* If proofs are presented after the time for presenting them has passed, and the underwriter's agent act and speak as if they were in season, this may be received as evidence of waiver. *Home Ins. Co. v. Baltimore Warehouse Co.*, * 93 U. S., 527.

§ 1455. An agent of an insurance company has power to waive the formalities of the requirements concerning proof of loss, and also clauses barring suit within a year. *Ide v. Phoenix Ins. Co.*, * 2 Biss., 833; 2 Ch. Leg. N., 310.

§ 1456. *Same—Parol contract—Special case stated.*—Plaintiff applied to the local agent of a fire insurance company for a policy of insurance upon a building; the agent verbally accepted the proposal and received the premium therefor, but never remitted the premium money to the company, and no policy was ever made out. The house was burned, and notice was promptly given to the agent, who professed himself satisfied and required no formal written proofs, and constantly assured the plaintiff and third persons that she loss "was all right, and would soon be paid." After more than a year's delay, he informed the plaintiff that the

(a) But this case having gone to the same court a second time, it was said by Story, J., for the court: "The non-production then of the proper certificate was occasioned, not by any laches imputable to the party, but by the omission of the company to give notice of the defect, and of the mistaken confidence placed by the party in the company itself. If the company had contemplated the objection, it would have been but ordinary fair dealing to have apprised the plaintiff of it; for it is now obvious that the defect might have been immediately supplied. As it was, the company, unintentionally it may be, by their silence misled him. The delay to procure the correct certificate was not unreasonable." *Columbia Ins. Co. v. Lawrence*, * 10 Pet., 507.

company would not pay the loss. All the policies of the company require written and formal proofs of loss within thirty days, and bar suits for losses not brought within one year. *Held*, (1) that the parol contract was valid, and could be enforced without a policy; (2) that the action of the agent amounted to a waiver of strict proofs and of the limitation of right of action; (3) that the company's failure to issue a policy after the payment of the premium could not be taken advantage of by it in a court of equity. *Ibid*.

§ 1457. *Same*—*Special case stated*.—A policy required the assured to give immediate notice of loss, "and as soon thereafter as possible render a particular account and proof thereof," in default whereof all claim under the policy should be forfeited. The loss occurred March 20th. On the 14th of April following the plaintiff furnished proofs of loss, containing the written portions of the policy and all indorsements thereon, also statements that there was no other insurance, of the actual cash value of the property, of the plaintiff's ownership, of the purposes for which the building was occupied and by whom, the date and amount of the loss, and how the fire originated, if known. *Held*, that this was a substantial compliance with the requirements in question. *Held*, further, that if shortly after the loss, and after being informed of the facts concerning the ownership of the lot, a general agent of the company told the plaintiff that the company was not liable because of the failure to state the true title to the lot in question, such fact would be evidence tending to show a waiver of the requirement of proofs of loss; but the question of waiver was for the jury. *Field v. Insurance Co.*,* 6 Biss., 121.

§ 1458. *Same*—*By repudiating all liability under a policy of insurance*, on the ground that the assured had no interest in the premises at the time of loss, the underwriter waives an objection that the proofs were made by the person to whom the policy was payable rather than by the assured. *Rumsey v. Phoenix Ins. Co.*, 17 Blatch., 527; S. C., 2 Fed. R., 429 (§§ 1221-23).

§ 1459. *Same*.—If, upon notice of loss being given an underwriter, liability is repudiated on the ground that no contract for insurance was ever made, objection to the sufficiency of the notice is waived, and formal proofs of loss required by the policy are dispensed with. *Bennett v. Maryland Ins. Co.*, 14 Blatch., 426 (§§ 1117-21).

§ 1460. A policy of fire insurance required the proofs of loss to be made by the assured. They were made by the plaintiff, who had made a contract for the sale of them to L., L. being in fact the assured, though payment was to be made to the plaintiff. When the proofs were furnished the underwriter repudiated all liability on other grounds. *Held*, a waiver of the requirement. *Rumsey v. Phoenix Ins. Co.*, 2 Fed. R., 429; S. C., 17 Blatch., 527 (§§ 1221-23).

§ 1461. If objection to payment after proofs of loss are furnished is based on the ground that the premium has not been paid, the proofs of loss are to be deemed sufficient. *Bang v. Farmville Ins. Co.*, 1 Hughes, 290 (§§ 1186-87).

§ 1462. A vessel was insured against loss by fire, and was partly burned and sank. The underwriter refused to pay on notice of the loss, given in due time, on the ground that the loss was the result of a marine peril. *Held*, a waiver of objection to the proofs of loss. *Held*, also, that the same fact amounted to a waiver of a provision in the policy exempting the underwriter from suit for sixty days after loss. *Norwich Transp. Co. v. Western Mass. Ins. Co.*, 6 Blatch., 241; 12 Wall., 201 (§§ 1280-83).

§ 1463. Facts considered in a particular case with reference to the question whether there was evidence to go to the jury of waiver of proofs of loss. *Perry v. Faneuil Hall Ins. Co.*, 11 Fed. R., 482 (§§ 1227-28).

§ 1464. A waiver, by a fire insurance company, of preliminary proofs of loss, may be proved indirectly by circumstances as well as by direct testimony. *Home Ins. Co. v. Baltimore Warehouse Co.*,* 3 Otto, 527; 9 Ch. Leg. N., 89.

§ 1465. *Fraud and false swearing*.—A fire insurance policy contained the following: "All fraud, or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture" of the insurance. The judge instructed the jury that if the assured knowingly and with intent to defraud the underwriter made up a false and exaggerated statement of the amount and value of the property insured, the contract was not binding. *Sibley v. St. Paul Ins. Co.*,* 9 Biss., 31.

§ 1466. Under such a provision, if the assured, with intent to deceive, exhibited to the underwriter books of account containing false entries of the value of the property, he cannot recover. *Weide v. Germania Ins. Co.*,* 1 Dill., 441.

§ 1467. In a suit upon a fire policy the plaintiff cannot recover if with fraudulent intent he withheld or delayed to deliver to the underwriter the information, invoices, documents and proofs called for by the policy. *Betts v. Franklin Ins. Co.*,* Taney, 171.

§ 1468. So, too, if he was wilfully guilty of false swearing in his affidavit to the defendant, or if he presented the affidavit of any other person, or made any statement to the defendant knowing it to be false. *Ibid*.

§ 1469. But the omission to furnish the defendant with the information and documents men-

tioned, or delay in presenting them or any of them, is no bar to the suit if such omission or delay was due to the loss of papers, or to oversight, mistake, or accident, and without fraudulent intent. *Ibid.*

§ 1470. Nor is any error of fact contained in the plaintiff's affidavit, or in any other affidavit furnished by him, any bar to the suit if he acted in good faith, and believed said affidavits or other papers to be true when he furnished them. *Ibid.*

§ 1471. Same.— Mere mistake in estimating the value of goods lost will not avoid a policy upon them. Otherwise as to fraud, the burden of proof in regard to which is upon the underwriter. *Huchberger v. Merchants' Ins. Co.*, * 4 Biss., 265.

§ 1472. Same.— If a party insured knowingly, and with intent to defraud the underwriter, make a false and exaggerated statement of the loss, he forfeits all claim against the underwriter, under the common provision against fraud or attempts at fraud by false swearing or otherwise. *Sibley v. St. Paul Ins. Co.*, * 9 Biss., 31.

§ 1473. Same.— Overvaluation of the loss of property insured will not avoid the contract if it was not material and fraudulent. If the discrepancy between the true value of the property, which is the actual cash value thereof, and that stated by the assured in their proofs of loss is large, that fact would be evidence bearing upon the question of fraud. *Mack v. Lancashire Ins. Co.*, * 2 McC., 211.

§ 1474. Same.— Fraudulent overstatement by the assured of the amount of loss will avoid the insurance. The burden of proof is upon the underwriter. *Huchberger v. Home Ins. Co.*, 5 Biss., 106 (§§ 100-102).

§ 1475. Where a policy provides that fraud in swearing to the proofs of loss shall avoid the contract, it is for the underwriter to show, not only falsity in the proofs, but fraud. *Putnam v. Commonwealth Ins. Co.*, 18 Blatch., 368 (§§ 1374-78).

§ 1476. Same — Refusal to be examined.— A refusal by the assured to submit to examination concerning the loss does not work a forfeiture, but only suspends his claims under clauses in a policy one of which provides that until examination "the loss shall not be payable," and another that fraud or false swearing shall cause "a forfeiture of all claims." *Weide v. Germania Ins. Co.*, * 1 Dill., 441.

§ 1477. Same.— By certain policies of insurance the assured, after furnishing proofs of loss, were bound, if required, to submit to an examination under oath, and until such examination should be permitted, the loss should not be payable. *Held*, that this did not require the assured to answer questions respecting the amounts for which they had made settlements with other underwriters. *Insurance Cos. v. Weides*, * 14 Wall., 375; 1 Dill., 441.

§ 1478. Policies stipulated that fraud or false swearing in making proofs of loss should work a forfeiture of the insurance. *Held*, that this does not refer to testimony on the subject given at the trial. *Ibid.*

§ 1479. Bills and invoices.— A policy insuring goods required the assured to produce certified copies of all bills and invoices the originals of which had been lost. The assured were requested to produce duplicate bills of purchases, but it did not appear when the request was made, or whether there was any neglect or refusal to comply. *Held*, that a refusal to instruct the jury that the assured could not recover was properly refused. *Ibid.*

XII. ADJUSTMENT OF LOSS.

SUMMARY — *Valued policy*, §§ 1480, 1481.— *Property held in trust*, § 1482.— *Double insurance*, § 1483.

§ 1480. A valued policy of insurance determines beforehand the amount for which the insurer is liable in case of loss, and is inserted in the policy as a fixed sum to be paid if loss occurs. It does more than to merely value the property; it values the loss. *Luce v. Springfield Ins. Co.*, §§ 1484-85.

§ 1481. To make a policy valued there must be a contract, either to pay a stipulated sum, or that the property shall be estimated at a stipulated sum in case of loss. *Ibid.*

§ 1482. A policy of insurance effected by a factor on merchandise, his own, or held in trust or on commission, covers the property, and not merely the interest of the factor therein; and parol evidence is inadmissible to show that his interest alone was intended. *Robbins v. Fireman's Ins. Co.*, §§ 1486-90.

§ 1483. Where two policies, though issued to different persons, cover the same interest and inure to the benefit of the same owner, the insurance is double. Thus where R. & A., agents of a company, insured the property of the company in their hands, and the company insured the same property, both contracts being for the benefit of the company, *held*, that the insurance was double. *Ibid.*

[NOTES.— See §§ 1491-1496.]

LUCE v. SPRINGFIELD FIRE & MARINE INSURANCE COMPANY.

(Circuit Court for Michigan: 1 Flippin, 281-287. 1873.)

Opinion by WITHEY, J.

STATEMENT OF FACTS.—Luce brings this action as the assignee of a policy of insurance, issued by the defendant to James H. Roberts, dated February 28, 1871, insuring Roberts “against loss or damage by fire to the amount of \$2,500, for one year on his oil paintings, consisting of landscapes and portraits, as per schedule, \$7,500 other insurance.” In the printed portion of this policy is this clause: “Said loss or damage to be estimated according to the true and actual cash value of the said property at the time the same may happen.”

The schedule referred to in the policy was made up and furnished by the insured to defendant’s agents some two or three days after the application for insurance, and subsequent to the date of the policy, enumerating one hundred and five paintings; opposite each is extended in figures what purports to be Roberts’ estimate of value. I say Roberts’ estimate because it is in proof that the figures indicate his valuation. The schedule reads: “President Taylor and Cabinet, \$1,000; President Harrison and Cabinet, \$1,000; one full length portrait of Washington, \$1,000; General Taylor and the Battle of Buena Vista, \$3,000,” etc., comprising one hundred and five paintings, the aggregate of the sums extended amounting to \$45,900.

Three questions are presented: 1st. Was there a compromise between Roberts, plaintiff’s assignee, and defendant and the other companies that issued policies insuring the property? 2d. Was the policy issued by defendant a valued policy? 3d. What is the measure of damages?

§ 1484. *Compromise, to constitute a defense to an action on an insurance policy, must be binding on both parties.*

Four companies issued policies covering the property in question, three of them insuring \$2,500 each, and one \$2,400, making \$9,900 insurance. Defendant’s policy was for \$2,500; the Phoenix, of Hartford, \$2,500; the Home, of New York, \$2,500, and the Queen, of Liverpool and London, \$2,400. Mr. Ireton, the general agent and adjuster of the Phoenix, visited Grand Rapids, and under claim that he represented, for purposes of settlement, all the companies, obtained an understanding with the insured that the companies would pay *pro rata*, and the insured would accept \$3,000 in full satisfaction of the four policies. All the paintings, save two, having been destroyed by fire, Roberts claimed \$9,900 full insurance. Ireton claimed the paintings were worthless as works of art and of trifling value. The evidence shows that Ireton had not authority to bind all the companies, consequently his promise that any company for which he was not authorized to act would give Roberts a draft for its proportion was not binding on such company. From which it follows that as to all the policies there was no binding compromise.

By the terms of the arrangement, Roberts was to receive drafts from the companies as soon as they could arrive from Detroit, where the defendant and the Queen were represented by general agent and adjuster. The two drafts from Detroit were received within two or three days by the local agents at Grand Rapids, who offered them to Roberts if he would receipt and surrender the policies of those companies. A few days after this Roberts transferred to plaintiff Luce all the policies remaining in his hands, and his rights in the surrendered Phoenix policy. No draft in behalf of the Home Company was

received by the local agents, nor was one drawn or tendered to Roberts in behalf of the Home until the trial of this cause.

Mr. Ireton, at the time of the arrangement of compromise, gave Roberts a draft for \$757.58 on the Phoenix Company, being its proportion of the \$3,000 to be paid in compromise, and took up the policy of that company. The tender by defendant and the Queen was conditioned that Roberts surrender and receipt the policies. It would seem that such incomplete tender by two companies, and no seasonable tender by the Home, would present another good reason why the compromise was not effected, if a tender and readiness to perform were necessary. But standing as a mere agreement of compromise, it must have been one which would operate as a satisfaction of the contracts of insurance before such agreement can be offered as a defense to an action on the policies. A compromise agreement like accord and satisfaction, in order to take away the right of action on the original contract, must be an agreement which is substituted for the pre-existing obligation. It must bind both parties so that suit may be maintained by either, to enforce the same. I think neither party was bound by the compromise arrangement, except so far as it was executed, as it undoubtedly was, with the Phoenix Company.

The question of valued policy is not so free from difficulty. This policy runs very close to the dividing line between an open and a valued policy, but after much consideration it is my opinion that this is not a valued policy. Such a policy determines beforehand the amount for which the insurer is liable in case of loss, and is inserted in the policy as a fixed sum, to be paid if loss occurs. It does more than merely value the property insured it values the loss. To do this the policy must amount to a contract, either to pay, in case of loss, a stipulated sum; or that the property shall be estimated at a stipulated sum in case of loss. Such seems, fairly stated, to be the rule of the books. *Flanders on Fire Insurance*, 45; *Phillips on Ins.*, §§ 1178, 1180, 1213; *Harris v. The Eagle Fire Ins. Co.*, 5 John., 368; *Laurent v. Chatham Fire Ins. Co.*, 1 Hall, 52, 53; *Wallace v. Insurance Co.*, 1 Bennett's Fire Ins. Cases, 412.

An agreement between the insurer and insured that the property shall be estimated at a certain sum would make a valued policy, and the question is, was that done in this case? It has been held, when the policy describes the property, and contains a clause "valued at," or "agreed value," or "worth," followed by a specific sum, that such words indicate a valued policy, because amounting to an agreement that in case of loss the property shall be estimated of the value stated.

If the policy, after describing the property, had added only "value \$10,000" or other sum, this might probably, by analogy with decided cases, be held a valued policy; and yet, it would then seem not to be within the idea of a valued policy as defined in the books, but to value the property, not the loss; between valuing the property and valuing the loss, the books have attempted to make distinction, and yet it verges upon a distinction without a difference, when we consider the cases cited to illustrate and support the rule; and yet, in principle, there is a clear distinction, though not always exemplified by the adjudicated cases. The tendency of the cases is to hold that valuing the property values the loss, and is in the right direction.

§ 1485. *Valued policy. List of articles with dollar mark.*

But does this policy indicate such an agreement between the parties? I read this policy as if, instead of the words "as per schedule," it ran thus: "Do insure James H. Roberts against loss or damage by fire, to the amount

of \$2,500, for one year, on his oil paintings, consisting of landscapes and portraits, viz.: "President Taylor and Cabinet, \$1,000; President Harrison and Cabinet, \$1,000; one full length portrait of Washington, \$1,000; General Taylor and the Battle of Buena Vista, \$3,000," and so on, with the entire list of one hundred and five paintings.

Now unless the court interpolates into this contract some word or words not there, before the sign of dollars, in each instance, indicating that the figures represent agreed values, as "worth," "valued at," "value," or "agreed value," it is not clearly seen how the policy can be held, according to adjudicated cases, or upon principle, to be an agreement that in case of loss such amounts shall be the estimated value of the paintings named. Especially is it difficult to so read the contract, when further on, in the printed portion of the policy, is the express stipulation that "the loss or damage is to be estimated according to the true and actual cash value of the property at the time the same may happen."

If the written part of the policy is inconsistent with the printed portion, the latter must give way to the former. This is a well established rule in reference to policies of insurance, but I am unable to say that there is any inconsistency, and certainly the rule is as well settled that the different classes must be made to harmonize if possible. They are not inconsistent, but in harmony, when read together. Without further discussion, I hold, for the reasons stated, that this is not a valued policy.

The only question remaining is, as to the rule of damage. The plaintiff's only testimony on this subject is that given by Roberts, the insured, who says in his judgment the paintings were worth \$45,000. Roberts is an old man, and has for thirty years been engaged in painting; but when his testimony is weighed in the light of the evidence produced by the defendant, no one can justly conclude otherwise than that Roberts' judgment is not a safe criterion of the value of these paintings. The basis of his judgment was not stated, and I have little doubt no just basis for his extravagant valuation exists.

On the part of the defendant there were four persons testified, all of whom speak from knowledge of works of art, including paintings. One for thirty years has been a successful portrait painter; two have been and are extensive dealers in paintings and works of art, importing from Europe, and evincing a discriminating judgment of art works. They all testify that, as works of art, these paintings had no value. Their judgment was based upon, and they testified in reference to, the two paintings which were not destroyed. Portraits of "John Wesley," and "Governor Bouck," which were by Roberts, the insured declared to be of average merit with the paintings destroyed, as I have the testimony, though it is claimed he qualified this statement as to "Wesley." But take "Governor Bouck" as a standard. The witnesses say these two paintings, which were produced in court, are worthless as works of art. Both paintings were thus characterized; that of "Wesley" utterly worthless, and that of "Governor Bouck" as very inferior; it has "hardness of color or surface texture, wanting in drawing, wholly defective in composition, coloring and everything. They do not come under the head of art."

It is said by these witnesses that landscape paintings of like inferior quality would be worth more than portraits, because they would sell better at auction to persons without taste, or ignorant of art or of the value of paintings. They say landscapes of like want of merit might bring twenty-five to fifty dollars, at auction. Portraits of "Governor Bouck" might bring twenty-five

to thirty dollars, for the sake of having a copy of Elliott's original painting, but such portraits as "John Wesley" would be utterly worthless. Paintings find their market value mainly from their quality and the name of the artist. There are in this list of paintings eighty-eight portraits, four groups of portraits, five battle pieces, four historical pieces and four landscapes. Under the evidence it is somewhat doubtful what the value of the destroyed paintings may be, but the proofs will justify me in finding about \$3,000 as the value, particularly if aided by the fact that the defendant, with the "Home" and "Queen," come into court and tender at this rate; while in my opinion, \$3,000 is the full value of the paintings in any and every aspect of the case; and I am not disposed, in view of all the facts, to fix the amount less.

Defendant is liable for \$757.58 of this value, and \$44.20 for nine months' interest. Judgment for plaintiff, \$801.78, and costs.

ROBBINS v. FIREMEN'S FUND INSURANCE COMPANY.

(Circuit Court for New York: 16 Blatchford, 122-132. 1879.)

Opinion by SHIPMAN, J.

STATEMENT OF FACTS.—This is a motion for a new trial. Without giving a history in detail of all the facts in the case, the facts which are material upon the decision of this motion are as follows: The American Watch Company, of Waltham, Massachusetts, has been, for many years, a large manufacturer of silver watch cases and of watch movements. Robbins & Appleton, the plaintiffs, were, at the time of the issuing of the policies hereinafter mentioned, and for a long time have been, the sole selling agents of said company, and to this firm the entire production of the company was sent for sale, upon commission. The plaintiffs were factors or agents for no other person or corporation. They also manufactured and sold gold watch cases, upon their own account. Within a year prior to the fire hereinafter mentioned, they procured four policies in different fire insurance companies, in their own names, payable to themselves, whereby they were insured against loss by fire, to the extent of \$30,000, on "watches, jewelry and other merchandise, their own, or held by them in trust or on commission, or sold but not delivered, contained in substantial iron safes, on second floor of brick and iron building, Nos. 1, 3 and 5, Bond street, New York city." All the premiums of insurance the plaintiffs paid from their own funds. The policy in the defendant company was one of the four, was for \$5,000, and contained the words, "other insurance permitted, without notice." The policy also contained the following provisions: "7. In case of any other insurance upon the property hereby insured, whether made prior or subsequent to the date of this policy, the assured shall be entitled to recover of this company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon, and it is hereby declared and agreed that, in case of the assured holding any other policy in this or any other company, on the property insured, subject to the conditions of average, this policy shall be subject to average in like manner. Re-insurance, in case of loss, to be settled in proportion as the sum re-insured shall bear to the whole sum covered by the re-insured company. 9. In case of loss on property held in trust or on commission, or, if the interest of the assured be other than the entire and sole ownership, the names of the respective owners shall be set forth in the proofs of loss, together with their respective interests therein. If this policy is made payable, in case of

loss, to a third party, or held as collateral security, the proofs of loss shall be made by the party originally insured, unless there be an actual sale of the property insured. And, further, that it shall be optional with the company to repair, rebuild or replace the property lost or damaged with other of like kind and quality, within a reasonable time, giving notice of their intention so to do within thirty days after receipt of the proofs herein required. The cash value of property destroyed or damaged by fire shall in no case exceed what would be the cost to the assured at the time of the fire of replacing the same, and, in case of the depreciation of such property, from use or otherwise, a suitable deduction from the cash cost of replacing shall be made, to ascertain the actual cash value at the time of the fire." At the same time, the plaintiffs, as the agents of the American watch company, procured from fourteen companies policies of insurance against fire, in the name of said watch company, to the extent of \$80,000, payable to its treasurer, upon watches, watch movements and other merchandise contained in the same safes on the same floor of said building. All these policies were contributory. The premiums were paid by the watch company. By a fire which occurred on March 6, 1877, the plaintiffs' own property in these safes, valued at \$22,000, was damaged to the extent of \$3,000, and the watch company's property therein, valued at about \$107,000, was damaged to the extent of \$85,500. Of this loss, \$80,000 were upon watch movements, and \$5,500 were upon silver watch cases. These goods were held by the plaintiffs, at the time of the fire, on commission for the watch company.

The defendant, not denying its liability to the plaintiffs for a proportionate share of their own loss, insisted that the extent of its liability was \$500, upon three grounds: 1st. That the insurance was upon the plaintiffs' goods alone, or upon the plaintiffs' interest in the property in the safes, and that such was the intent of the parties to the contract, and that extrinsic evidence was admissible to show such intent. 2d. That the procuring policies of insurance in the name of the plaintiffs, upon the goods of the watch company, was an unauthorized and voluntary act of the plaintiffs, and was not ratified, prior or subsequent to the fire, by the principals, who, in fact, elected not to adopt the insurance. 3d. That the insurance upon the watch company's goods in the name of the plaintiffs was not double insurance and did not contribute with the policies in the name of the watch company, and that in any event the plaintiffs could recover for the benefit of the watch company only the excess of its loss above \$80,000, to wit, \$5,500. The plaintiffs, denying each position of the defendant, contended, upon the second point, that they were authorized to insure, in their own name, the watch company's property for its benefit, and that they procured the four policies under and in pursuance of such authority; and that, if not so authorized, the contracts and the policies of insurance had been adopted by the watch company. The court declined to admit parol evidence of the intent of the parties, upon the ground that, under the conceded facts in the case, the policy was a contract to insure the property in the safes, and not merely the interest of the plaintiffs therein; and that, it being undenied that no property was, or was intended to be, held on commission, except the property of the watch company, extrinsic evidence was not admissible to vary the contract; and, furthermore, that the offered evidence, if admissible, did not tend to show a non-intent by the parties to the contract to insure the watch company's property.

The court charged the jury as follows: "Upon the undisputed facts, the

legal construction of the policy of insurance is, that the merchandise in the second-story safes, whether belonging to Robbins & Appleton, or held by them in trust, or on commission, for the watch company, was insured, and that Robbins & Appleton's interest in the property was not simply insured. The insurance was upon the whole property, and not merely upon the plaintiffs' interest in the property. Furthermore, the plaintiffs having insured the property in their own names, and with their own funds, are entitled to receive from the insurance company their own loss in full, and the excess of insurance above the plaintiffs' loss they hold as trustees, for the benefit of their principals, the watch company, and the excess of insurance, which, in this case, would be \$27,000, contributes with the policies which were taken out in the name of the watch company, provided this and the other policies ever become valid and subsisting policies in which the watch company was beneficially interested." Two questions of fact were submitted to the jury, who were instructed as follows: "If you find that this policy was taken out in the name of Robbins & Appleton, in pursuance of and in conformity with the instructions of the watch company previously given to its factors, then you will find for the plaintiffs for the sum of \$4,095.75, and interest from August 25, 1877; but if you find that the policy in the name of Robbins & Appleton was not previously authorized, and was not taken in pursuance of instructions, or was a voluntary act on the part of Robbins & Appleton, then you will inquire whether, before or after the fire, and prior to April 11, 1877, it was adopted by the watch company, for, unless so adopted, it is not entitled to the benefit of the insurance, and the plaintiffs are only entitled to recover \$500 and interest." The jury returned a verdict for the plaintiffs for \$4,095.75, and interest.

§ 1486. *Insurance by factor of merchandise, his own, or held in trust or on commission.*

1st. The proper construction of the contract of insurance. This question has been, in my opinion, substantially settled by the decision in *Home Ins. Co. v. Baltimore Warehouse Co.*, 3 Otto, 527. In that case, a policy of insurance had been procured by warehousemen in their own names, and payable to themselves, upon goods which were the property of the consignors, and upon which the bailees had made advances. The language of the policy was: The Home Insurance Company "insure Baltimore Warehouse Company against loss or damage by fire, to the amount of \$20,000, on merchandise, hazardous or extra-hazardous, their own or held by them in trust, or in which they have an interest or liability, contained in" a described warehouse. The court said: "There is nothing ambiguous in this description of the subject insured. It is as broad as possible. The subject was merchandise stored or contained in a warehouse. It was not merely an interest in that merchandise. The merchandise of the warehouse company, owned by them, was covered, if any they had. So was any merchandise in the warehouse in which they had an interest or liability. And so was any merchandise which they held in trust. The description of the subject must be entirely changed before it can be held to mean what the insurers now contend it means. If, as they claim, only the interest which the warehouse company had in the merchandise deposited in their warehouse was intended to be insured, why was that interest described as the merchandise itself? Why not as the assured's interest in it? Throughout the policy, whenever the subject intended to be insured is spoken of, it is described, not as a partial interest, not as a mere lien for advances and charges

upon the goods held in storage, but as the property itself, whatever may be the existing rights to it. . . . It is undoubtedly the law that wharfingers, warehousemen and commission merchants having goods in their possession, may insure them in their own names, and, in case of loss, may recover the full amount of insurance, for the satisfaction of their own claims first, and hold the residue for the owners. Such insurance is not unusual, even when not ordered by the owners of goods, and, when so made, it inures to their benefit, and such insurance, we must hold, the warehouse company sought and obtained by the policy of the plaintiff in error."

§ 1487. *Evidence to show what property was intended.*

The defendant, however, insists that parol evidence was admissible to show that the watch company's property was not intended to be insured. When a policy is taken out "for or on account of the owners," or "on account of whomsoever it may concern," the owners not being specified, evidence is often necessary to show who are the owners, or who are intended to be insured thereby, because the contract fails to designate the names of the beneficiaries, and, being silent, the names of the owners must be supplied by extrinsic evidence. So, also, when the insured has property in trust or on commission belonging to two persons, one of whom is the actual beneficiary of the policy and the other is not, it is competent to show, by extrinsic evidence, whose property was actually intended to be covered by the insurance. For, in this case, the policy is silent as to a material part of the contract. And, where a factor, at the time of the fire, has property in his possession belonging to one person, but, at the time of taking the insurance and continuously thereafter, both parties to the contract intended that the insurance should be for the benefit of another person, whose property has never been received, in such case the company may show the intent of the factor, and that the policy never attached to any property in his possession. In this case, however, it was proved and not denied that the plaintiffs were factors for the watch company alone, and that, for many years, they had been exclusively factors for that company; and it is not claimed that they contemplated becoming factors for any other person. Property held on commission being specified in the contract, and, at the time of the execution of the contract and continuously thereafter, the plaintiffs having had in their store, on commission, the property of no one but the watch company, it follows that the policy, so far forth as it relates to property on commission, attached to the property of the watch company or to no property. The effect of the parol testimony would have been to alter the express and unambiguous terms of the written contract.

§ 1488. *Double insurance. Contribution.*

2d. Did the several policies upon the watch company's property constitute double insurance, and were the four policies which were issued in the name of the plaintiffs upon said property, contributory with the policies upon the same property in the name of the watch company?

This question has been very fully and ably argued by the defendant's counsel, but I am of opinion that the principles which govern its decision have been authoritatively established in the Baltimore Warehouse Company case, cited *supra*, although it is obvious that the question which is presented by the facts of this case was not before the supreme court. The warehouse company held in its warehouse goods belonging to seven depositors. A large portion of this property was destroyed by fire. Previously to, and at the time of, the fire, the company held a policy for \$20,000 in the Home Insurance Company, and

another policy, substantially in the same form, for \$10,000, issued by another insurance company. To four of the consignors the warehouse company had made advances. Three of the consignors to whom advances had been made had taken out policies, also in force at the time of the fire, in their own names, covering specific portions of said property, and all of the last mentioned policies, except two, were made payable, on their face, to the warehouse company, in these words: "Loss, if any, payable to the Baltimore Warehouse Company," and were delivered to and held by it as additional security for advances, at the time of making said advances. The insurance company asked the circuit court to charge that "the policies obtained by Hough, Clendening & Co. upon their cotton, and made payable to the Baltimore Warehouse Company, being for a different assured, were upon a different interest from that covered by the policy now in suit, and the latter is not bound to contribute to any losses for which the former are liable." The circuit court was of the opinion that the policies in the name of the warehouse company covered only its interest in the property contained in the warehouse, and charged that it was entitled to recover for two-thirds of all loss or damage to the property upon which it had made advances, to the extent of its advances on the same, less the amount which the jury should find to be due from the special policies on cotton on which the plaintiff had made advances, made payable to the plaintiff, each of said special policies contributing to the loss on the cotton insured by it, with the general policies held by the plaintiff. The jury found for the plaintiff, and the insurance company brought a writ of error. The supreme court said: "The most important question in this case relates to the proper construction of the defendants' policy of insurance. It is contended, on their behalf, that it covered only the warehouse company's interest in the goods contained in the warehouse. If this is the true meaning of the contract, the instruction given by the circuit court to the jury was erroneous. If, on the other hand, the policy covered the merchandise itself, and not merely the interest which the warehouse company had therein, there is no just ground of complaint of the charge of the circuit judge." After deciding that the policy covered the merchandise itself, the court proceeds as follows: "Without pursuing this discussion further, we have said enough to vindicate our opinion, that the policy upon which this suit was brought covered the merchandise held by the warehouse company on storage, and not merely the interest of the bailees in that property. It follows, necessarily, that there was double insurance. The policy issued to the warehouse company, and those obtained by the depositors of the merchandise, covered the same property, and they were for the benefit of the same owners. The persons assured were the same; for, if the policies taken out by Hough, Clendening & Co. were upon their goods, notwithstanding the memorandum that the loss, if any, was payable to the Baltimore Warehouse Company, as may be conceded was the case, so was the policy now in suit. The insurers are liable, therefore, *pro rata*, each contributing proportionately." It is true that the court did not pass upon the question whether the policy in suit contributed with the policies which were not made payable to the warehouse company, for that question was not before the court. The only point which the court decided, in this part of the case, was whether two policies upon the same interest in the same property, one issued to the bailees and owners and made payable to the bailees, and the other issued to the bailees, constituted double insurance. The principle upon which the court placed its decision in favor of double in-

insurance is that these two classes of policies covered the same interest in the same property, and were for the benefit of the same owners. Where these two facts exist, double insurance is the result.

§ 1489. *Double insurance defined.*

Lord Mansfield defined double insurance to be "when the same man is to receive two sums instead of one, or the same sum twice over for the same loss, by reason of his having made two insurances upon the same goods on the same ship" (*Godin v. London Assurance Co.*, 1 Burr., 489, 495); but it is not essential that the respective policies should be issued to the same persons. If the policies, though issued to different persons, cover the same interest, and inure to the benefit of the same owner, the insurance is double. If the policies are issued to different persons, in respect of different rights, as, for example, to mortgagor and mortgagee, or do not inure to the benefit of the same owner, the insurance is not double. And here consists the distinction between the case of *North British Ins. Co. v. London Ins. Co.*, L. R., 5 Ch. Div., 569, which is relied upon by the defendant and the warehouse company case. In the English case, *Barnett & Co.*, wharfingers, who, by the custom of London, or of the trade, were responsible to their consignors, like common carriers, and were liable to make good loss by fire, effected insurance in their own name to a large amount on property, "the assured's own, in trust or on commission, for which they are responsible," in their warehouse. The policies contained a contributory clause. A fire destroyed property of one of the consignors, who had insured in their own names in other companies. *Barnett & Co.* were paid their insurance and paid the consignors the amount of their loss. The wharfingers' insurers claimed contribution from the consignors' insurers, and whether the whole insurance was double and contributory was the question in an equity suit between the two sets of insurers. It was held that the insurance was not double. The different judges place the stress of their argument upon the fact that the wharfingers were liable as common carriers, and construe the contract to be an insurance to protect them against loss arising from this liability. The two classes of insurance were considered to be upon different interests, although upon the same property. In the Baltimore warehouse case the court gave a different construction to the contract.

It results then, from the fact that the *Robbins & Appleton* policies, so far forth as they related to the watch company's property, were upon the same property which was insured in its name, and from the further fact that the two sets of policies upon the watch company's goods were for the benefit of the same owner (for, as to the insurance upon the property of the watch company in the plaintiffs' policies, they were trustees for the owner), that the insurance was double and contributory. The plaintiffs' policies upon the watch company's property present the ordinary case of insurance, by a factor, of goods in his possession belonging to another person. Such insurance, either directly or indirectly, inures to the benefit of the owner. In this case, the insurance was directly for the benefit of the owner, as the factors had no charges or liens upon the goods. The fact that the plaintiffs' policies covered goods which were their own, and were not in the watch company's policies, does not take the insurance upon the company's goods out of double insurance, for this circumstance does not alter the fact that the insurance upon the watch company's goods was entirely for its benefit. The two classes of property were perfectly distinct and separate, and the ascertainment of the amount due upon account of the watch company was merely a matter of arithmetical computation.

§ 1490. *Verdict not against evidence.*

The defendant also asks that a new trial should be granted upon the ground that the verdict was contrary to the evidence. Two questions of fact were submitted to the jury: 1st. Was the insurance unauthorized? 2d. If unauthorized, was it adopted? The jury found for the plaintiffs generally. In the present condition of the litigation of the plaintiffs with their insurers (another suit now awaiting trial in this court), I do not think it advisable to discuss the questions of fact, except simply to say that the state of the evidence was not such as to warrant the granting a new trial.

The motion for a new trial is denied.

§ 1491. In general.—The assured is entitled under a fire insurance policy to recover the amount of his loss up to the sum insured. *Curtis v. Home Ins. Co.*, * 1 Biss., 495.

§ 1492. A mortgagee may insure his interest in the mortgaged property without regard to mortgagor, and in case of loss recover the amount without liability to account to the mortgagor. *Johnson v. North British Ins. Co.*, * 1 Holmes, 117.

§ 1493. Other insurance.—A policy contained the following: "Nor shall the assured be entitled to recover of this company any greater proportion of the loss or damage than the amount hereby insured bears to the whole sum insured on said property." *Held*, that this referred to other insurance by the same person, or to other insurance of the same interest, and not to separate insurance by the mortgagor or mortgagee, or by different mortgagees upon the same property. *Ibid*.

§ 1494. Double insurance.—When a warehouse company obtains insurance upon goods deposited with them, "their own or held in trust," and the depositors insure the same property, the insurance is double. *Home Ins. Co. v. Baltimore Warehouse Co.*, * 93 U. S., 527.

§ 1495. On April 20th defendants insured A. & Co. in \$3,000 "on their new lithographic printing press." Afterwards A. & Co. bought another and larger lithographic press, and on June 28th procured insurance in \$4,000 "on their lithographic presses and ink mill." On October 30th A. & Co. purchased a lithographic press, insured by the policy in suit in \$4,300, as "on their H. & K., No. 6, steam lithographic press." *Held*, not double insurance. *Mauger v. Holyoke Ins. Co.*, * 1 Holmes, 287.

§ 1496. Application of the following provision to a special set of facts involving several insurances upon a quantity of grain: "The company shall be liable only for such proportion of the whole loss as the amount of this insurance bears to the cash value of the whole property herein described." *Barnes v. Hartford Ins. Co.*, * 3 McC., 226.

§ 1497. In a case in which the question as to contribution was involved, the court admitted in evidence several statements or plans of adjustment of the loss, made by an expert, and founded upon different theories of the law. They were not admitted as evidence of the facts stated in them, or as obligatory upon the jury, but only for the purpose of assisting the jury in calculating the amount of liability of the defendants upon the several hypotheses of fact stated in them, and stated only hypothetically. The jury were left free to accept either hypothesis, or reject them all. *Held*, no error. *Home Ins. Co. v. Baltimore Warehouse Co.*, * 3 Otto, 527.

§ 1498. Assessment policy — Maximum of insurance.—The plaintiff in an action upon an assessment policy of a peculiar nature, held entitled to recover the maximum amount insured unless the underwriter show that each sum should be reduced. *Lueders v. Hartford Ins. Co.*, * 19 Fed. R., 468.

XIII. REBUILDING.

§ 1499. Consideration.—Where, under the terms of a policy of insurance against fire, the company elects to rebuild, the policy becomes a contract, on the part of the company, for the consideration of the premium paid by the assured, to restore and repair his house; and the law requires the company to restore and repair the house as nearly as possible to its condition before the fire. *Collins v. Aetna Insurance Co.*, * 1 Ch. Leg. N., 202.

§ 1500. If the company makes application to the assured, before commencing the work, for a plan of the original house, and the assured refuses to furnish such plan, he cannot complain if the new part of the building does not exactly correspond with that of the original house. *Ibid*.

§ 1501. **Waiver.**—If the company, by its workmen, takes possession of the premises, and sets men to work in restoring the building, it will be assumed to have waived the notice of the fire, and of the extent of the injury, etc., as required by the policy. *Ibid.*

§ 1502. **Damages.**—In an action by the assured to recover damages, on the ground that the house has not been rebuilt as before the fire, the measure of damages, if allowed, should be the expense in putting the house in the condition it was in before the fire. *Ibid.*

XIV. PLEADING.

§ 1503. **Subrogation.**—Where property insured is burned through the misconduct of another, and the claim for insurance is paid, the underwriter, if seeking to recover from the wrong-doer, must sue in the name of the person whose property was destroyed. This rule is not changed by a statute which declares that actions must be brought in the name of the real party in interest, in a case where the amount paid is less than the value of the property, and there has been no assignment by the assured to the underwriter. *Ætna Ins. Co. v. Hannibal R. Co.*, *8 Dill., 1.

XV. SUBROGATION.

[See PLEADING, *supra*.]

§ 1504. **Responsibility of tenant for loss by fire.**—Where a tenancy from year to year is by mere occupancy, without any express agreement, liability for destruction by fire is not incidental to such mere occupancy. But upon an express agreement to repair and keep in repair, the tenant is liable for loss or injury by accidental fire; and this whether the agreement be by covenant under seal, or only verbal, or inferential. *Lovett's Case*, *9 Ct. Cl., 479.

§ 1505. **Landlord and tenant.**—The fire policy of a landlord, made in his own behalf and at his cost, does not attach to the building insured, or inure to the benefit of the lessee, but is personal to him. Nor is there, in the case of fire insurance, any such thing as subrogation of the insurer for the insured, so that the lessee is to be credited, on account of any liability for damages caused by the fire, with the amount paid the landlord by the insurer. *Ibid.*

§ 1506. **An insurer of goods destroyed by accidental fire on the transit,** who has paid the loss, may sue the common carrier for indemnity by suit brought in the name of the insured. As between insurer and carrier, the latter is ultimately liable for a loss rather than the former. *Hall v. Railroad Companies*, 18 Wall., 367.

D. LIFE INSURANCE.

I. CREATION, NATURE AND REQUISITES OF THE CONTRACT, §§ 1507-1620.	IV. WORDS OF EXCEPTION: SUICIDE AND VIOLATION OF LAW, §§ 1707-1748.
II. PARTIES ENTITLED TO BENEFIT OF THE CONTRACT, §§ 1621-1640.	V. ASSIGNMENT OF POLICY, §§ 1749-1754.
III. WARRANTY, CONCEALMENT AND REPRESENTATION, §§ 1641-1706.	VI. PROOFS OF LOSS, §§ 1755-1757.
	VII. ADJUSTMENT OF LOSS, §§ 1758-1768.
	VIII. EVIDENCE, §§ 1769-1771.
	IX. SUBROGATION, §§ 1772, 1773.

I. CREATION, NATURE AND REQUISITES OF THE CONTRACT.

SUMMARY—*Insurable interest*, §§ 1507-1518.—*Payment of premiums*, §§ 1514-1532.—*Acknowledgment of receipt*, § 1517.—*Sickness of assured no excuse for non-payment of premium*, § 1518.—*Waiver*, §§ 1519-1528.—*Notification of time or place of payment*, §§ 1529, 1530.—*Existence of war*, § 1531.—*Conflicting clauses*, § 1532.—*Right to paid-up policy*, §§ 1533-1537.—*Non-forfeiture act of Massachusetts*, § 1538.—*Contributory plan*, §§ 1539-1541.

§ 1507. A policy of insurance taken out for the benefit of a creditor on the life of his debtor in the amount of \$3,000, where the debt was only \$70, is a wagering policy, and this though the policy was taken out in the name of the debtor and assigned by him to the creditor, who was to have, and in fact retained, only \$2,000 of the amount collected; and the policy is good only for the amount of the debt. Nor would the receipt of one-third of the insurance money by the representative of the assured from the creditor bar a claim for the balance. *Cam-mack v. Lewis*, §§ 1542-43.

§ 1508. Lawful marriage is necessary to give a woman an insurable interest in the life of one whom she claims to be her husband. *Holabird v. Atlantic Ins. Co.*, §§ 1544-45.

§ 1509. Mutual consent, in good faith, to become husband and wife, followed by cohabitation, in the case of persons of marriageable age, constitutes a lawful marriage in Missouri, Tennessee or Illinois. *Ibid.*

§ 1510. Either one of the parties insured by a policy on the lives of a husband and wife may on behalf of both sign an acknowledgment of a credit, or may authorize another to sign it on behalf of both. *Connecticut Ins. Co. v. Schaefer*, §§ 1546-49.

§ 1511. A policy of life insurance taken out in good faith, and valid at its inception, is not avoided by the cessation of the insurable interest, unless the contract so provide. So held of a policy issued on the lives of a husband and wife, payable to the survivor, the wife, who survived, having obtained a divorce from her husband. *Ibid.*

§ 1512. A brother may effect insurance upon his life, making the sum payable to his sister, especially if she be one of his next of kin. *Aetna Ins. Co. v. France*, §§ 1550-52.

§ 1513. The lower court refused to charge the jury that if they believed that the premiums in each case were paid by the sister, there was evidence from which they could find that the application for insurance was made and the policy in question taken out by her for her own benefit, in which case she must show an insurable interest in the life of her brother. *Held*, rightly refused. *Ibid.*

§ 1514. If, in satisfaction of premium payable in money, the agent of an underwriter accept chattels and choses in action, no contract is thereby created. *Hoffman v. Hancock Ins. Co.*, §§ 1553-54.

§ 1515. *Quære*, whether an action upon a policy can be maintained when the assured in his life time, upon the refusal of the company to ratify an arrangement of its agent in regard to premium, brought an action against the company to recover back the consideration given the agent. *Ibid.*

§ 1516. Payment of premium made to one who has been the authorized agent of an underwriter, and as such has received payment of a premium from the same person, will be good, though he had resigned his agency before the second payment was made, if that fact was not known to the assured. *Insurance Co. v. McCain*, §§ 1555-56.

§ 1517. Where a note is given for premium, and payment of the premium is acknowledged in the policy, it seems that for the purpose of defeating the contract the underwriter cannot dispute the acknowledgment by showing non-payment of the note. *Young v. Mutual Life Ins. Co.*, §§ 1567-69.

§ 1518. The fact that the assured became sick and mentally incapable of attending to his business, during which time a premium note became due, and that the plaintiff in whose favor the policy ran was ignorant of the existence of the note, is no excuse for failing to pay the same at maturity. *Thompson v. Insurance Co.*, § 1559; *Klein v. Insurance Co.*, § 1557.

§ 1519. A policy of life insurance contained a provision that it should become void if the premiums should not be paid on the day when they became due, or if any notes given in payment of premiums should not be paid at maturity. *Held*, that the taking of premium notes was not in itself a waiver of the conditional forfeiture. *Thompson v. Insurance Co.*, §§ 1558-62.

§ 1520. A parol agreement made at the time of effecting an insurance, that one of the terms concerning payment of the premium should not be strictly enforced, cannot be received in evidence. *Ibid.*

§ 1521. A practice by an insurance company, to allow thirty days' grace for the payment of premium after the same becomes due, is a mere voluntary indulgence and not binding, especially as applied to a particular case in which no payment or tender was made at all. *Ibid.*

§ 1522. Retention by the assured for fifteen days of a policy issued and sent to him, without objection or explanation, is an acceptance of its terms and conditions. *Davis v. Massachusetts Ins. Co.*, §§ 1563-66.

§ 1523. If a policy be delivered to the assured by the agent of an underwriter, with a statement that there is "no hurry" about the payment of premium then due, a presumption arises, *prima facie*, that a credit is intended, though the policy require payment to make the contract binding. But if authority of the agent to waive such requirement has been completely taken away from him, to the knowledge of the supposed assured, the agent's act in giving a credit will be nugatory. *Ibid.*

§ 1524. Circumstances under which a forfeiture was deemed to have been waived, among them the following: The defendant in *New York* transmitted a policy and receipts of payment of premium to be delivered to the assured in California, knowing that payments had not been made and could not be made in *New York*, and that they could not be made elsewhere in the mode required by the contract for a month after they became due, when a forfeiture would have been incurred. *Young v. Mutual Life Ins. Co.*, §§ 1567-69.

§ 1525. A policy of insurance is not forfeited for non-payment of premium when due if a person intrusted by the assured on leaving home to attend to the business is misled by the agent of the underwriter, on such person's applying for information as to the time for payment, where the person afterwards, within a reasonable time, while waiting for promised information by the agent, makes a tender of the sum due. *Selvage v. Hancock Ins. Co.*, § 1570.

§ 1526. Consideration of the question whether there was sufficient evidence of a tender. *Ibid.*

§ 1527. An agent of an insurance company may waive a provision requiring payment of premium on a day named, though the policy provide that no person except the president and secretary of the company is authorized to make, alter or discharge contracts or waive forfeitures. *Ibid.*

§ 1528. An insurance company may waive a provision in its favor; and to show such waiver evidence is proper to show that the local agent of the company was in the habit of extending the time of payment, and that this was acquiesced in by the company. Nor is it material that a particular extension of time was applied for and granted after the payment became due, where there is nothing in the evidence to show any distinction against such a case. *Insurance Co. v. Norton*, §§ 1571-74.

§ 1529. A. applied for insurance by the defendant through defendant's agent, B. B. told A. that the defendant would notify him when to pay the premiums, and that he need give himself no uneasiness about that. A policy was issued, which required payment at certain times and showed that B. had no power to waive forfeitures. The company notified A. when the first premium became due (which was duly paid), but not when the time for paying the second arrived, and the same was not paid as required by the policy, though tender was afterwards made, after the death of the assured. *Held*, that the defendant was not estopped to say that the requirement of prompt payment was not complied with. *Insurance Co. v. Mowry*, § 1575; *Thompson v. Insurance Co.*, §§ 1558-62.

§ 1530. An insurance company has no right, without notifying its assured, to remove its usual agency so as to cause a forfeiture by reason of the failure of the assured to find the place of payment upon due inquiry. *Briggs v. National Ins. Co.*, § 1576.

§ 1531. The intervention of war, before the performance of a contract between parties on opposite sides of the lines of conflict, does not merely suspend executory contracts; it abrogates them. This principle is applicable to the contract of life insurance, in case of the non-payment of premiums when they become due, so far as any right is concerned of one assured by a company in the north, before the war of the rebellion, the assured residing in the south during the war, to reinstate the policy after the war by tender of back premiums that became due while hostilities existed. But such person may recover the equitable value of his policy at the time when the war prevented payment of premiums. *New York Ins. Co. v. Statham*, §§ 1577-81.

§ 1532. A provision in a life insurance policy which declares the policy forfeit if advance interest on notes given for premium is not paid does not conflict with a provision that the policy is not forfeited for failure to pay premiums after the first one has been paid. *Nettleton v. St. Louis Ins. Co.*, § 1582.

§ 1533. A stipulation in a policy of insurance that paid-up policies will only be issued in case assured, within sixty days after default in payment, return the original policy for cancellation, is a condition precedent to the requirement of a paid-up policy, and must be complied with unless an adequate excuse is shown. *Coffey v. Universal Ins. Co.*, §§ 1583-84.

§ 1534. Circumstances of excuse in this case considered, and *held* sufficient. *Ibid.*

§ 1535. Defendant issued a policy of insurance to the plaintiff in which it agreed, after the payment of the annual premiums, to issue to the plaintiff a paid-up policy upon the surrender of the existing policy. The plaintiff applied without success to the defendant for one of its printed forms of paid-up policies, and then tendered one drawn by himself, in substance the same as one which the defendant had tendered to the plaintiff, but which the plaintiff at first refused to accept. Defendant refused to execute the same. *Held*, a breach of contract on the part of defendant. *Watts v. Phoenix Ins. Co.*, §§ 1585-87.

§ 1536. The beneficiaries of a life insurance policy must be joined as plaintiffs in a suit for breach of such contract, or the recovery will at most only be for nominal damages. *Ibid.*

§ 1537. Where a life insurance company refuses to issue a paid-up policy as contracted for in a lapsed policy which had been in force for several years, there can be no rescission of the contract, for it is impossible to put the parties back into their old positions. *Ibid.*

§ 1538. Policies of insurance issued from the home office by foreign companies upon the lives of citizens of Massachusetts are not within the non-forfeiture law of that state, of 1861, chapter 186. *Shattuck v. Mutual Life Ins. Co.*, §§ 1587-89.

§ 1539. The policy of an insurance company, issued upon the "contributory plan" of providing for the payment of losses by making assessments on the assured, construed not to make

the payment of such assessments obligatory. The assessment was to be made "upon the policy-holders at the time of the assessment," thus showing that those who had defaulted on previous assessments, and thus lapsed out, were not to be treated as liable to assessment. (Per Blodgett, J.) *In re Protection Ins. Co.*, §§ 1590-93.

§ 1540. Assessments on holders of policies issued on such contributory plan, when the policy provides a time and mode of assessment, cannot afterwards be made by an assignee in insolvency of the company upon a neglect of the company to make the same. *Ibid.*

§ 1541. *Quære*, whether the company could have any claim upon policy-holders until payment of the loss for which an assessment is made. *Ibid.*

[NOTES.—See §§ 1594-1620.]

CAMMACK v. LEWIS.

(15 Wallace, 648-649. 1872.)

APPEAL from the Supreme Court of the District of Columbia.

STATEMENT OF FACTS.—Lewis was in debt to Cammack in the sum of \$70, and at the solicitation of the latter, who agreed to pay the premiums, he took out a policy of insurance on his life for \$3,000, and assigned it to Cammack, and gave to Cammack his note, of the same date with the policy, for \$3,000, without receiving any consideration for the note. Seven months after this Lewis died intestate, leaving a widow and children. Among his papers was found an agreement by Cammack to pay to Lewis' wife, in case Cammack collects the full amount of the policy, one-third of the sum so collected. The money was collected and the amount mentioned paid to Lewis' wife before she had taken out letters of administration upon her husband's estate, and while ignorant of the facts in the case, but afterwards having taken out such letters, she brings this suit for the remainder of the \$3,000, as administratrix.

§ 1542. *Policy for \$3,000 assigned to a creditor to secure \$70, a wagering contract.*

Opinion by MR. JUSTICE MILLER.

If the transaction as set up by Cammack be true, then, so far as he was concerned, it was a sheer wagering policy, and probably a fraud on the insurance company. To procure a policy for \$3,000 to cover a debt of \$70 is of itself a mere wager. The disproportion between the real interest of the creditor and the amount to be received by him deprives it of all pretense to be a *bona fide* effort to secure the debt, and the strength of this proposition is not diminished by the fact that Cammack was only to get \$2,000 out of the \$3,000; nor is it weakened by the fact that the policy was taken out in the name of Lewis and assigned by him to Cammack. This view of the subject receives confirmation from the note executed by Lewis to Cammack for the precise amount of the risk in the policy, which, if Cammack's account be true, was without consideration, and could only have been intended for some purpose of deception; probably to impose on the insurance company.

Under these circumstances, we think that Cammack could, in equity and good conscience, only hold the policy as security for what Lewis owed him when it was assigned, and such advances as he might afterwards make on account of it, and that the assignment of the policy to him was only valid to that extent.

Whether Lewis was a participant in the fraud does not fully appear. Such conversations of his as are proved tend to show that he looked upon Cammack as a friend, to whom he was willing to trust the policy assigned, and that he never supposed more would be claimed by Cammack than what he owed him. It is also probable that he believed he would survive the life

of the policy, and with the single exception of the note for \$3,000, given by him without consideration, there is nothing proved against him inconsistent with that view of the matter, and with his fair dealing. At all events, we do not see such evidence on his part of a corrupt transaction, as to forbid the court from doing justice between his administratrix and Cammack, after the amount secured by the policy has been paid by the company to the latter.

§ 1543. *Receipt of one-third the insurance money in full of plaintiff's claim, not a bar to suit for the rest, if given in ignorance of facts.*

The receipt of the one-third of the insurance money by the complainant does not, we think, under all the circumstances of the case, conclude her as a settlement of the matter in dispute. It is obvious that she was ignorant of the full extent of her rights; that she acted hastily and without due consideration, and was largely influenced by the advice of Mr. Chandlee, who had been her husband's friend and adviser, and who was prompted to do what he did by Cammack, while in ignorance of many of the facts of the case.

Besides, the bill in this case, as appears on its face, is brought by her as administratrix, and the receipt by her of the one-third paid on the policy was before any administrator had been appointed. If she has a right to recover all the \$3,000 as administratrix, it could not be defeated by her receipt of \$1,000, paid to her in her own right before any administration had been taken out on Lewis' estate. On the whole, we are of the opinion that the decree of the supreme court should be affirmed, and it is so ordered.

HOLABIRD v. ATLANTIC INSURANCE COMPANY.

(Circuit Court for Missouri: 2 Dillon, 166-168. 1873.)

STATEMENT OF FACTS.—Action on a policy for \$10,000 on the life of Holabird, alleged to have been the husband of the plaintiff. The defense was want of insurable interest and breach of warranty.

Charge by TREAT, J.

Under the issues in this case, *the plaintiff must prove that* at the date of the policy sued on *she was the lawful wife of O. F. Holabird*, the person on whose life the risk was taken. If, at the time of the marriage ceremony, in May, 1861, testified to by plaintiff, the said O. F. Holabird had a wife living, then said alleged marriage with plaintiff was void, and the plaintiff could not be, or become, the lawful wife of said O. F. Holabird during the life-time of his former wife.

§ 1544. *Missouri laws of marriage.*

By the statutes of Missouri marriage is declared to be "a civil contract, to which the consent of the parties capable in law of contracting is essential." If subsequent to the death of the former wife, were there one, Mr. Holabird and the plaintiff, being over twenty-one years of age, were married, and that marriage was prior to the date of the policy, and they continued to live together as husband and wife until the policy was issued, then she, as his wife, had an insurable interest in his life.

It is not necessary to the validity of a marriage in Missouri that any special ceremony, religious or otherwise, should be performed, nor that the marriage should be solemnized before any person belonging to any one of the classes named in the Missouri statute as authorized to perform the ceremony. Marriage in Missouri may be had by the mutual present consent of two competent persons, made in good faith and followed by cohabitation, without the addi-

tion of any prescribed formalities, and may be shown by such evidence as proves that such a marriage actually exists. And such is substantially the law in Tennessee and Illinois, so far as the same affects this case. Therefore, should the jury believe, from the evidence, that at the date of the marriage ceremony with the plaintiff, in May, 1861, Mr. Holabird had another wife living; yet should they further believe, from the evidence, that such former wife died in 1863, and if they further believe, from the evidence, that afterwards, in the state of Missouri, Tennessee, or Illinois, the plaintiff and Mr. Holabird agreed by mutual consent, given in good faith, to become husband and wife, and cohabited as such thereafter, then, from the date of said mutual consent, she was his wife.

The attention of the jury is directed to the difference between the mere attempted recognition of a past void marriage and a subsequent expression of mutual and then present consent to be husband and wife. The subsequent marriage may be proved by habit and repute, if the evidence thereof satisfies the jury that the parties had mutually agreed to become husband and wife, in good faith, and had cohabited thereafter as such. If at the date of the marriage ceremony between O. F. Holabird and the plaintiff in May, 1861, said O. F. Holabird did not have another wife living, then the plaintiff became his lawful wife at that time.

§ 1545. *Declarations "in any respect untrue" must be strictly fulfilled.*

The defendant seeks to avoid the policy by showing that those declarations contained in the application which are specified in the answer filed in this case, were, or some one of them was, in some respects untrue, at the time when made. By the terms of the contract, if any one of the said declarations is found to have been in any respect untrue at the time when made, then the plaintiff cannot recover. It is immaterial whether, if untrue, those declarations were not intentionally untrue, or whether the matter inquired into, had it been otherwise answered, would have caused the risk to be considered more hazardous, or whether the disease denied contributed to the death. Contracts like that sued on are based for their validity upon the truthfulness of the declarations made by the applicant in the written application to the company. As the declarations are presumed to be true, the burden of proving them untrue is upon the defendant, who controverts them. Whether the representations were material to the risk or not is not open for inquiry in this case; for the defendant and plaintiff agreed, as it was competent for them to do, that if any of the declarations were in any respect untrue, the policy should be void.

Hence it is for the jury to determine from the evidence whether the defendant has shown any one of the declarations to have been untrue in any respect, when made, and also whether the plaintiff has shown that at the date of the policy she was the lawful wife of said O. F. Holabird. The jury should pass upon this case with impartiality, and free from all prejudice for or against either of the parties to the suit. The rights of corporations and of natural persons are to be decided by the same rules of justice, and should be affected by no considerations except such as the law and evidence require when controversies arise between them for judicial investigation.

If the jury find for the plaintiff they will assess her damages at \$10,000, deducting therefrom the amount of notes for premiums on the policy unpaid at the time of Mr. Holabird's death, together with any balance of the year's premium remaining unpaid, and will add interest on said sum at the rate of

six per cent. per year from the time proof of death was submitted to the defendant to the present time.

If the jury find for the plaintiff, and are further satisfied from the evidence that the defendant has vexatiously refused to pay the loss in this case, they may in their discretion, under the statute, add to the foregoing sum an amount not exceeding ten per centum of the amount of the loss. The law commits the question of vexatious refusal to the calm and deliberate consideration of the jury, to be determined in the light of all the facts and circumstances of the case. Stats. 1865, 402, sec. 1. (Verdict and judgment for the plaintiff.)

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY v. SCHAEFER.

(4 Otto, 457-463. 1876.)

ERROR to U. S. Circuit Court, Southern District of Ohio.

Opinion by MR. JUSTICE BRADLEY.

STATEMENT OF FACTS.—This was an action on a policy of life assurance issued July 25, 1868, on the joint lives of George F. and Franzisca Schaefer, then husband and wife, payable to the survivor on the death of either. In January, 1870, they were divorced, and alimony was decreed and paid to the wife. There was never any issue of the marriage. They both subsequently married again, after which, in February, 1871, George F. Schaefer died. This action was brought by Franzisca, the survivor. On the trial of the cause, several exceptions were taken by the defendant to the rulings and charge of the court, and this writ of error is brought to reverse the judgment for alleged error in said rulings and charge.

The first exception was for overruling certain testimony offered by the defendant. The plaintiff, having offered herself as a witness, on her cross-examination admitted that she had employed one Harris as her attorney to file her petition for divorce; and being questioned whether she had not stated to him, to be embodied in the petition, that Schaefer had been an habitual drunkard for a period of more than three years prior to the date of filing the petition, denied that she had so stated to him. (Had such been the fact, it would have falsified the statement made in the application for insurance.) The defendant called Harris, and asked him whether the plaintiff had not so stated to him on that occasion.

§ 1546. *Confidential communications.*

The question was objected to and overruled, as calling for confidential communications between attorney and client. The defendant alleges that herein the court erred, because, by the law of Ohio, such communications are not privileged. An examination of the Ohio statutes renders it doubtful whether the law is as the defendant contends. But if it were, the court did right to exclude the testimony. The laws of the state are only to be regarded as rules of decision in the courts of the United States where the constitution, treaties or statutes of the United States have not otherwise provided. When the latter speak, they are controlling; that is to say, on all subjects on which it is competent for them to speak. There can be no doubt that it is competent for congress to declare the rules of evidence which shall prevail in the courts of the United States, not affecting rights of property; and where congress has declared the rule, the state law is silent. Now, the competency of parties as witnesses in the federal courts depends on the act of congress in that behalf,

passed in 1864, amended in 1865, and codified in the Revised Statutes, section 858. It is not derived from the statute of Ohio, and is not subject to the conditions and qualifications imposed thereby. The only conditions and qualifications which congress deemed necessary are expressed in the act of congress; and the admission in evidence of previous communications to counsel is not one of them. And it is to be hoped that it will not soon be made such. The protection of confidential communications made to professional advisers is dictated by a wise and liberal policy. If a person cannot consult his legal adviser without being liable to have the interview made public the next day by an examination enforced by the courts, the law would be little short of despotic. It would be a prohibition upon professional advice and assistance.

The other exceptions were to the charge of the court, and relate to two points: First, to the forbearance note given for a portion of the last renewal premium; and, secondly, to the alleged failure of interest of the plaintiff in the policy, caused by the divorce of the insured parties.

§ 1547. *Acceptance of note signed "A. & B." by A. precludes payee from denying sufficiency of signature.*

First, as to the forbearance note. Only one-half of the annual premium was required to be paid in cash; the insured, if they chose, could have a credit for the other half. This credit was given upon the assured's signing an acknowledgment in the following form: "I hereby acknowledge a credit or forbearance of — dollars of the premium on my policy No. —, which amount shall be a lien on said policy at six per cent. per annum until paid or adjusted by return of surplus premium." It was not a note promising to pay money, but a form of acknowledgment by which the assured consented to a deduction from the policy for non-payment of a portion of the premium. As long as George F. Schaefer took any interest in the policy, he signed this acknowledgment for himself and wife, "George F. and Franz. Schaefer;" or for himself alone. One premium became due after the divorce, and Franzisca Schaefer herself attended to the payment of it,—paying the cash portion, and authorizing her son by a former marriage to sign the forbearance note, as it is called. He did so in the name of both parties insured, thus: "Geo. F. & F. Schaefer." The company accepted it. On what valid ground they can now object to the transaction, it is difficult to see. A joint act was to be done. Only one of the parties could physically do it. Either had a right to do it. This act was, to pay or settle the annual premium. The plaintiff, as one of the joint parties, performed what was necessary to be done. George F. Schaefer could not complain; for it was done in his interest, keeping the policy alive for his benefit as well as Franzisca's. The company could not complain; for they accepted both the money and the acknowledgment in the form in which they were given. There is no pretense that any deception was practiced upon them. This point is really frivolous.

The other point, relating to the alleged cessation of insurable interest by reason of the divorce of the parties, is entitled to more serious consideration, although we have very little difficulty in disposing of it.

§ 1548. *Reasonable expectation of pecuniary benefit or advantage from continued life of another, an insurable interest in such life.*

It will be proper, in the first place, to ascertain what is an insurable interest. It is generally agreed that mere wager policies—that is, policies in which the insured party has no interest whatever in the matter insured, but only an interest in its loss or destruction—are void, as against public policy. This

was the law of England prior to the Revolution of 1688. But after that period a course of decisions grew up sustaining wager policies. The legislature finally interposed, and prohibited such insurance: First, with regard to marine risks, by statute of 19 Geo. II., ch. 37; and next, with regard to lives, by the statute of 14 Geo. III., ch. 48. In this country, statutes to the same effect have been passed in some of the states; but where they have not been, in most cases either the English statutes have been considered as operative or the older common law has been followed. But precisely what interest is necessary, in order to take a policy out of the category of mere wager, has been the subject of much discussion. In marine and fire insurance the difficulty is not so great, because there insurance is considered as strictly an indemnity. But in life insurance the loss can seldom be measured by pecuniary values. Still, an interest of some sort in the insured life must exist. A man cannot take out insurance on the life of a total stranger, nor on that of one who is not so connected with him as to make the continuance of the life a matter of some real interest to him.

It is well settled that a man has an insurable interest in his own life, and in that of his wife and children; a woman in the life of her husband; and the creditor in the life of his debtor. Indeed, it may be said generally that any reasonable expectation of pecuniary benefit or advantage from the continued life of another creates an insurable interest in such life. And there is no doubt that a man may effect an insurance on his own life for the benefit of a relative or friend; or two or more persons, on their joint lives, for the benefit of the survivor or survivors. The old tontines were based substantially on this principle, and their validity has never been called in question.

The essential thing is, that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the insured has no interest. On this point, the remarks of Chief Justice Shaw, in a case which arose in Connecticut (in which state the present policy originated), seem to us characterized by great good sense. He says:

"In discussing the question in this commonwealth (Massachusetts), we are to consider it solely as a question of common law, unaffected by the statute of 14 Geo. III., passed about the time of the commencement of the Revolution, and never adopted in this state. All, therefore, which it seems necessary to show, in order to take the case out of the objection of being a wager policy, is, that the insured has some interest in the *cestui que vie*; that his temporal affairs, his just hopes and well-grounded expectations of support, of patronage, and advantage in life, will be impaired; so that the real purpose is not a wager, but to secure such advantages, supposed to depend upon the life of another; such, we suppose, would be sufficient to prevent it from being regarded as a mere wager. Whatever may be the nature of such interest, and whatever the amount insured, it can work no injury to the insurers, because the premium is proportioned to the amount; and whether the insurance be a large or small amount, the premium is computed to be a precise equivalent for the risk taken. We cannot doubt," he continues, "that a parent has an interest in the life of a child, and, *vice versa*, a child in the life of a parent; not merely on the ground of a provision of law that parents and grandparents are bound to support their lineal kindred when they may stand in need of relief, but upon considerations of strong morals, and the force of natural affection between near kindred, operating often more efficaciously than those of positive law." *Loomis v. Eagle Life Ins. Co.*, 6 Gray, 399.

We concur in these views, and deem it unnecessary to cite further authorities, all those of importance being collected and arranged in the recent treatises on the subject. See May on Insurance, secs. 102-111; Bliss on Life Insurance, secs. 20-31.

§ 1549. *Cessation of an insurable interest will not per se terminate a life policy.*

The policy in question might, in our opinion, be sustained as a joint insurance, without reference to any other interest, or to the question whether the cessation of interest avoids a policy good at its inception. We do not hesitate to say, however, that a policy taken out in good faith, and valid at its inception, is not avoided by the cessation of the insurable interest, unless such be the necessary effect of the provisions of the policy itself. Of course, a colorable or merely temporary interest would present circumstances from which want of good faith and an intent to evade the rule might be inferred. And in cases where the insurance is effected merely by way of indemnity, as where a creditor insures the life of his debtor, for the purpose of securing his debt, the amount of insurable interest is the amount of the debt.

But supposing a fair and proper insurable interest, of whatever kind, to exist at the time of taking out the policy, and that it be taken out in good faith, the object and purpose of the rule which condemns wager policies is sufficiently attained; and there is then no good reason why the contract should not be carried out according to its terms. This is more manifest where the consideration is liquidated by a single premium paid in advance, than where it is distributed in annual payments during the insured life. But, in any case, it would be very difficult, after the policy had continued for any considerable time, for the courts, without the aid of legislation, to attempt an adjustment of equities arising from a cessation of interest in the insured life. A right to receive the equitable value of the policy would probably come as near to a proper adjustment as any that could be devised. But if the parties themselves do not provide for the contingency, the courts cannot do it for them.

In England, by the operation of the statute of 14 Geo. III., as construed by the courts, the law has assumed a very definite form. In a lucid judgment delivered by Baron Parke in the exchequer chamber, in the case of *Dalby v. Life Ins. Co.*, decided in 1854 (15 C. B., 365), it was held that the true meaning of the statute is, that there must be an interest at the time the insurance is effected, but that it need not continue until death; the words of the statute being, "that no insurance shall be made on a life or lives wherein the assured shall have no interest, or by way of gaming or wagering," and "that in all cases where the insured hath interest in such life, etc., no greater sum shall be recovered than the amount or value of the interest." The word "hath" was construed as necessarily referring to the time of effecting the insurance, and not to the time of the death; that being the only construction which would subserve the object of the statute to discourage wagering, render the contract uniform and certain, and preserve a fixed relation between the premiums and the amount insured, as required by the principles of life assurance. This case overruled the previous case of *Goodsall v. Boldero*, 9 East, 72, decided by Lord Ellenborough, in which, proceeding upon the idea that life insurance is a mere contract of indemnity, it was held that the interest must continue until death, and even until the bringing of the action. Baron Parke, in commenting upon this case, very justly says:

"Upon considering this case, it is certain that Lord Ellenborough decided it

upon the assumption that a life policy was in its nature a mere contract of indemnity, as policies on marine risks, and against fire, undoubtedly are; and that the action was, in point of law, founded on the supposed damnification occasioned by the death of the debtor, existing at the time of the action brought; and his lordship relied upon the decision of Lord Mansfield in *Hamilton v. Mendes*, 2 Burr., 1270, that the plaintiff's demand was for an indemnity only. Lord Mansfield was speaking of a policy against marine risks, which is, in its terms, a contract for indemnity only. But that is not the nature of what is termed an assurance for life; it really is what it is on the face of it,—a contract to pay a certain sum in the event of death. It is valid at common law; and, if it is made by a person having an interest in the duration of the life, it is not prohibited by the statute."

As thus interpreted, we might almost regard the English statute as declaratory of the original common law, and as indicating the proper rule to be observed in this country where that law furnishes the only rule of decision. Be this however as it may, in our judgment a life policy, originally valid, does not cease to be so by the cessation of the assured party's interest in the life insured.

Judgment affirmed.

ÆTNA LIFE INSURANCE COMPANY v. FRANCE.

(4 Otto, 561-567. 1876.)

ERROR to U. S. Circuit Court, Eastern District of Pennsylvania.

Opinion by MR. JUSTICE BRADLEY.

STATEMENT OF FACTS.—This action was brought by David France and Lucetta P., his wife, to recover the amount of a policy of insurance for \$10,000, issued by the Ætna Life Insurance Company on the life of Andrew J. Chew, of Philadelphia, dated September 13, 1865, and payable to the said Lucetta, who was Chew's sister.

The proposals for the insurance, made out upon one of the printed blanks of the company, were signed by both Chew and Mrs. France. The following is a copy of the introductory part of the policy: "This policy of insurance witnesseth, that the Ætna Life Insurance Company, in consideration of the sum of \$243.50, to them in hand paid by Andrew J. Chew, for the benefit of Lucetta P. France, his sister, and of the annual premium of \$243.50, to be paid to said company on or before the 13th day of September in every year during the continuance of this policy, do assure the life of Andrew J. Chew, of Philadelphia, in the county of Philadelphia, state of Pennsylvania, in the amount of \$10,000 for the term of his life.

"And the said company do hereby promise and agree to and with the said assured, her executors, administrators and assigns, well and truly to pay, or cause to be paid, the said sum insured to the said assured, her executors, administrators or assigns, within ninety days after due notice and proof of the death of the said Andrew J. Chew, and in either case all indebtedness of the party to the company shall be deducted from the sum insured. If any notes given by the said Andrew J. Chew for any portion of the cash part of premium on the within policy for any current year shall mature and not be paid, the policy shall become void from that date, and all payments of premium thereon forfeited to said company."

The policy, amongst other things, contained the following stipulation: "And it is also understood and agreed to be the true intent and meaning

hereof, that if the proposal, answers and declaration made by the said Andrew J. Chew, and bearing date the 13th day of September, 1865, and which are hereby made part and parcel of this policy as fully as if herein recited, and upon the faith of which this agreement is made, shall be found in any respect false or fraudulent, then and in such case this policy shall be null and void."

The trial resulted in a verdict and judgment for the plaintiffs. The defendant sued out this writ of error. Numerous exceptions were taken, on which errors are assigned here, but they are all reducible to two heads or grounds of defense, viz: 1. Want of insurable interest in Lucetta P. France. 2. Misrepresentation and breach of warranty as to the age and health of said Chew. It is insisted that the rulings and charge of the court below on these points were erroneous.

First, on the question whether Lucetta P. France had an insurable interest in the life of Chew, the conceded facts are that she was his sister, as stated in the policy; that, at the time the policy was issued, she was married to the other plaintiff, David France, and in no way dependent on her brother for her support; that the latter was earning his living as a ladies' shoemaker, and was of small means. Evidence was given tending to show that Mrs. France had, at different times, loaned money to her brother to an amount of some \$2,000, and lent him \$400 more in September, 1865; that a previous policy of like amount with the present had been obtained of the defendant company on Chew's life for his sister's benefit in June of the same year, and that at the time of issuing the policy now in suit he was unmarried, but was engaged to be married, and was in fact married the next day. The policy, as well as the several receipts for the annual premiums, signed by the secretary of the company, and countersigned by its agent in Philadelphia, all acknowledge that said premiums were received from Chew.

§ 1550. *Policy on one's life, payable to sister, valid.*

The construction given to the policy by the court below was, that it was a contract between the company and Chew for an assurance of his life, with a stipulation and agreement that the money should be paid to his sister, and the court held that such a policy is sustainable at law on account of the nearness of the relationship between the parties, and especially as Mrs. France, at the time the insurance was effected, was one of Chew's next of kin, prospectively interested in his estate as a distributee. We concur in the construction of the policy made by the court, and in the validity of the transaction. As held by us in the case of *The Connecticut Mutual Life Ins. Co. v. Schaefer*, 4 Otto, 457 (§§ 1546-49, *supra*), any person has a right to procure an insurance on his own life and to assign it to another, provided it be not done by way of cover for a wager policy; and where the relationship between the parties, as in this case, is such as to constitute a good and valid consideration in law for any gift or grant, the transaction is entirely free from such imputation. The direction of payment in the policy itself is equivalent to such an assignment.

§ 1551. *Acknowledgment of payment of premium by C. conclusive under the circumstances.*

The insurance company gave in evidence three promissory notes given by Lucetta P. France herself for part of the last three premiums paid on the policy, and requested the court to charge that if the jury believed that the premiums on the policy were paid by Lucetta P. France, whether in cash or by her notes, there was evidence from which they could find that the application for insurance was made and the policy in question taken out by her for

her own benefit; and, if such was the case, she must show an insurable interest in the life of her brother beyond that of mere relationship before she could recover. The court refused so to charge, and, we think, rightly. Waiving the question whether, merely as sister of Chew, Mrs. France could have effected in her own name an insurance on his life without its being obnoxious to the charge of a wager policy, the evidence was incompetent to prove the fact sought to be proved by it. The company, when taking the notes in question, acknowledged the premiums to have been received from Chew, and was estopped from going behind its own admission under the circumstances of the case. The contract of insurance, as correctly construed by the court, was made with Chew, and the relationship was such as to divest the assignment of the policy or the direction of its payment to his sister of all semblance of a wagering transaction. Under the circumstances, it matters not if the money or notes required for paying the premium did come from Mrs. France; at most, it was by way of advance on her brother's account and on his contract. He had a right to take out a policy on his own life for his sister's benefit, and she had a right to advance him the necessary means to do so. As between strangers, or persons not thus nearly connected, such a transaction would be evidence to go to the jury, from which, according to the circumstances of the case, they might or might not infer that it was mere gambling. But as between brother and sister, or other near relations, desirous of thus providing for each other, and, as said by Chief Justice Shaw, presumed to be actuated by "considerations of strong morals, and the force of natural affection between near kindred operating often more efficaciously than those of positive law" (*Loomis v. Eagle Life Ins. Co.*, 6 Gray, 399), the case is divested of that gambling aspect which is presented where there is nothing but a speculative interest in the death of another, without any interest in his life to counterbalance it. On this ground we hold that where, as in this case, a brother takes out a policy on his own life for the benefit of his sister, it is totally immaterial what arrangement they choose to make between them about the payment of the premiums. The policy is not a wager policy. It is divested of those dangerous tendencies which render such policies contrary to good morals. And as the company gets a perfect *quid pro quo* in the stipulated premiums, it cannot justly refuse to pay the insurance when incurred by the terms of the contract.

§ 1552. *Answers stated to be as nearly correct as party can remember. Falsity must be with knowledge.*

Second. The other exceptions relate to alleged misrepresentations by Chew in the proposal for insurance. The policy makes the proposal and the answers to the questions therein a part of the contract, and declares that if they shall be found in any respect false or fraudulent, the policy itself shall be void. Among the questions are the following, with the answers given to each respectively:

"4. Place and date of birth of the party whose life is to be insured?' *Ans.* 'Born in New Jersey, in 1835.'

"5. Age and next birthday?' *Ans.* 'Thirty years, October 28, as near as I can recollect.'

"11. Has the party ever had any of the following diseases; if so, how long, and to what extent: palsy, spitting of blood, consumption, asthma, bronchitis, diseases of the lungs, . . . rupture, convulsions, etc.?' *Ans.* 'None.'

"12. Is the party subject to habitual cough, dyspepsia, etc.?' *Ans.* 'No.'

"13. Has the party had, during the last seven years, any severe disease?

If so, state the particulars, and the name of the attending physician.' *Ans.* 'No.'"

The answers were followed by this qualification: "The above is as near correct as I remember."

The defendant offered evidence tending to show that Chew, at the time of the application, would have been thirty-five or thirty-seven years old at his next birthday, instead of thirty, and that he was born October 28, 1828; and that he had been ruptured from infancy, and so continued up to the date of the application, and wore a truss; and that he had had consumption, or some disease of the lungs; and that he was subject to habitual cough and dyspepsia; and had been attended by physicians for severe disease within seven years; and that he knew all of these matters at the time of the application. Counter evidence was given on the part of the plaintiffs. Among the proofs of death was an affidavit of the widow of Chew, stating that he was born October 28, 1828, which defendant relied on as to the point of age. Mrs. France denied all knowledge of the papers received by defendant as proof of loss, except her own affidavit; and as to the alleged rupture, called, amongst others, Dr. Lewis, as an expert, and proposed to him the question, whether the existence of a reducible rupture in a subject of life assurance in his opinion appreciably increased the risk of the underwriters? The question was objected to, but allowed.

The defendant asked the court to charge that if any of the answers were untrue, in whole or in part, the verdict must be for the defendant. The court charged that the truth or falsehood of the answers materially affected the risk, but added:

"But the answers here are qualified by the words appended at the foot of the application, 'the above is as near correct as I remember,' which are applicable to all the statements made by the assured. He must be understood, therefore, as stipulating only for the integrity and approximate accuracy of his answers, and not for their absolute verity. Without this qualification, substantial error in any of his answers would avoid the policy, irrespective of his motive, because he warranted their truth; with it, the plaintiffs' right to recover will not be defeated, unless it appears that some one of the answers was consciously incorrect.

"To avoid the policy, then, the jury must be satisfied that the answers, or some of them, were untrue in any respect materially affecting the risk, and that the assured knew of their incorrectness."

And, in particular, as to Chew's representation of his age, the court charged "that if he knew, or had reason to believe, that the year of his birth, as stated in the answer, did not correctly indicate his age, the policy is void and the plaintiffs are not entitled to recover." We think the qualification made by the court was entirely justified by the form in which the answers were given. If the company was not satisfied with the qualified answer of the applicant, they should have rejected his application. Having accepted it, they were bound by it.

As to the diseases inquired about, the court charged substantially to the same effect, namely, that the answers called for were material, and if untrue, and Chew knew or had reason to believe them so, the policy was void. As to the alleged rupture, in particular, the court said: "If, however, it appears that the rupture had been completely reduced, so that its effects had entirely passed away and it had ceased to affect his health or impair his capacity to take

fatiguing and prolonged exercise, the jury will determine whether the answer is untrue as nearly as he could remember. On the other hand, if the rupture had not been cured, it is hardly presumable that he could have forgotten it at the time of the application; and if the jury so find, it was his duty to disclose the fact that he had been afflicted with this disease, and his negative answer will avoid the policy."

And so of the rest. We think the charge was a fair one, and gave the defendant the full benefit of any falsity contained in the answers given by the applicant. Under the charge as given, we do not see how the evidence of the physician, even if irrelevant, could injure the defendant. Other points were raised, but it is unnecessary to discuss them. From a careful examination of the whole case, as presented, we are satisfied that there is no error in the record.

Judgment affirmed.

HOFFMAN v. JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY.

(2 Otto, 161-165. 1875.)

APPEAL from U. S. Circuit Court, Northern District of Ohio.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—There is a direct conflict in the testimony of the two principal witnesses in this case, and the discrepancies are irreconcilable. According to our view, the case must turn upon the application of legal principles to facts about which there is no controversy. An elaborate examination of the testimony is, therefore, unnecessary. A brief statement will be sufficient for the purposes of this opinion.

Justin E. Thayer was the general agent of the appellee at Cleveland, Ohio. He was authorized to appoint sub-agents; and on the 7th of April, 1869, appointed A. C. Goodwin such agent. This arrangement continued until the 7th of June, 1869. It was then put an end to by the parties; and they agreed that thereafter Goodwin should act as an insurance broker, and that he should receive for such applications as he might bring to Thayer thirty per cent. of the first premium paid for the insurance.

On the 7th of August, 1869, Goodwin gave to Frederick Hoffman a receipt, signed by Goodwin as agent, setting forth that he had received from Hoffman \$922.57, "being the first annual premium on an insurance of \$8,000 on the life of Frederick Hoffman, for which an application is this day made to the John Hancock Mutual Life Insurance Company of Boston. The said insurance to date from August 7, 1869, subject to the conditions and agreements of the policies of said company, provided that the said application shall be accepted by the said company, and a policy be by them granted thereon. The said policy, if issued, to be delivered by me, when received, to the holder of this receipt, which shall then be given up. It is expressly agreed and understood that, if the above-mentioned application shall be declined by the said company it shall be deemed that no insurance has been created by this receipt; but the amount above receipted shall be returned to the holder of this receipt, which shall then be given up."

The amount of the premium specified was paid by Hoffman to Goodwin as follows:

A horse valued at.....	\$400 00
A sixty-day note to Goodwin.....	100 00
A canceled debt owing by Goodwin to Hoffman.....	53 57
A premium note of.....	369 00
	<hr/> \$922 57

Goodwin reported the application to Thayer, but said nothing of the receipt. Thayer forwarded the application, and in due time received the policy. Some time afterwards, Hoffman called for the policy. Thayer demanded the premium. Hoffman refused to pay it, and produced Goodwin's receipt. Thayer then for the first time learned the existence of the receipt and the particulars of the alleged payment of the premium. He refused to ratify the transaction.

Ineffectual attempts were made to sell the horse. Finally Thayer, to save trouble to his company, agreed that if Hoffman would take back the horse, and pay in his stead \$250 to the company, the transaction should be closed, and the policy be delivered. This Hoffman refused to do, and sued the company in the court of common pleas of Cuyahoga county for what he had delivered to Goodwin. A verdict was found for the defendant. He took a new trial under the statute of Ohio. Upon the retrial, a verdict was rendered in his favor. The defendant moved for a new trial, which was granted. In this condition of things Hoffman died. The suit abated by his death, and was not revived. Thereupon his widow, Henrietta Hoffman, filed this bill. It prayed that the company should be compelled to deliver the policy to her, and to pay the amount of the insurance money specified. The policy was upon what is known as the "endowment plan." It provided that the amount insured should be paid to Hoffman at the end of ten years, or to his wife in the event of his death in the meantime. No part of what was paid by Hoffman to Goodwin ever came into the hands of Thayer or the company, or inured in anywise to the benefit of either.

Goodwin testified that his share of the premium was "two hundred and seventy-six dollars and some cents;" and, further, that Thayer assented to the transaction in advance, and with full knowledge of the facts ratified it subsequently. If it be admitted that the facts as to assent and ratification by Thayer are as stated by Goodwin,—a concession by no means warranted, in our judgment, by the state of the evidence,—the question arises, What is the legal result?

§ 1553. *General doctrine of agency stated.*

Agencies are special, general and universal. Story's Agency, sec. 21. Within the sphere of the authority conferred, the act of the agent is as binding upon the principal as if it were done by the principal himself. But it is an elementary principle, applicable alike to all kinds of agency, that whatever an agent does can be done only in the way usual in the line of business in which he is acting. There is an implication to this effect arising from the nature of his employment, and it is as effectual as if it had been expressed in the most formal terms. It is present whenever his authority is called into activity, and prescribes the manner as well as the limit of its exercise. *Upton v. Suffolk Co. Mills*, 11 Cush., 586; *Jones v. Warner*, 11 Conn., 48; Story's Agency, sec. 60 and note; 3 Chitt. Law of Com. & Manuf., 199; *United States v. Babbit*, 1 Bl., 61; 1 Pars. on Con., 4th ed., pp. 41, 42.

§ 1554. *Acceptance of chattels by agent in payment of premium not binding on underwriter.*

Life insurance is a cash business. Its disbursements are all in money, and its receipts must necessarily be in the same medium. This is the universal usage and rule of all such companies. Goodwin had settled his own debt to Hoffman of \$53.67, and had appropriated to himself Hoffman's note of \$100.

If he had the right to take his percentage in such way as he might think proper, this did not justify his taking the horse at \$400. Nor if Thayer had

expressly agreed to take the horse in payment of the premium *pro tanto*, could that have given validity to the transaction. If the agent had authority to take the horse in question, he could have taken other horses from Hoffman, and have taken them in all cases. This would have carried with it the right to establish a stable, employ hands, and do everything else necessary to take care of the horses until they could be sold. The company might thus have found itself carrying on a business alien to its charter, and in which it had never thought of embarking.

The exercise of such a power by the agent was liable to two objections: it was *ultra vires*, and it was a fraud as respects the company. Hoffman must have known that neither Goodwin nor Thayer had any authority to enter into such an arrangement, and he was a party to the fraud. No valid contract as to the company could arise from such a transaction. This objection is fatal to the appellant's case.

It is insisted by the counsel for the appellee, that Hoffman, by bringing his action at law, repudiated and rescinded the contract if there was one; and that the appellant is thereby estopped from maintaining this bill. Authorities are cited in support of this proposition. *Herrington v. Hubbard*, 2 Ill., 569; *Dalton v. Bentley*, 15 id., 420; *Smith v. Smith*, 19 id., 349; *Cooper v. Brown*, 2 McLean, 495; *Williams v. Washington Life Ins. Co.*, 4 Big. Life & Acc. Ins. Rep., 56. As the point already determined is conclusive of the case, it is unnecessary to consider this subject.

Decree affirmed.

INSURANCE COMPANY v. MCCAIN.

(6 Otto, 81-86. 1877.)

ERROR to U. S. Circuit Court, Southern District of Alabama.

STATEMENT OF FACTS.—This was an action on a policy of insurance on the life of McCain for the benefit of his wife and children. The company's agent, Smith, issued the policy and received the first payment of premium. The second premium was paid in time to Smith, who, however, before that time had resigned his agency for the company. Of this fact no notice was given to the assured either by Smith or the company. Before the third payment became due McCain died. Judgment for plaintiff.

§ 1555. *Notice of discontinuance of an agency necessary.*

Opinion by MR. JUSTICE FIELD.

The law embraced by the instructions to the jury is clearly and correctly stated. No company can be allowed to hold out another as its agent, and then disavow responsibility for his acts. After it has appointed an agent in a particular business, parties dealing with him in that business have a right to rely upon the continuance of his authority, until in some way informed of its revocation. The authorities to this effect are numerous, and will be found cited in the treatises of Paley and Story on Agency.

§ 1556. *Instructions to agent do not affect third persons unless notice brought home to them.*

The law is equally plain, that special instructions limiting the authority of a general agent, whose powers would otherwise be co-extensive with the business intrusted to him, must be communicated to the party with whom he deals, or the principal will be bound to the same extent as though such special instructions were not given. Were the law otherwise, the door would be open

to the commission of gross frauds. Good faith requires that the principal should be held by the acts of one whom he has publicly clothed with apparent authority to bind him. Story, Agency, secs. 126, 127, and cases there cited.

The law on the silence of the company, after receiving the statement of the agent that the premium had been paid, is also free from doubt. Silence then was equivalent to an adoption of the act of the agent, and closed the mouth of the company ever afterwards. It does not appear that the company ever objected to the payment of the premium to him until after the death of the insured. It was then too late. As pertinently said by counsel, the company cannot be permitted to occupy the vantage ground of retaining the premium if the party continued in life, and repudiating it if he died.

Judgment affirmed.

KLEIN v. INSURANCE COMPANY.

(14 Otto, 88-92. 1881.)

APPEAL from U. S. Circuit Court, Northern District of Illinois.

Opinion by MR. JUSTICE WOODS.

STATEMENT OF FACTS.—On September 1, 1866, a policy of insurance was issued by the New York Life Insurance Company upon the life of Frederick W. Klein, in the sum of \$5,000, payable to his wife, Caroline Klein, within sixty days after his death and due notice and proof thereof.

The policy is in the usual form. The consideration for its issue was the payment to the company by Caroline Klein of an annual premium of \$173, in semi-annual instalments of \$86.50 each, on the first day of September and the first day of March of every year during the life of Frederick W. Klein. The policy contains the following provision: "And it is also understood and agreed by the within assured to be the true intent and meaning hereof, that . . . in case the said Caroline Klein shall not pay the said premiums on or before the several days herein mentioned for the payment thereof, with any interest that may be due thereon, then and in every such case the said company shall not be liable for the payment of the sum assured or any part thereof, and this policy shall cease and determine."

The premiums were punctually paid until March, 1871, when default was made in the payment of the semi-annual instalment which matured on the first day of that month, and it remained unpaid until the death of Frederick W. Klein, which occurred March 18, 1871.

The agent of the company, after proof of the death of Klein, offered to pay Caroline Klein the surrender value of the policy. She declined to accept any sum less than the amount of the insurance, and on the company then insisting upon the absolute forfeiture of the policy, according to its terms, she filed this bill.

She therein alleges as the ground of relief that the policy was taken out by Frederick W. Klein without her knowledge; that she had received no information of its terms or conditions until after his death; that about February 1 he was taken down by the illness of which he died; that for about twenty days prior to March 1, and thence up to the time of his death, he was, in consequence of his sickness, deranged in mind and incapable of attending to any matter of business whatever, and for that reason, and that alone, failed to pay the premium when it was due, and that she failed to pay it because she was ignorant of the existence of the policy and of its terms.

The prayer of the bill is as follows: "That the said New York Life Insurance Company may be prevented from insisting upon and taking advantage of the alleged forfeiture of said policy of insurance, and that your oratrix may be relieved from said alleged default upon her part, and the accidental default of the said Frederick W. Klein in the non-payment of said semi-annual premium maturing March 1, 1871, and that the said New York Life Insurance Company may be decreed to pay to your oratrix the said sum of \$5,000," etc.

The answer of the company denies its liability upon the policy of insurance, and insists that the contract ceased and determined by reason of the non-payment of the premium due March 1, 1871, and denies the equity of the bill. The bill was dismissed upon final hearing. The cause was then brought to this court for review, by the appeal of the complainant.

Conceding, for the sake of argument, that the case made by the bill is sustained by the evidence, the question is presented whether, upon the facts, the appellant was entitled to the relief prayed for. In *New York Life Ins. Co. v. Statham*, 93 U. S., 24 (§§ 1577-81, *infra*), it was held by this court, Mr. Justice Bradley delivering its opinion, that a life insurance policy "is not a contract of insurance for a single year, with the privilege of renewal from year to year by paying the annual premium, but that it is an entire contract for assurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums." But, in the same case, the court further said: "In policies of life insurance time is material and of the essence of the contract, and non-payment at the day involves absolute forfeiture, if such be the terms of the contract."

While conceding this to be the rule which would apply if an action at law were brought upon the policy, the appellant insists that she is entitled to be relieved in equity against a forfeiture, by reason of the excuses for non-payment of the premium set out in the bill, and this contention raises the sole question in this case.

§ 1557. *Relief from forfeiture by non-payment at time on account of ignorance not to be granted.*

We cannot accede to the view of the appellant. Where a penalty or a forfeiture is inserted in a contract merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory. *Sloman v. Walter*, 1 Bro. Ch., 418; *Sanders v. Pope*, 12 Ves. Jr., 282; *Davis v. West*, id., 475; *Skinner v. Dayton*, 2 Johns. (N. Y.) Ch., 526. But in every such case the test by which to ascertain whether relief can or cannot be had in equity, is to consider whether compensation can or cannot be made.

In *Rose v. Rose*, Amb., 331, 332, Lord Hardwicke laid down the rule thus: "Equity will relieve against all penalties whatsoever; against non-payment of money at a day certain; against forfeitures of copyholds; but they are all cases where the court can do it with safety to the other party; for if the court cannot put him in as good condition as if the agreement had been performed, the court will not relieve."

A life insurance policy usually stipulates, first, for the payment of premiums; second, for the payment on a day certain; and third, for the forfeiture of the policy in default of punctual payment. Such are the provisions of the policy which is the basis of this suit. Each of these provisions stands on precisely the same footing. If the payment of the premiums, and their payment

on the day they fall due, are of the essence of the contract, so is the stipulation for the release of the company from liability in default of punctual payment. No compensation can be made a life insurance company for the general want of punctuality on the part of its patrons.

It was said in *New York Life Ins. Co. v. Statham* (*supra*), that "promptness of payment is essential in the business of life insurance. All the calculations of the insurance company are based on the hypothesis of prompt payments. They not only calculate on the receipt of premiums when due, but upon compounding interest upon them. It is on this basis that they are enabled to offer insurance at the favorable rates they do. Forfeiture for non-payment is a necessary means of protecting themselves from embarrassment. Delinquency cannot be tolerated or redeemed except at the option of the company."

If the assured can neglect payment at maturity and yet suffer no loss or forfeiture, premiums will not be punctually paid. The companies must have some efficient means of enforcing punctuality. Hence their contracts usually provide for the forfeiture of the policy upon default of prompt payment of the premiums. If they are not allowed to enforce this forfeiture they are deprived of the means which they have reserved by their contract of compelling the parties insured to meet their engagements. The provision, therefore, for the release of the company from liability on a failure of the insured to pay the premiums when due is of the very essence and substance of the contract of life insurance. To hold the company to its promise to pay the insurance, notwithstanding the default of the assured in making punctual payment of the premiums, is to destroy the very substance of the contract. This a court of equity cannot do. *Wheeler v. Connecticut Mutual Life Ins. Co.*, 82 N. Y., 543. See also the opinion of Judge Gholson in *Robert v. New England Life Ins. Co.*, 1 Disney (Ohio), 355.

It might as well undertake to release the assured from the payment of premiums altogether as to relieve him from forfeiture of his policy in default of punctual payment. The company is as much entitled to the benefit of one stipulation as the other, because both are necessary to enable it to keep its own obligations.

In a contract of life insurance the insurer and assured both take risks. The insurance company is bound to pay the entire insurance money, even though the party whose life is insured dies the day after the execution of the policy, and after the payment of but a single premium. The assured assumes the risk of paying premiums during the life on which the insurance is taken, even though their aggregate amount should exceed the insurance money. He also takes the risk of the forfeiture of his policy if the premiums are not paid on the day they fall due.

The insurance company has the same claim to be relieved in equity from loss resulting from risks assumed by it as the assured has from loss consequent on the risks assumed by him. Neither has any such right. The bill is, therefore, based on a misconception of the powers of a court of equity in such cases.

There is another answer to the case made by the bill. The engagement of the insurance company was with Caroline Klein, and not with Frederick W. Klein. It entered into no contract with the latter. It agreed to pay Caroline Klein the insurance, provided she paid with punctuality the premiums. She was never incapacitated from making payment. The alleged fact that she

had no knowledge of the existence and terms of the policy does not relieve her default. If the fact be true her ignorance resulted from the neglect of her husband, who, in respect to this contract of insurance, was her agent, in not informing her about the insurance upon his life and the terms of the policy. The bill is, therefore, an effort by her to obtain relief in equity against the appellee from the consequences of the carelessness or neglect of her own agent.

We are of opinion that the decree of the circuit court is right and should be affirmed.

THOMPSON v. INSURANCE COMPANY.

(14 Otto, 252-261. 1881.)

ERROR to U. S. Circuit Court, Southern District of Alabama.

STATEMENT OF FACTS.—This was an action on a policy of insurance on the life of Thompson, who died November 3, 1874. For one of the premiums, or a part of it, he had given his note, falling due October 24, 1874, in which was expressed the condition that if the note was not paid at maturity the policy should be void. The note was not so paid. The policy was in the usual terms, providing for the forfeiture of the insurance on non-payment of premium or interest on loan. There was a special plea setting up this line of defense, in addition to the general issue. Further facts appear in the opinion of the court.

Opinion by MR. JUSTICE BRADLEY.

The questions presented for review in this case arise on the rulings of the court below on the demurrers of the defendant. It appears from the special pleas that the policy contained the usual condition that it should become void if the annual premiums should not be paid on the day when they severally became due, or if any notes given in payment of premiums should not be paid at maturity. The replications do not pretend that the note given for premium, which became due on the 24th day of October, 1874, was ever paid, or that payment thereof was ever tendered, either during the life of Thompson or after his death; but it is contended that such payment was not necessary in order to avoid the forfeiture claimed by the defendant.

§ 1558. *Under what circumstances taking notes for premium is a waiver of the forfeiture stipulated.*

First, it is contended that the mere taking of notes in payment of the premium was in itself a waiver of the conditional forfeiture; and for this, reference is made to the case of *Insurance Co. v. French*, 30 Ohio St., 240. But in that case no provision was made in the policy for a forfeiture in case of the non-payment of a note given for the premium, and an unconditional receipt for the premium had been given when the note was taken; and this fact was specially adverted to by the court. We think that the decision in that case was entirely correct. But in this case the policy does contain an express condition to be void if any note given in payment of premium should not be paid at maturity. We are of opinion, therefore, that, whilst the primary condition of forfeiture for non-payment of the annual premium was waived by the acceptance of the notes, yet that the secondary condition thereupon came into operation, by which the policy was to be void if the notes were not paid at maturity. Beside this general answer, the plaintiff set up in her replications various excuses for not paying the note in question, which are relied on for avoiding the forfeiture of the policy.

§ 1559. *Ignorance of the maturity of a note no excuse for its non-payment.*

In the second replication, the excuse set up is that before the note fell due Thompson became sick, and mentally and physically incapable of attending to business until his death on the 3d day of November, 1874, and that the plaintiff was ignorant of the outstanding note. We have lately held, in the case of *Klein v. Insurance Co.*, 14 Otto, 88 (§ 1557, *supra*), that sickness or incapacity is no ground for avoiding the forfeiture of a life policy, or for granting relief in equity against forfeiture. The rule may, in many cases, be a hard one; but it strictly follows from the position that the time of payment of premium is material in this contract, as was decided in the case of *New York Life Insurance Co. v. Statham*, 93 U. S., 24. Prompt payment and regular interest constitute the life and soul of the life insurance business; and the sentiment long prevailed that it could not be carried on without the ability to impose stringent conditions for delinquency. More liberal views have obtained on this subject in recent years, and a wiser policy now often provides express modes of avoiding the odious result of forfeiture. The law, however, has not been changed; and if a forfeiture is provided for in case of non-payment at the day, the courts cannot grant relief against it. The insurer may waive it, or may by his conduct lose his right to enforce it; but that is all.

§ 1560. *Omission to give the customary notice of maturity of a note does not excuse non-payment of it.*

The third replication sets up a usage, on the part of the insurance company, of giving notice of the day of payment, and the reliance of the assured upon having such notice. This is no excuse for non-payment. The assured knew, or was bound to know, when his premiums became due. *Insurance Co. v. Eggleston*, 96 U. S., 572, is cited in support of this replication. But in that case the customary notice relied on was a notice designating the agent to whom payment was to be made, without which the assured could not make it, though he had the money ready. As soon as he ascertained the proper agent, he tendered payment in due form. It is obvious that the present case is very different from that. The reason why the insurance company gives notice to its members of the time of payment of premiums is to aid their memory, and to stimulate them to prompt payment. The company is under no obligation to give such notice, and assumes no responsibility by giving it. The duty of the assured to pay at the day is the same, whether notice be given or not. Banks often give notice to their customers of the approaching maturity of their promissory notes or bills of exchange; but they are not obliged to give such notice, and their neglect to do it would furnish no excuse for non-payment at the day.

§ 1561. *Parol agreement cannot be set up to contradict the terms of a note and policy.*

The fourth replication sets up a parol agreement of defendant, made on receiving the promissory note, that the policy should not become void on the non-payment of the note alone at maturity, but was to become void at the instance and election of the defendant, which election had never been made. As this supposed agreement is in direct contradiction to the express terms of the policy and the note itself, it cannot affect them, but is itself void. We did hold, in *Eggleston's case*, it is true, that any agreement, declaration or course of action on the part of an insurance company which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop the

company from insisting upon the forfeiture. An insurance company may waive a forfeiture or may agree not to enforce a forfeiture; but a parol agreement, made at the time of issuing a policy, contradicting the terms of the policy itself, like any other parol agreement inconsistent with a written instrument made contemporary therewith, is void and cannot be set up to contradict the writing. So, in this case, a parol agreement supposed to be made at the time of giving and accepting the premium note cannot be set up to contradict the express terms of the note itself and of the policy under which it was taken.

The last replication sets up and declares that it was the usage and custom of the defendants, practiced by them before and after the making of said note, not to demand punctual payment thereof at the day, but to give days of grace, to wit, for thirty days thereafter, and they had repeatedly so done with Thompson and others, which led Thompson to rely on such leniency in this case. This was a mere matter of voluntary indulgence on the part of the company, or, as the plaintiff herself calls it, an act of "leniency." It cannot be justly construed as a permanent waiver of the clause of forfeiture, or as implying any agreement to waive it or to continue the same indulgence for the time to come. As long as the assured continued in good health it is not surprising, and should not be drawn to the company's prejudice, that they were willing to accept the premium after maturity and waive the forfeiture which they might have insisted upon. This was for the mutual benefit of themselves and the assured, at the time, and in each instance in which it happened it had respect only to that particular instance, without involving any waiver of the terms of the contract in reference to their future conduct. The assured had no right, without some agreement to that effect, to rest on such voluntary indulgence shown on one occasion, or on a number of occasions, as a ground for claiming it on all occasions. If it were otherwise, an insurance company could never waive a forfeiture on occasion of a particular lapse without endangering its right to enforce it on occasion of a subsequent lapse. Such a consequence would be injurious to them and injurious to the public.

§ 1562. *Failure to pay or tender payment of premium, when fatal to the policy.*

But a fatal objection to the entire case set up by the plaintiff is that payment of the premium note in question has never been made or tendered at any time. There might possibly be more plausibility in the plea of former indulgence and days of grace allowed if payment had been tendered within the limited period of such indulgence. But this has never been done. The plaintiff has, therefore, failed to make a case for obviating and superseding the forfeiture of the policy, even if the circumstances relied on had been sufficiently favorable to lay the ground for it. A valid excuse for not paying promptly on the particular day is a different thing from an excuse for not paying at all.

Courts do not favor forfeitures, but they cannot avoid enforcing them when the party by whose default they are incurred cannot show some good and stable ground in the conduct of the other party on which to base a reasonable excuse for the default. We think that no such ground has been shown in the present case and that it does not come up to the line of any of the previous cases referred to in which the excuse has been allowed. We do not accept the position that the payment of the annual premium is a *condition precedent* to the continuance of the policy. That is untrue. It is a condition

subsequent only, the non-performance of which may incur a forfeiture of the policy or may not, according to the circumstances. It is always open for the insured to show a waiver of the condition, or a course of conduct on the part of the insurer which gave him just and reasonable ground to infer that a forfeiture would not be exacted. But it must be a just and reasonable ground, one on which the assured has a right to rely. Judgment affirmed. (a)

DAVIS v. MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY.

(Circuit Court for Vermont: 13 Blatchford, 462-469. 1876.)

Opinion by SHIPMAN, J.

STATEMENT OF FACTS.—This case was tried by the court upon the following agreed statement of facts, a jury having been waived by the written stipulation of the parties: "The plaintiff's intestate, Jerry B. Sweatland, resided in Richford, in this district, and was the keeper of a hotel. The defendants are a corporation created by the laws of the state of Massachusetts, with headquarters at Springfield, in that state. On the 1st of August, 1873, and for two years before, one M. V. B. Edgerly, of Manchester, N. H., was the general agent of defendants for a portion of New England, including the state of Vermont. For the same time, one Charles Parkhurst was special state agent for Vermont, for the purpose of soliciting applications for insurance in said company, delivering policies and collecting premiums thereon, appointed by said Edgerly, with headquarters at Burlington, Vermont. About April 1, 1872, Parkhurst employed one H. M. Buxton to solicit applications for insurance, and it was also Buxton's duty, under such employment, to collect premiums on policies that were placed in his hands, and thereupon to deliver premium receipts and such policies to the assured. Said Buxton made monthly remittances of all such premiums so collected to Parkhurst, keeping an account of all such applications, policies delivered and not delivered, payments, etc., in a book, which account was the only one kept by Buxton with the company, or in the insurance business. Parkhurst's compensation as agent was a certain commission reserved out of all said premiums. He employed Buxton as sub-agent, and paid him an annual salary for his services. The above comprised all the duty and authority of said Buxton under such employment. All his communications about the defendants' business were with Parkhurst. Parkhurst was under bond to the defendants. Buxton was not under bonds to Parkhurst or the defendants. Neither Edgerly nor Parkhurst had any authority to grant insurance, and all the authority Buxton had was derived from said employment by Parkhurst. Buxton's headquarters were at St. Albans, Vermont, and he was at the time subject to the orders of Parkhurst, but his work was done mainly in Franklin, Grand Isle and Lamoille counties. Richford is twenty-eight miles from St. Albans, and Buxton was in the habit of going there once each month, and while there, stopping sometimes at Sweatland's hotel, and sometimes at another hotel in the place. On June 4, 1873, Sweatland executed and delivered to Buxton an application for insurance, signed by him. Buxton sent the same to Parkhurst, the latter transmitted it to Edgerly, and the latter to the defendants, at Springfield. The same was accepted by the defendants, and on the 13th day of June, 1873, they made out and signed a premium receipt and policy. They sent the same to Edgerly, general agent,

at Manchester, who received and stamped the same June 16, 1873, and forwarded the said premium receipt and policy to Parkhurst, at Burlington. About the last of June, 1873, Parkhurst sent the same to Buxton, at St. Albans. On the 1st of July, 1873, Buxton wrote a letter to Sweatland, of which the following is a copy: 'St. Albans, Vt., July 1, 1873. Jerry B. Sweatland, Esq., Dear Sir: Inclosed find your policy. You can send the amount due by C. M. Searle, if you wish, and I will return you receipt for the same, or you can pay it to me when I am up next time, as you please; no hurry about it. Yours, very truly, H. M. Buxton,'—and sent the policy with the letter, by the hand of C. M. Searle, therein named, to Sweatland. Searle was a mail agent, running between Richford and St. Albans, daily. Said policy and letter were received by Sweatland on or about the 1st of July, and they were found among his papers after his decease, and after said letter no communication of any kind was had between Sweatland and Buxton, or Sweatland and the defendants, in respect to the policy or anything else. The premium provided for in the policy was never tendered or paid by Sweatland, or by any one on his behalf, to Buxton, or the defendants, or any one in their behalf, before Sweatland's decease. Said premium receipt was never delivered to Sweatland or asked for by him, but remained in Buxton's hands after his receipt of the same from Parkhurst, until one or two days after Sweatland's decease, when Buxton returned it to Parkhurst. Said Sweatland was, at the time he received said policy, in perfect health, and so continued until the 15th of July, 1873, when he died in an apoplectic fit. No question is made but that all the requirements of the policy as to notice of death, and all other matters, subsequent to the decease of said Sweatland, have been complied with.

"The plaintiff offers to show by E. H. Powell, his attorney, and if competent or admissible against defendants' objection, it may be taken as proved, that a few days after the decease of Sweatland, the said Buxton told him, said Powell, that he thought the company would make no question about the claim, and that it was not necessary to make any tender of the premium which the said Powell then had and proposed to pay, and otherwise would have tendered to said Buxton, as agent for defendants." The application of Sweatland, a copy of which was partly written and partly printed upon the back of the policy, contained the following agreement: "And it is hereby further agreed, that under no circumstances shall the policy be in force until the first premium, as stated in the policy, shall have been paid during the life-time of the said party whose life is hereby proposed for insurance, to the company, or to an agent duly authorized by the company to receive payments of premiums, and that no premium, or instalment of premium, shall be considered as paid, unless a receipt shall have been given therefor, at the time of payment, duly signed by the secretary or president of the said company." By the policy, the defendants, "in consideration of the declarations and statements made in the application for this policy, and of the annual premium of \$32.80, to be paid on or before the 13th day of June, at noon, in each and every year during the continuance of the policy, do insure the life of Jerry B. Sweatland, . . . in the amount of one thousand dollars, for the term of life;" and the company promised to pay the sum insured to the said Jerry B. Sweatland, his executors, administrators, or assigns, "said sum insured being for the express benefit of Mary B. Sweatland, wife of the said Jerry B. Sweatland." The policy was "issued and accepted upon the following express conditions: . . . *Second.* That this policy shall not take effect until the advance premium hereon shall

have been paid during the life-time of the person whose life is hereby insured. . . . *Third.* That no premium or instalment of premium hereon shall be considered as paid, unless a receipt shall have been given therefor at the time of payment, duly signed by the president or secretary of said company. . . . *Eleventh.* That no agent of the company shall make any contract binding the company, nor alter or change any condition of this policy, nor waive forfeiture of this policy." The book of Buxton contained a list of the policies which he had received, with the numbers, names of the insured, and other important memoranda in relation to each policy, arranged in tabular divisions or columns. Under the head of "premiums received," and "when received," opposite the name of Jerry B. Sweatland were blanks, and the words "died July 15, 1873," were written against his name.

§ 1563. *Retention by insured of a policy implies acceptance of its terms.*

In order to determine the principles of law which are applicable to this case, it is necessary for this court to find the inferences of fact which are properly deducible from the agreed statement of facts.

(1) From the retention of the policy, without objection, by Sweatland, for fifteen days under the circumstances which have been detailed, the court is authorized to infer an acceptance of its terms and provisions.

§ 1564. *Agreement by agent to pay premium is payment by assured.*

(2) Was payment of the premium actually made, as between the insured and the company? If Buxton had undertaken, either expressly or impliedly, to pay the premium to the company, and to make Sweatland his own debtor therefor, the transaction would have been equivalent to payment. Cases of this kind are not infrequent. But there is an entire absence of evidence that there was any such express or implied agreement or understanding between them. On the other hand, the letter of Buxton furnishes evidence that the premium was not paid as between the insured and the company. The agent says, "you can send the amount due, and I will return you receipt for the same"—showing that no receipt was to be given, and indicating that no payment was to be considered as made, until the money was actually received. Buxton's book-keeping confirms this view. The question is answered in the negative.

§ 1565. *Policy delivered without requiring payment, a presumption that credit is intended.*

(3) Did Buxton attempt to alter the condition of the policy requiring a prepayment of the advance premium before the policy should take effect, and to give a credit to Sweatland for the amount? If the provisions of the policy are agreed to and accepted by the insured, "where the policy is delivered without requiring payment, the presumption is, especially if it is a stock company, that a credit was intended." *Miller v. Life Ins. Co.*, 12 Wall., 303. This is not a conclusive presumption, but the question whether credit was intended is one of fact, and there is not any unyielding rule of law implying such a result from the mere fact of the delivery of an executed contract. Waiver is the act of the company, acting through its duly authorized agents. The intention of the only person who acted in this matter is to be gathered solely from his letter, in which he says, "you can send me the amount due by C. M. Searle, if you wish, and I will return you receipt for the same, or you can pay it to me when I am up next time, as you please. No hurry about it." If he had not added the last clause, the letter might have been construed to mean—you can examine the policy and send me the money, and I will return you re-

ceipt, it being well understood that the policy does not take effect until the premium is paid; but, when the writer says, there is "no hurry about it," it indicates that he intended that the policy should be subsisting; otherwise, there was need of promptness, as the event proved. If it was desirable to the insured that the policy should take effect, it was also desirable that he should take the proper steps to make it effectual. Although Buxton knew of the express provisions of the policy, he probably relied upon the continuance of the life of a man who was apparently in good health, and, in the expectation that payment would be made in the future, he took the unauthorized liberty of disregarding the terms of the contract. I am, therefore, of opinion that the presumption which is to be inferred from delivery has not been overcome by the defendants.

§ 1566. *Authority of agent to waive terms.*

It having been thus found, as matter of fact, that there was an attempted waiver by Buxton, the question of law arises — was the attempted waiver effectual? It is not necessary, under the provisions of this application and policy, to consider any distinction between the powers of a general agent, by which term I mean an agent who is authorized to make contracts of life insurance, and the powers of a sub-agent, who is employed "to solicit applications for insurance, and, under such employment, to collect premiums on policies that are placed in his hands, and thereupon to deliver premium receipts and such policies to the assured," and whose powers are co-extensive with the business intrusted to his care, because, in my opinion, the powers of any person who was an agent, and not an officer of the company, to vary the terms of the contract which had been entered into between the company and Sweatland, had been taken away, and the prohibition of the exercise of such powers was known to Sweatland. The provisions alike of the application and of the policy declare that the policy will not take effect, unless prepayment has been made. This condition could have been waived by the company, or its duly authorized agent, unless the agent had been prohibited from varying the terms of the policy, and that restriction of his powers had been brought home to knowledge of the insured. In this case the contract, which the insured had in his possession, bore upon its face the restriction of the powers of any agent, as to the alteration of the provisions of the policy. Sweatland had expressly agreed, in his application, that under no circumstances should the policy be in force until the first premium had been paid during his lifetime. This agreement was embodied in the policy to which he had also assented, and which informed him that an agent could not vary or alter one of its conditions. In the absence of fraud or imposition, it is conclusively presumed that a party to a written contract which has been received and accepted by him knew of its terms. *Rice v. Dwight Mfg. Co.*, 2 Cush., 80; *Grace v. Adams*, 100 Mass., 505; *Hopkins v. Wescott*, 6 Blatch., 64. In this case, under the express provision of the contract, credit must be given, or be sanctioned by the company, acting through its board of directors, or those executive officers who represented the company in this policy. Unless so made or sanctioned, the attempted waiver is ineffectual. The company would have had the power, notwithstanding the terms of the policy, to invest its agent with authority to waive its provisions, but no attempt has been made to show that the company ever sanctioned the act of Buxton. *Union Mut. Life Ins. Co. v. McMillen*, Supreme Court of Ohio, 1873, 4 Bigelow's Life & Accident Insurance Reporter, 384. There being no evidence of such sanction,

Sweatland knew that he had not paid the premium, that Buxton had no authority to waive prepayment, and that the policy had not become effectual.

The decision of this point renders it unnecessary to determine whether the suit was properly brought in the name of the administrator. Let judgment be rendered for the defendants.

YOUNG v. MUTUAL LIFE INSURANCE COMPANY.

(Circuit Court for California: 2 Sawyer, 325-333. 1872.)

STATEMENT OF FACTS.— This was an action by the administrator of M. P. Young on a policy of life insurance. The application was made on the 5th of June, 1867, and an agreement was delivered by the agent of defendant to Young acknowledging the receipt of the first quarter's premium, and promising to return it if the application was rejected by the company, in New York. The application was not rejected, the policy was sent to Homans, the California agent, and was received by him about August 2, 1867. The policy was dated April 5th instead of June 5th. On the 8th of August, Homans addressed a letter to Young, asking whether the policy should be sent to him or would he call and get it. It does not appear whether Young ever received the letter. On August 21st Young received a wound from a pistol shot, from which he died September 20, 1867. Further facts appear in the opinion of the court.

Opinion by SAWYER, J.

It is not denied that there was, in fact, a contract made. The receipt and memorandum given to the applicant, dated June 5th, purports upon its face to insure him from its date, provided, only, that the application should be accepted by the defendant. It was accepted, and a policy in due form fully executed and sent to the San Francisco office to be delivered. These acts, it is conceded, constitute a contract.

But it is insisted that, although the memorandum of agreement of June 5th does not specify all the terms of the contract, it is implied that the policy shall be upon the usual terms embraced in the company's policies; that the acceptance was upon the terms of the policy, as it was actually prepared and executed, and that, under these terms, the policy became forfeited for non-payment of premiums, as required by one of its express conditions. The defendant claims that the note given for the first quarter's premium, not having been paid when due, a forfeiture resulted. If not, then that a forfeiture accrued upon the non-payment of the second quarter's premium, which fell due on July 5th, if the date of the policy, or on September 5th, if the date of the receipt and memorandum of July 5th is to control.

§ 1567. *Acknowledgment of payment as a receipt not conclusive; as a contract, conclusive.*

The plaintiff insists that it is incompetent to show a non-payment of the note against the acknowledgment of the receipt of the money in the memorandum of June 5th, and also in the policy, for the purpose of defeating the contract; that the note was accepted as payment, and the defendant is estopped from denying it for such a purpose. It was so expressly held in *Provident Life Insurance Co. v. Fennell*, 49 Ill., 180. This, I suppose, is on the principle recognized by the authorities, that such acknowledgments are often to be regarded as presenting a double aspect — firstly, as a simple receipt for money; secondly, as constituting a part of a contract. In the first aspect, and

for collateral purposes, such as the recovery of the money, the acknowledgments may be contradicted. In the second, and for the purpose of defeating the operation of the contract, they cannot be contradicted. These distinctions are discussed in *Peck v. Vanderberg*, and cases there cited, 30 Cal., 23, and *Ashley v. Vischer*, 24 Cal., 322; *Goit v. National Protection Insurance Co.*, 25 Barb., 192.

But I shall not rest my decision on that ground.

§ 1568. *Forfeitures not favored.*

The plaintiff further insists that, if there was a forfeiture, it was waived by defendant. It is elementary law that forfeitures are not favored, and that provisions for forfeiture must be strictly construed. The authorities, also, hold that these principles are applicable to forfeitures in insurance policies; that the provisions for forfeiture are inserted for the benefit of the companies, and may be waived by them; and that courts will find a waiver upon slight evidence. See, among many cases, *Ripley v. Aetna Insurance Co.*, 29 Barb., 557; *Goit v. National Protection Insurance Co.*, 25 Barb., 189; *Baker v. Union Life Insurance Co.*, 6 Robt., 294; *Boehen v. Williamsburg Ins. Co.*, 35 N. Y., 131; *Bouton v. Am. M. L. Insurance Co.*, 25 Conn., 542; *Pino v. Merchants', etc., Insurance Co.*, 19 La. Ann., 21'; *Insurance Co. v. Webster*, 6 Wall., 129.

§ 1569. *Circumstances under which a forfeiture will be considered waived by the insurer.*

Apply these principles to the facts of this case. The policy bears date April 5th, and the receipts prepared by the company correspond with this date. The company, therefore, regarded the second quarter's premium as due July 6th, and acted upon that idea, although the application was made and the first memorandum, receipt and contract given on July 5th. The promissory note given for the first quarter's premium being payable without grace, fell due August 4th. It will be seen that the condition of the policy imposing forfeiture required payment to be made "at the office of the company, in the city of New York, or to agents," when they produce receipts signed by the president or secretary, "unless otherwise expressly agreed in writing." There is no evidence in this case of its having been otherwise agreed in writing. It does not appear that the policy was received at the San Francisco office before the 2d of August. At or about the 6th of July the policy must have been in defendant's office in New York, which would give twenty-seven days to August 2d to make the passage to San Francisco. The defendant knew, at the time of dispatching the policy, that the second instalment of premium had not been paid at the office in New York. It also knew that it could not be paid to its agents here, in accordance with the terms of the contract, so as to be obligatory upon defendant, for the reason that the only receipt duly signed as specified in the policy, authorizing the payment to its agents, was attached to the policy, and would not reach San Francisco till the month of August, a month after it was due. The defendant did not expect payment at its office in New York city, or it would not have sent its receipt to its agent to enable him to receive payment. The defendant, then, by its officers in New York, transmitted the policy and receipts with knowledge that payment had not and would not be made at the office in New York, and that it could not be made elsewhere in the mode required by the terms of the contract for a month after due. Yet the policy was sent with an intent that it should be delivered, and payment received by its agent in San Francisco, although it knew that there must necessarily be a forfeiture upon the strict letter of the

contract. Also, after the receipt of the policy at San Francisco, on the 2d of August, nearly a month after the second instalment fell due, according to the terms of the policy, the defendant's agent, necessarily knowing that payment had not been made, stamped and countersigned the receipt, ready for delivery upon payment, thereby treating the agreement as still in force. Again, on the 8th of August, four days after the note given for the first quarter's premium fell due, and after default in payment, and necessarily with knowledge of non-payment of both the note and second instalment, the agents of the defendant addressed to Young the note set out in the findings of facts.

This act, after the forfeiture, if any there was, had attached, recognizes the agreement as being still in force. The letter does not even demand payment, or refer to the fact of non-payment, or fix any time when the insured should call for the policy, or make payment. It simply notifies him that his policy has arrived, and asks whether it should be sent to him at Vallejo, or whether he would call and get it, when in the city, implying that it would be at his option to have it sent to him at once, or wait his convenience till he should come to the city, and be able to call for it. The defendant manifested no haste or anxiety upon the subject, for the policy was on hand from the 2d to the 8th of August at least, before the notice to Young was even written, and it does not appear when it was sent. It does not appear that this or any other notice reached him. No other act of the company is shown inconsistent with this action, or tending in the slightest degree to show an intention to insist upon a forfeiture till after the death of Young, when the policy was canceled October 31, payment of the loss having before been refused.

It could hardly have been expected that Young would call to make the second payment until notified whether the risk had been accepted, especially as there was ample time between June 5, when the application was made, and the 5th of September, the time when the next payment would have fallen due, had the date of the policy agreed with the date of the application, and the preliminary memorandum of agreement given to him by defendant's agent in San Francisco. It was, doubtless, supposed that notice of acceptance or rejection would be given before the note for the first quarter's premium would fall due. But however this may be, the several acts of the defendant, and all its acts, and the acts of its officers in relation to the matter shown to the court, which were performed subsequent to the accruing of the forfeiture, if any accrued, treat the agreement for insurance as still in force. They affirmatively indicate an intention not to insist upon a forfeiture, and had the accident and death not occurred, there can be no doubt, from the facts shown, that even as late as the death of Young, the premium would have been received and the policy delivered. In the case cited by counsel, of Chipman against the same defendant, tried in this court a year ago, there was no act of any kind shown on the part of the company indicating an intention to waive the forfeiture, or in any way recognizing a subsisting contract. Whereas, in this case, all the acts of the company, after the forfeiture accrued and prior to Young's death, shown to the court, recognize the contract as still subsisting, and manifest an intention not to claim a forfeiture.

I think, upon the facts, the court must find a waiver of any forfeitures which had accrued, and that under the circumstances, after the death of the assured, it was too late, for the first time, to insist upon the forfeiture. Let the plaintiff have judgment for the amount of the policy, less one year's premiums, and interest from the time payment should have been made.

SELVAGE v. JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY.

(Circuit Court for New York: 12 Federal Reporter, 603-606. 1882.)

Opinion by WHEELER, J.

STATEMENT OF FACTS.— This is an action upon a policy of life insurance, and has now, after verdict for the plaintiff and before judgment thereon, been heard upon a motion of the defendant for a new trial. The policy provided for the payment of a premium at the office of the company, "or to their agents producing the receipt of said company," on or before the 13th day of July in every year during the continuance of the policy; that if any premiums should not be paid on or before the day when due, the policy should thereupon become forfeited and void, except as provided by the non-forfeiture law of Massachusetts; and that no person except the president or secretary was authorized to make, alter or discharge contracts or waive forfeitures. The premiums were paid to and received by agents producing receipts— for 1871 on July 17th; for 1872 on July 13th; for 1873 on August 1st; for 1874 on September 25th. The assured died March 13, 1879. The premium for 1875 was not paid on or before July 13th, and has never been received. If the plaintiff is entitled to have that premium treated as paid or tendered in due time, the non-forfeiture laws of Massachusetts would continue the policy so as to cover the death, otherwise not.

§ 1570. *No forfeiture if assured misled by underwriter's agent.*

The plaintiff's evidence tended to show that some time before July 13th, in that year, the assured and the plaintiff, being about to leave home, arranged with Edson C. Chick, a friend, to see to this payment for them; that afterwards, but still some time before the day, Chick called upon the agents who had charge of the defendant's business for that state, and who had produced the prior receipts and received the payments, and who had the receipt for that premium, and inquired when the premium would be due, being ignorant of the precise day and having no means at hand to ascertain it; that the agent said that their safe was locked and another agent was gone out with the key, so that the information could not then be given; that he then took Chick's address, and told him further that he would inform him seasonably of the day; that he never did inform Chick or the assured, or the plaintiff, of the day; that on the 18th day of August the assured took the requisite amount of money and started for the office of the agents, saying he would go there and tender the amount of the premium, and returned saying he had done so; that controversy soon arose about non-acceptance of the premium, which was renewed after the death, in which the agents and officers of the defendant were fully informed that a tender on that day was claimed to have been made, and did not deny or dispute it. The defendant's evidence tended to show that notice was directed to be sent to the assured thirty days before the day; that no arrangement was made with Chick about informing him of the day; and that no tender of that premium was made. The defendant requested that a verdict be directed in its favor. The jury was instructed that if the assured and the plaintiff arranged with and relied upon Chick to see to the payment of that premium, and Chick applied at the office of the agents before the day for information as to the day, and the agent agreed to furnish it and did not, and Chick waited until after the day, relying upon that agreement, so that in fact Chick and the assured and the plaintiff were deceived into letting the day pass without payment by the agreement of the agent to inform Chick

and the failure to do so, and the premium was in fact tendered within a reasonable time of waiting for the information, the plaintiff was entitled to a verdict; but that if they were not so deceived into letting the day pass without payment, or if the tender of the premium was not in fact made, or if it was not made within a reasonable time for waiting for the information, the verdict should be for the defendant. The motion is urged principally on the ground that there was not sufficient evidence that a tender was actually made to be submitted to the jury upon that point, and because a verdict for the defendant was not directed.

What the assured said that he was going to do or had done about making the tender would not probably be sufficient to support the finding. What he said in starting with the money might be admissible as a part of the *res gestæ*; what he said in returning was a mere narrative of a past transaction, hearsay and of no weight. There is no question, however, as to the admissibility of this evidence under consideration; the question is whether all that was put in was sufficient. The conduct of a party with reference to a claim made about which the party is called upon to act is always admissible in evidence and important; and when a claim was made founded upon a fact, entirely, the existence of which was within the knowledge or reach of the knowledge of the party and not controverted, but proceeded about as if it existed, all this was not only competent but quite strong evidence in the nature of an implied admission that the fact existed.

It is doubtless true, as has been well argued for the defendant, that in case of such policies payment of the premiums must with great strictness be made at the day, and that misfortune or accident, or indulgence at some times after the day, will not excuse from payment, or entitle delinquent to indulgence at other times. *N. Y. Life Ins. Co. v. Statham*, 93 U. S., 24 (§§ 1577-81, *infra*), *Kline v. N. Y. Life Ins. Co.*, 3 Morr. Trans., 110; *Thompson v. Life Ins. Co.*, *id.*, 332.

It is also true that these agents were somewhat special agents, with limited authority in respect to making new contracts and waiving forfeitures in respect to the policy, and that notice of the limitation was carried to policyholders by the policy itself. Still, the requirement of payment was not so absolutely strict but that the conduct of the defendant could change or modify it. *Ins. Co. v. Eggleston*, 96 U. S., 572. Neither was the limitation upon the authority of the agents imposed by any statute or law, or otherwise, so that full authority might not be given by those entitled to confer authority, nor so but that it might be proved by course of dealing, or otherwise, as such authority is usually proved. These agents were well authorized to receive payment according to the terms of the policy itself, and to transact the whole of that business in behalf of the defendant. Had they taken counterfeit money and called it good, probably no one would say that the policy was forfeited, although that would be non-payment, if good money was offered when the character of the bad was discovered and made known. Nor if they said that only part was due, and only what they said was due was offered, would any one probably say that the policy was forfeited because the whole was not offered? They were authorized to give all necessary information for the transaction of the business, and the defendant would be bound to the correctness of such as they should give. As has been said on behalf of the defendant, the assured could look at the policy for information as to the day, and Chick could have inquired of him; but Chick had not the information at hand, and

although he had other sources to go to for it, and although they might not be bound to give it, still he had the right to ask for it of them, and if they gave it they were bound to give it correctly, and if they undertook to give it they ought to do so. They were not asked to waive a forfeiture, for there was none; nor were they asked to make, alter or discharge any contract; they were merely asked for information and undertook to give it, but did not, and misled those interested in keeping up the insurance. This was done in a matter intrusted to them, and the defendant, which intrusted them, ought to bear the consequences. Had the assured called the 13th of July and inquired, and they had told him that the next day was the day, and relying upon that they had waited until the next day, and then been told it was too late, probably no one would say that the defendant was not estopped from claiming it was too late. That would be the same as this, except this was misleading for a longer time; but, as the jury have found, not longer than was reasonable to be relied upon.

The motion is denied, and the stay of proceedings is vacated.

INSURANCE COMPANY v. NORTON.

(6 Otto, 284-245. 1877.)

ERROR to U. S. Circuit Court, Northern District of Illinois.

STATEMENT OF FACTS.—Mrs. Norton sued the defendant upon a policy of insurance on her husband's life. The defense made was that the policy was forfeited because of the non-payment of the premiums at the time they were due, in accordance with the terms of the policy. Replication that the defendant's agent, duly authorized so to do, had extended the time. Rejoinder denying that the company had extended the time of payment or waived any advantage as alleged. The testimony was conflicting. Judgment was for the plaintiff.

Opinion by MR. JUSTICE BRADLEY.

The material question in this case is whether, in view of the express provisions of the policy, the evidence introduced by the assured was relevant and competent to show that the company had authorized its agent to grant indulgence as to the time of paying the premium notes, and waive the forfeiture incurred by their non-payment at maturity; or to show that any valid extension had, in fact, been granted, or the forfeiture of the policy waived.

§ 1571. *An insurance company may waive a condition in its policy, and such waiver may be proved by parol.*

The written agreement of the parties, as embodied in the policy and the indorsement thereon, as well as in the notes and the receipt given therefor, was undoubtedly to the express purport that a failure to pay the notes at maturity would incur a forfeiture of the policy. It also contained an express declaration that the agents of the company were not authorized to make, alter or abrogate contracts or waive forfeitures. And these terms, had the company so chosen, it could have insisted on. But a party always has the option to waive a condition or stipulation made in his own favor. The company was not bound to insist upon a forfeiture, though incurred, but might waive it. It was not bound to act upon the declaration that its agents had no power to make agreements or waive forfeitures; but might, at any time, at its option, give them such power. The declaration was only tantamount to a notice to the assured, which the company could waive and disregard at pleasure. In either case,

both with regard to the forfeiture and to the powers of its agent, a waiver of the stipulation or notice would not be repugnant to the written agreement, because it would only be the exercise of an option which the agreement left in it. And whether it did exercise such option or not was a fact provable by parol evidence, as well as by writing, for the obvious reason that it could be done without writing.

§ 1572. *Evidence admissible that the local agent was in the habit of extending time of payment, and that his acts were ratified by the company.*

That it did authorize its agents to take notes, instead of money, for premiums, is perfectly evident from its constant practice of receiving such notes when taken by them. That it authorized them to grant indulgence on these notes, if the evidence is to be believed, is also apparent from like practice. It acquiesced in and ratified their acts in this behalf. For a long period, it allowed them to give an indulgence of ninety days; after that, of sixty; then of thirty days. It is in vain to contend that it gave them no authority to do this, when it constantly allowed them to exercise such authority, and always ratified their acts, notwithstanding the language of the written instruments.

We think, therefore, that there was no error committed by the court below in admitting evidence as to the practice of the company in allowing its agents to extend the time for payment of premiums and of notes given for premiums, as indicative of the power given to those agents; nor any error in submitting it to the jury, upon such evidence, to find whether the defendant had or had not authorized its agent to make such extensions; nor in submitting it to them to say whether, if such authority had been given, an extension was made in this case.

§ 1573. *Waiver of forfeiture may be made after forfeiture incurred.*

Much stress, however, is laid on the fact that the extension claimed to have been given in this case was not given or applied for until after the first note became due and the forfeiture had been actually incurred. But we do not deem this to be material. The evidence does not show that any distinction was made in granting extensions before or after the maturity of the notes. The material question is whether the forfeiture was waived; and we see no reason why this may not be done as well by an agreement made for extending the note after its maturity as by one made before. In either case, the legal effect of the indulgence is this: the company say to the insured, pay your note by such a time, and your policy shall not be forfeited. If the insured agrees to do this, and does it or tenders himself ready to do it, the forfeiture ought not to be exacted. In both cases, the parties mutually act upon the hypothesis of the continued existence of the policy. It is true, if the agreement be made before the note matures and before the forfeiture is incurred, it would be a fraud upon the assured to attempt to enforce the forfeiture, when, relying on the agreement, he permits the original day of payment to pass. On the other hand, if the agreement be made after the note matures, such agreement is itself a recognition on the company's part of the continued existence of the policy, and consequently of its election to waive the forfeiture. It is conceded that the acceptance of payment has this effect; and we do not see why an agreement to accept, and a tender of payment according to the agreement, should not have the same effect. Both are acts equally demonstrative of the election of the company to waive the forfeiture of the policy. Grant that the promise to extend the note is without consideration, and not binding on the

company,—which is perhaps true, as well when the promise is made before maturity as when it is made afterwards,—still it does not take from the company's act the legitimate effects of such act upon the forfeiture of the policy. Perhaps the note might be sued on in disregard of the extension; but if it could be, that would not annihilate the fact that the company elected to waive the forfeiture by entering into the transaction. If it should repudiate its agreement, it could not repudiate the waiver of the forfeiture without at least giving to the assured reasonable notice to pay the money.

Forfeitures are not favored in the law. They are often the means of great oppression and injustice. And where adequate compensation can be made, the law in many cases, and equity in all cases, discharges the forfeiture upon such compensation being made. It is true, we held in *Statham's Case*, 93 U. S., 24 (§§ 1577–81, *infra*), that in life insurance time of payment is material, and cannot be extended by the courts against the assent of the company. But where such assent is given, the courts should be liberal in construing the transaction in favor of avoiding a forfeiture.

The case of leases is not without analogy to the present. It is familiar law that, when a lease has become forfeited, any act of the landlord indicating a recognition of its continuance, such as distraining for rent or accepting rent which accrued after the forfeiture, is deemed a waiver of the condition.

§ 1574. *Authorities reviewed.*

In *Doe v. Meux*, 4 Barn. & Cress., 606, there was a general covenant to repair, and a special covenant to make specific repairs after three months' notice; and a condition of forfeiture for non-performance of covenants. The landlord gave notice to the tenant to make certain specific repairs within three months. This was held a waiver of the forfeiture already incurred under the general covenant. Justice Bailey said: "The landlord, in this case, had an option to proceed on either covenant; and, after giving notice to repair within three months, he might have brought an action against the defendant upon the former covenant, for not keeping the premises in repair. But that is very different from insisting upon the forfeiture. . . . I think that the notice amounted to a declaration that he would be satisfied if the premises were repaired within three months, and that he thereby precluded himself from bringing an ejectment before the expiration of that period."

In *Doe v. Birch*, 1 Mee. & W., 402, there was a covenant on the part of the tenant to make certain improvements on the premises within three months, or that the lease should be void. He failed to make the improvements in the manner stipulated; and, after the expiration of the three months, the landlord's son, on his father's behalf, made a demand of a quarter's rent. But, it not appearing that the landlord knew of the tenant's failure with regard to the improvements, it was held that the son had not sufficient authority to waive the forfeiture. Otherwise, it seems, that the demand of that rent would have amounted to a waiver. Baron Parke referred to *Green's Case*, 1 Croke, 3, where calling the party a tenant, in a receipt for bygone rent, was held to be sufficient evidence of a waiver, though the acceptance of the rent was not such. And he adds: "If it had been proved that the father had notice of the alterations, and he had still allowed the son to receive the rent, the forfeiture might have been waived. But that was not proved; and the question of waiver does not, therefore, distinctly arise in the case. If it had, the authorities cited show that this was a lease voidable at the election of the landlord. Then I

think that an absolute, unqualified demand of rent, by a person having sufficient authority, would have amounted to a waiver of the forfeiture, and it would have been like the case I cited from Croke's Reports."

In *Ward v. Day*, 4 Best & Smith, 335, after a forfeiture of a license to gather minerals off of a manor had been incurred, the landlord entered into negotiations with the licensee and his son, to grant to the latter a renewal of the license when it should expire; and terms were agreed on, which the landlord afterwards refused to carry out. It was held that, by entering into these negotiations, he waived the forfeiture of the original license. The negotiations assumed that the original license was to continue to its termination. The exaction of the forfeiture was in the landlord's election; and he evinced his election not to enforce it by entering into the negotiations. Justice Blackburn says: "Most of the cases in which the doctrine of election has been discussed have been cases of landlord and tenant under a regular lease, in which has been reserved a right of re-entry for a forfeiture; that is, an option to determine the lease for a forfeiture; but this doctrine is not, as Mr. Russell seems to think, confined to such cases. So far from that being so, the doctrine is but a branch of the general law, that, where a man has an election or option to enter into an estate vested in another, or to deprive another of some existing right, before he acts he must elect, once for all, whether he will do the act or not. He is allowed time to make up his mind; but when once he has determined that he will not consider the estate or lease, whichever it may be, void, he has not any further option to change his mind." And then the learned judge cites authorities, going back to the Year Books, to show that a determination of a man's election in such cases may be made by express words, or by act; and that if, by word or by act, he determines that the lease shall continue in existence, and communicates that determination to the other party, he has elected that the other shall go on as tenant.

These cases show the readiness with which courts seize hold of any circumstances that indicate an election or intent to waive a forfeiture. We think that the present case is within the reason of these authorities; and that the objection, that the note was already past due when the agreement to extend it was made, is not sufficient to prevent said agreement from operating as a waiver of the forfeiture.

Several minor points were raised by the defendant; but they are all either substantially embraced in the main points already considered, or are not of sufficient force to require special discussion. We find no error in the record, and the judgment of the circuit court is affirmed.

Dissenting opinion by MR. JUSTICE STRONG.

I dissent from the judgment given in this case. The insurance effected by the policy became forfeited by the non-payment *ad diem* of the premium note. The policy then ceased to be a binding contract. It was so expressly stipulated in the instrument. Admitting that the company could afterwards elect to treat the policy as still in force, or, in other words, could waive the forfeiture, the local agent could not, unless he was so authorized by his principals. The policy declared that agents should not have authority to make such waivers. And there is no evidence in this case that the company gave to the agent parol authority to waive a forfeiture after it had occurred. They had ratified his acts extending the time of payment of premium notes, when the extension

was made before the notes fell due. But no practice of the company sanctioned any act of its agent done after a policy had expired, by which new life was given to a dead contract.

JUSTICES SWAYNE and FIELD dissented.

INSURANCE COMPANY *v.* MOWRY.

(6 Otto, 544-549. 1877.)

ERROR to U. S. Circuit Court, District of Rhode Island.

Opinion by MR. JUSTICE FIELD.

STATEMENT OF FACTS.—This was an action on a policy of insurance, issued by the Union Mutual Life Insurance Company, a corporation created under the laws of Maine, upon the life of Nelson H. Mowry, for the sum of \$10,000. The insurance was effected by a nephew of the insured for his sole benefit. The nephew was at the time a creditor of the insured to the extent of \$6,000, and had agreed to embark with him in an enterprise requiring the expenditure of considerable capital, and depending for its success upon the knowledge and skill of the insured in business. These circumstances gave the nephew such an interest in the life of the insured as to prevent the policy from being a wager one. The insurance effected was from the 9th of March, 1867, and the policy recited the payment of the first annual premium on that day, and stipulated for the payment of the subsequent premiums on the same day of that month each year. The payment of the insurance money, after notice and proof of the death of the insured, was made dependent upon the punctual payment, each year, of the premium. The policy, in terms, declared that it was made and accepted by the insured and the nephew, upon the express condition that if the amount of any annual premium was not fully paid on the day and in the manner provided, the policy should be "null and void, and wholly forfeited." And it declared that no agent of the company, except the president and secretary, could waive such forfeiture, or alter that or any other condition of the policy.

The second premium, due on the 9th of March, 1868, was not paid, and the insured died on the 8th of April following. Forty-five days after it was due, and fifteen days after the death of the insured, this premium was tendered to the company, and was refused. The question for determination is, whether a tender of the premium at that time was sufficient to hold the company to the payment of the insurance money.

By the express condition of the policy, the liability of the company was released upon the failure of the insured to pay the premium when it matured; and the plaintiff could not recover, unless the force of this condition could in some way be overcome. He sought to overcome it, by showing that the agent, who induced him to apply for the policy, represented to him, in answer to suggestions that he might not be informed when to pay the premiums, that the company would notify him in season to pay them, and that he need not give himself any uneasiness on that subject; that no such notification was given to him before the maturity of the second premium, and for that reason he did not pay it at the time required. This representation before the policy was issued, it was contended in the court below, and in this court, constituted an estoppel upon the company against insisting upon the forfeiture of the policy.

But to this position there is an obvious and complete answer. All previous verbal arrangements were merged in the written agreement. The understanding of the parties as to the amount of the insurance, the conditions upon which it should be payable, and the premium to be paid, was there expressed, for the very purpose of avoiding any controversy or question respecting them. The entire engagement of the parties, with all the conditions upon which its fulfillment could be claimed, must be conclusively presumed to be there stated. If by inadvertence or mistake, provisions other than those intended were inserted, or stipulated provisions were omitted, the parties could have had recourse for a correction of the agreement to a court of equity, which is competent to give all needful relief in such cases. But, until thus corrected, the policy must be taken as expressing the final understanding of the assured and of the insurance company.

§ 1575. *A promise of future action under a contract to be made not an estoppel.*

The previous representation of the agent could in no respect operate as an estoppel against the company. Apart from the circumstance that the policy subsequently issued alone expressed its contract, an estoppel from the representations of a party can seldom arise, except where the representation relates to a matter of fact,—to a present or past state of things. If the representation relate to something to be afterwards brought into existence, it will amount only to a declaration of intention or of opinion, liable to modification or abandonment upon a change of circumstances of which neither party can have any certain knowledge. The only case in which a representation as to the future can be held to operate as an estoppel is where it relates to an intended abandonment of an existing right, and is made to influence others, and by which they have been induced to act. An estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon an agreement not yet made.

The doctrine of estoppel is applied with respect to representations of a party to prevent their operating as a fraud upon one who has been led to rely upon them. They would have that effect if a party who, by his statements as to matters of fact, or as to his intended abandonment of existing rights, had designedly induced another to change his conduct or alter his condition in reliance upon them, could be permitted to deny the truth of his statements, or enforce his rights against his declared intention of abandonment. But the doctrine has no place for application when the statement relates to rights depending upon contracts yet to be made, to which the person complaining is to be a party. He has it in his power in such cases to guard in advance against any consequences of a subsequent change of intention and conduct by the person with whom he is dealing. For compliance with arrangements respecting future transactions, parties must provide by stipulations in their agreements when reduced to writing. The doctrine carried to the extent for which the assured contends in this case would subvert the salutary rule, that the written contract must prevail over previous verbal arrangements, and open the door to all the evils which that rule was intended to prevent. *White v. Ashton*, 51 N. Y., 280; *Bigelow, Estoppel*, 437-441; *White v. Walker*, 31 Ill., 422; *Faxon v. Faxon*, 28 Mich., 159.

The learned judge who tried this case in the circuit court instructed the jury in substance that if they could find from the language of the agent that there was an agreement between him and the assured, made before the policy was exe-

cuted, that the latter should have notice before he should be required to pay the annual premium, then that the company, not having given such notice, was estopped from setting up the forfeiture stipulated by the policy for non-payment of the premium when due. For the reasons we have stated, we think the court erred in this instruction.

There is nothing in the record which shows that the agent was invested with authority to make an insurance for the company. In representing himself as an agent, he only solicited an application by the assured to the company for a policy. That instrument was to be drawn and issued by the company, and it shows on its face that the authority to the agent was limited to countersigning it before delivery and receiving the premiums. But even if the agent had possessed authority to make an insurance for the company, and he made the agreement pretended, still the assured was bound by the terms of the policy subsequently executed and accepted by him. The judgment must be reversed, and the cause remanded for a new trial; and it is so ordered.

BRIGGS v. NATIONAL LIFE INSURANCE COMPANY.

(Circuit Court for Massachusetts: 11 Federal Reporter, 458-460. 1882.)

Opinion by LOWELL, J.

STATEMENT OF FACTS.—The plaintiff's bill shows that he procured an endowment policy for \$2,000, payable in fifteen years from April 21, 1877, one of the conditions of which was that he should pay annual premiums of \$113.60 on the 21st of April in each year; that he paid the premiums for 1877, 1878 and 1879; that the company had its domicile at Washington, but had a general agent and office in Massachusetts; that the three premiums were paid to the agent and were countersigned as coming from the Massachusetts office; that some time in April, 1880, before the fourth premium became due, the plaintiff was informed and believed that the company had ceased to do business in Massachusetts, and had given up its office; that he made many inquiries as to where and to whom he was to pay the premium, but was unable to learn; that on or about April 18, 1880, he was informed that the premium was to be paid to a certain bank in Taunton; that he immediately called on the company's former agent to inquire whether it was safe to pay to the bank, and was informed by said agent that the company had taken the collections out of the hands of their agents here without their knowledge, but that he would ascertain where and to whom he should pay said premium; that the agent informed him, April 30th, that he could pay a bank in Taunton, and he tendered the amount accordingly, which was kept a few days and then returned with a statement that the policy was forfeited; that he was always ready and willing to pay, but had not sufficient notice, etc. The bill prays a reinstatement, or certain other relief. The defendant demurs.

§ 1576. *Notice to be given of change of place of payment.*

The only question argued is whether the bill, upon its face, brings the plaintiff within the principle of *Ins. Co. v. Eggleston*, 96 U. S., 572. Both counsel agree that if the assured had been in the habit of paying the premiums to a local agent, the company have no absolute right to change the agency without notice to the assured, and still to insist on payment at the very day; but the defendant insists that the failure to notify must be fraudulent, in order to give the assured an excuse for not paying at the day. They cite *Thompson v. Knickerbocker Life Ins. Co.*, 2 Woods, 547, but that was a case

in which the company had been accustomed to give notice to the assured that his own note was about to become due,—a fact equally within the knowledge of the assured; and it ought certainly to require very strong evidence to erect such a custom into an estoppel, especially as the policy provided that notice should not be required. Undoubtedly, an actual promise to notify one who had not equal means of information would be binding. *Leslie v. Knickerbocker Life Ins. Co.*, 63 N. Y., 27. And in Iowa a custom to notify was held to have the same effect. *Mayer v. Ins. Co. of Chicago*, 38 Ia., 304.

I understand the case in 96 U. S. not to turn upon a question of actual fraud at all, but on fair and reasonable business conduct, by which one party shall not be misled to his injury by a change of place by the other. It is precisely as if the company itself should remove its principal office, without notice, to some other city than Washington, and try to forfeit the policies of all those who were misled by the change.

The other question is whether the bill, rightly construed, alleges that the plaintiff was misled to his injury by the change of agency. The narrative is somewhat minute, and not sharply and technically affirmative or negative in its allegations. I agree that all pleadings are to be taken most strongly against the pleader, as was ably and learnedly shown by the defendant's counsel; but I add that a bill in equity is to be read reasonably. I do not find that it can fairly be inferred from this bill that the information, which the plaintiff admits he had three days before April 21st, came from an authorized source, and therefore was notice to him that the bank in Taunton had power to receive the premium. On the contrary, the allegation is that he knew of no one but the former agent, and that he applied to him as soon as he heard about the bank in Taunton. No doubt it would have been easier to apply to the bank itself; but that raises the question whether the supreme court mean to say that the insurance company ought to give notice to their policy-holders, or that the assured are themselves bound to exercise their best diligence. This is not a question to be decided upon this demurrer, because the facts are not sufficiently developed to enable me to decide it understandingly.

On the face of the decision in 96 U. S. I understand that the defendant should have notified the plaintiff. When and under what circumstances notice may be excused, or what sort of notice must be given, or what information on the part of the assured will dispense with notice, are as yet undecided. There is nothing in the bill which authorizes me to say that the plaintiff received any notice from the defendant concerning its change of agency.

If I could have ended the case here, there was the temptation to do so, that the costs of a suit must bear a very large proportion to the amount in controversy; but I find in this bill, fairly construed, sufficient equity to put the defendant company to its answer. Demurrer overruled.

NEW YORK LIFE INSURANCE COMPANY v. STATHAM.

(3 Otto, 24-27. 1876.)

APPEAL AND ERROR, U. S. Circuit Court, Southern District of Mississippi.

STATEMENT OF FACTS.—In each of these cases policies of insurance had been issued and the premiums regularly paid until the breaking out of the rebellion, when they were stopped, and the war was relied upon as excusing the non-payment of the premiums. Decree and judgments against the defendants.

§ 1577. *Nature of contract of life insurance; not a contract for a single year, with right of renewal.*

Opinion by MR. JUSTICE BRADLEY.

We agree with the court below that the contract is not an assurance for a single year, with a privilege of renewal from year to year by paying the annual premium, but that it is an entire contract of assurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums. Such is the form of the contract, and such is its character. It has been contended that the payment of each premium is the consideration for insurance during the next following year,—as in fire policies. But the position is untenable. It often happens that the assured pays the entire premium in advance, or in five, ten, or twenty annual instalments. Such instalments are clearly not intended as the consideration for the respective years in which they are paid; for, after they are all paid, the policy stands good for the balance of the life insured, without any further payment. Each instalment is, in fact, part consideration of the entire insurance for life. It is the same thing, where the annual premiums are spread over the whole life. The value of assurance for one year of a man's life when he is young, strong and healthy, is manifestly not the same as when he is old and decrepit. There is no proper relation between the annual premium and the risk of assurance for the year in which it is paid. This idea of assurance from year to year is the suggestion of ingenious counsel. The annual premiums are an annuity, the present value of which is calculated to correspond with the present value of the amount assured, a reasonable percentage being added to the premiums to cover expenses and contingencies. The whole premiums are balanced against the whole insurance.

§ 1578. *Promptness of payment and forfeiture for non-payment at time agreed.*

But whilst this is true, it must be conceded that promptness of payment is essential in the business of life insurance. All the calculations of the insurance company are based on the hypothesis of prompt payments. They not only calculate on the receipt of the premiums when due, but on compounding interest upon them. It is on this basis that they are enabled to offer assurance at the favorable rates they do. Forfeiture for non-payment is a necessary means of protecting themselves from embarrassment. Unless it were enforceable, the business would be thrown into utter confusion. It is like the forfeiture of shares in mining enterprises and all other hazardous undertakings. There must be power to cut off unprofitable members or the success of the whole scheme is endangered. The insured parties are associates in a great scheme. This associated relation exists whether the company be a mutual one or not. Each is interested in the engagements of all; for out of the co-existence of many risks arises the law of average, which underlies the whole business. An essential feature of this scheme is the mathematical calculations referred to, on which the premiums and amounts assured are based. And these calculations, again, are based on the assumption of average mortality and of prompt payments and compound interest thereon. Delinquency cannot be tolerated nor redeemed, except at the option of the company. This has always been the understanding and the practice in this department of business. Some companies, it is true, accord a grace of thirty days or other fixed period, within which the premium in arrear may be paid on certain conditions of continued good health, etc. But this is a matter of stipulation or of discre-

tion on the part of the particular company. When no stipulation exists it is the general understanding that time is material, and that the forfeiture is absolute if the premium be not paid. The extraordinary and even desperate efforts sometimes made, when an insured person is *in extremis*, to meet a premium coming due, demonstrates the common view of this matter.

The case, therefore, is one in which time is material and of the essence of the contract. Non-payment at the day involves absolute forfeiture, if such be the terms of the contract, as is the case here. Courts cannot with safety vary the stipulation of the parties by introducing equities for the relief of the insured against their own negligence.

§ 1579. *Doctrine that war suspends contracts does not apply to executory contracts.*

But the court below bases its decision on the assumption that, when performance of the condition becomes illegal in consequence of the prevalence of public war, it is excused, and forfeiture does not ensue. It supposes the contract to have been suspended during the war and to have revived with all its force when the war ended. Such a suspension and revival do take place in the case of ordinary debts. But have they ever been known to take place in the case of executory contracts in which time is material? If a Texas merchant had contracted to furnish some Northern explorer a thousand cans of preserved meat by a certain day, so as to be ready for his departure for the North Pole, and was prevented from furnishing it by the civil war, would the contract still be good at the close of the war five years afterwards, and after the return of the expedition? If the proprietor of a Tennessee quarry had agreed, in 1860, to furnish, during the two following years, ten thousand cubic feet of marble for the construction of a building in Cincinnati, could he have claimed to perform the contract in 1865, on the ground that the war prevented an earlier performance?

The truth is that the doctrine of the revival of contracts suspended during the war is one based on considerations of equity and justice, and cannot be invoked to revive a contract which it would be unjust or inequitable to revive.

In the case of life insurance, besides the materiality of time in the performance of the contract, another strong reason exists why the policy should not be revived. The parties do not stand on equal ground in reference to such a revival. It would operate most unjustly against the company. The business of insurance is founded on the law of averages; that of life insurance eminently so. The average rate of mortality is the basis on which it rests. By spreading their risks over a large number of cases the companies calculate on this average with reasonable certainty and safety. Anything that interferes with it deranges the security of the business. If every policy lapsed by reason of the war should be revived, and all the back premiums should be paid, the companies would have the benefit of this average amount of risk. But the good risks are never heard from; only the bad are sought to be revived, where the person insured is either dead or dying. Those in health can get new policies cheaper than to pay arrearages on the old. To enforce a revival of the bad cases, whilst the company necessarily lose the cases which are desirable, would be manifestly unjust. An insured person, as before stated, does not stand isolated and alone. His case is connected with and co-related to the cases of all others insured by the same company. The nature of the business, as a whole, must be looked at to understand the general equities of the parties. We are of opinion, therefore, that an action cannot be maintained for the

amount assured on the policy of life insurance forfeited, like those in question, by non-payment of the premium, even though the payment was prevented by the existence of the war.

§ 1580. *Assured entitled to equitable surrender value of policy.*

The question then arises, Must the insured lose all the money which has been paid for premiums on their respective policies? If they must, they will sustain an equal injustice to that which the companies would sustain by reviving the policies. At the very first blush, it seems manifest that justice requires that they should have some compensation or return for the money already paid, otherwise the companies would be the gainers from their loss; and that from a cause for which neither party is to blame. The case may be illustrated thus: Suppose an inhabitant of Georgia had bargained for a house situated in a northern city, to be paid for by instalments, and no title to be made until all the instalments were paid, with a condition that, on the failure to pay any of the instalments when due, the contract should be at an end, and the previous payments forfeited; and suppose that this condition was declared by the parties to be absolute and the time of payment material. Now, if some of the instalments were paid before the war, and others accruing during the war were not paid, the contract, as an executory one, was at an end. If the necessities of the vendor obliged him to avail himself of the condition, and to resell the property to another party, would it be just for him to retain the money he had received? Perhaps it might be just if the failure to pay had been voluntary, or could by possibility have been avoided. But it was caused by an event beyond the control of either party,—an event which made it unlawful to pay. In such case, whilst it would be unjust, after the war, to enforce the contract as an executory one against the vendor, contrary to his will, it would be equally unjust in him, treating it as ended, to insist upon the forfeiture of the money already paid on it. An equitable right to some compensation or return for previous payments would clearly result from the circumstances of the case. The money paid by the purchaser, subject to the value of any possession which he may have enjoyed, should, *ex æquo et bono*, be returned to him. This would clearly be demanded by justice and right.

And so, in the present case, whilst the insurance company has a right to insist on the materiality of time in the condition of payment of premiums, and to hold the contract ended by reason of non-payment, they cannot with any fairness insist upon the condition, as it regards the forfeiture of the premiums already paid; that would be clearly unjust and inequitable. The insured has an equitable right to have this amount restored to him, subject to a deduction for the value of the assurance enjoyed by him whilst the policy was in existence; in other words, he is fairly entitled to have the equitable value of his policy.

As before suggested, the annual premiums are not the consideration of assurance for the year in which they are severally paid, for they are equal in amount; whereas, the risk in the early years of life is much less than in the later. It is common knowledge that the annual premiums are increased with the age of the person applying for insurance. According to approved tables, a person becoming insured at twenty-five is charged about \$20 annual premium on a policy of \$1,000, whilst a person at forty-five is charged about \$38. It is evident, therefore, that, when the younger person arrives at forty-five, his policy has become, by reason of his previous payments, of considerable value. Instead of having to pay for the balance of his life \$38 per annum, as he

would if he took out a new policy on which nothing had been paid, he has only to pay \$20. The difference (\$18 per annum during his life) is called the equitable value of his policy. The present value of the assurance on his life exceeds by this amount what he has yet to pay. Indeed, the company, if well managed, has laid aside and invested a reserve fund equal to this equitable value, to be appropriated to the payment of his policy when it falls due. This reserve fund has grown out of the premiums already paid. It belongs, in one sense, to the insured who has paid them, somewhat as a deposit in a savings bank is said to belong to the person who made the deposit. Indeed, some life insurance companies have a standing regulation by which they agree to pay to any person insured the equitable value of his policy whenever he wishes it; in other words, it is due on demand. But whether thus demandable or not, the policy has a real value corresponding to it,—a value on which the holder often realizes money by borrowing. The careful capitalist does not fail to see that the present value of the amount assured exceeds the present value of the annuity or annual premium yet to be paid by the assured party. The present value of the amount assured is exactly represented by the annuity which would have to be paid on a new policy, or \$38 per annum in the case supposed, where the party is forty-five years old; whilst the present value of the premiums yet to be paid on a policy taken by the same person at twenty-five is but little more than half that amount. To forfeit this excess, which fairly belongs to the assured, and is fairly due from the company, and which the latter actually has in its coffers, and to do this for a cause beyond individual control, would be rank injustice. It would be taking away from the assured that which had already become substantially his property. It would be contrary to the maxim, that no one should be made rich by making another poor.

We are of opinion, therefore, first, that as the companies elected to insist upon the condition in these cases, the policies in question must be regarded as extinguished by the non-payment of the premiums, though caused by the existence of the war, and that an action will not lie for the amount insured thereon.

Secondly, that such failure being caused by a public war, without the fault of the assured, they are entitled *ex æquo et bono* to recover the equitable value of the policies with interest from the close of the war.

It results from these conclusions that the several judgments and the decree in the cases before us, being in favor of the plaintiffs for the whole sum assured, must be reversed and the records remanded for further proceedings. We perceive that the declarations in the actions at law contain no common or other counts applicable to the kind of relief which, according to our decision, the plaintiffs are entitled to demand; but as the question is one of first impression, in which the parties were necessarily somewhat in the dark with regard to their precise rights and remedies, we think it fair and just that they should be allowed to amend their pleadings. In the equitable suit, perhaps, the prayer for alternative relief might be sufficient to sustain a proper decree; but, nevertheless, the complainants should be allowed to amend their bill, if they shall be so advised.

§ 1581. *Principle upon which value of a policy should be computed.*

In estimating the equitable value of a policy, no deduction should be made from the precise amount which the calculations give, as is sometimes done where policies are voluntarily surrendered, for the purpose of discouraging such surrenders; and the value should be taken as of the day when the first default occurred in the payment of the premium by which the policy became

forfeited. In each case the rates of mortality and interest used in the tables of the company will form the basis of the calculation.

The decree in the equity suit and the judgments in the actions at law are reversed, and the causes respectively remanded to be proceeded with according to law and the directions of this opinion.

Opinion by WAITE, C. J.

I agree with the majority of the court in the opinion that the decree and judgments in these cases should be reversed, and that the failure to pay the annual premiums as they matured put an end to the policies, notwithstanding the default was occasioned by the war; but I do not think that a default, even under such circumstances, raises an implied promise by the company to pay the assured what his policy was equitably worth at the time. I therefore dissent from that part of the judgment just announced which remands the causes for trial upon such a promise.

Opinion by MR. JUSTICE STRONG.

While I concur in a reversal of these judgments and the decree, I dissent entirely from the opinion filed by a majority of the court. I cannot construe the policies as the majority have construed them. A policy of life insurance is a peculiar contract. Its obligations are unilateral. It contains no undertaking of the assured to pay premiums; it merely gives him an option to pay or not, and thus to continue the obligation of the insurers, or terminate it at his pleasure. It follows that the consideration for the assumption of the insurers can in no sense be considered an annuity consisting of the annual premiums. In my opinion, the true meaning of the contract is, that the applicant for insurance, by paying the first premium, obtains an insurance for one year, together with a right to have the insurance continued from year to year during his life, upon payment of the same annual premium, if paid in advance. Whether he will avail himself of the refusal of the insurers, or not, is optional with him. The payment *ad diem* of the second or any subsequent premium is, therefore, a condition precedent to continued liability of the insurers. The assured may perform it or not, at his option. In such a case, the doctrine that accident, inevitable necessity or the act of God may excuse performance has no existence. It is for this reason that I think the policies upon which these suits were brought were not in force after the assured ceased to pay premiums. And so, though for other reasons, the majority of the court holds; but they hold, at the same time, that the assured in each case is entitled to recover the surrender, or what they call the equitable, value of the policy. This is incomprehensible to me. I think it has never before been decided that the surrender value of a policy can be recovered by an assured, unless there has been an agreement between the parties for a surrender; and certainly it has not before been decided that a supervening state of war makes a contract between private parties, or raises an implication of one.

Dissenting opinion by MR. JUSTICE CLIFFORD, MR. JUSTICE HUNT concurring.

Where the parties to an executory money-contract live in different countries, and the governments of those countries become involved in public war with each other, the contract between such parties is suspended during the existence of the war, and revives when peace ensues; and that rule, in my judg-

ment, is as applicable to the contract of life insurance as to any other executory contract. Consequently, I am obliged to dissent from the opinion and judgment of the court in these cases.

NETTLETON v. ST. LOUIS LIFE INSURANCE COMPANY.

(Circuit Court for Indiana: 7 Bissell, 293-296. 1876.)

STATEMENT OF FACTS.— Action on a life insurance policy by the beneficiary. The policy was for \$5,000, on the commutation or ten-year plan, providing for the absolute payment of the ratio of the full amount insured upon payment of the annual premium of \$283.90; and, also, that no forfeiture should take place after payment of the first annual premium; all premiums were to be paid half in cash and half in notes. The policy also contained a clause to the effect that a failure to pay interest in advance on unpaid premium notes would entail a forfeiture.

It appeared from the evidence that the first annual premium was paid, but that on the 31st of July, 1872, the assured owed defendant for unpaid premiums the sum of \$737.81, for which he gave his note at twelve months, at the same time pledging his policy for the payment of said note. The note was never paid, nor any part of it, and on the 14th of May, 1875, the assured died. Defendant answered, setting up the fact that the advance interest on the note was never paid. To this answer plaintiff demurred.

Opinion by GRESHAM, J.

It was insisted by the plaintiff's counsel that the interest was a mere incident to the note, and a part of it; that the parties could not have intended that the failure to pay interest on the note should forfeit the policy when neglect to pay the principal was not to have that effect; and that the interest forfeiting clause was in conflict with the provision which declared that the policy should be commuted and not forfeited for failure to pay premiums or the principal of premium notes.

§ 1582. *Provisions of policy in regard to forfeiture considered.*

I see no conflict in the provisions of this policy. The assured expressly agreed that he would pay interest annually on all notes given on account of premiums, and that a failure so to pay interest should forfeit his policy. In the face of that clear and explicit agreement it will not do to say that the interest was a mere incident to the note and a part of it, and that by the terms of the policy a failure to pay premiums or premium notes was not to work a forfeiture. To read this policy as if the interest forfeiting clause were not in it would be to make a new and substantially different contract for the parties, which courts are not at liberty to do. This company did business on the mutual plan. Premiums were paid half in cash and half in notes, and it was, of course, indispensable to provide a fund out of which losses arising from death might be promptly paid. To provide such a fund the company's plan of business contemplated and required the investment of the cash half of its premiums and the prompt annual payment of the interest on these investments, as well as the prompt annual payment of the interest in advance on its premium notes. It is not difficult to see that the success of the company depended largely upon the annual collection of its interest. If one member might let his premium note run without paying the annual interest, all might. The company could not have long existed and paid its current death claims with this wide departure from the plan of its organization.

So far, then, from the interest forfeiting clause being in conflict with any other part of the policy, it was a wise and necessary provision. I have carefully read the opinion of the Kentucky court of appeals in the case of the St. Louis Mutual Life Ins. Co. v. Grigsby, 2 Cent. L. J., 123, upon which counsel relied with apparent confidence. In that case it was held that the policy was hypothecated for the payment of the note and interest and that the company was amply secured. Although this decision comes from a court of great respectability, for the reasons already given I cannot follow it.

In the case at bar, when the assured died two years' interest was due and unpaid on the note given for \$737.81. It does not appear from the pleadings that the policy was entitled to any dividend in the hands of the company. In the Grigsby case the dividends due the assured were equal to the interest due on the premium note, less \$6.97. I do not say that a court of equity would not be justified in relieving a party from forfeiture under such circumstances.

To have forfeited the policy in that case, when the premium in the hands of the company due the assured was within \$6.97 of being enough to pay the interest due on the note, would seem to have been against conscience, but the decision was based upon other grounds. Courts of equity sometimes "relieve against forfeiture when the amount is greatly disproportionate and the forfeiture is designed as mere security so that full compensation can be made." The demurrer is overruled.

COFFEY v. UNIVERSAL LIFE INSURANCE COMPANY.

(Circuit Court for Wisconsin: 7 Federal Reporter, 301-311. 1881.)

Opinion by DYER, J.

STATEMENT OF FACTS. — This is a bill to compel the defendant company, which is a corporation of the state of New York, to issue to the complainant a paid-up policy of life insurance of the amount of \$600; and the controversy between the parties arises upon the following state of facts:

"On the 23d day of May, 1868, the complainant procured from the defendant company a policy of insurance on his own life, for the sum of \$1,000, payable to Honora Coffey on the 23d day of May, 1883, or in case of complainant's death before that day, then within thirty days after notice and proof of death. The policy required the premiums to be paid in four instalments, of \$14.26 each, on the 23d day of May, August, November, and February, in each year, and contained a condition that in case of default in the payment of either of the premiums the policy should become void, and all payments made thereon should be forfeited, except as further provided. By the terms of the policy it was further stipulated, that, in case of default in any payment after two full years' payments had been made thereon, the policy might be exchanged for a paid-up endowment policy for an amount stated in a table given in the original policy, subject to the condition that the policy, duly receipted, "shall have been transmitted to and received by the company within sixty days after such default, and that no condition of the policy shall have been violated." By the table annexed it was made to appear that the complainant, after nine years' payment of premiums, would be entitled, under the conditions before stated, to a paid-up term policy for \$600.

"All premiums were paid to the 23d day of May, 1877, inclusive, covering a period of nine years from the date of the policy. Payments were made to local agents of the company in Wisconsin. On the 23d day of August, 1877,

the complainant went to the company's agent in Milwaukee, as usual, and desired to pay the premium due on that day, but was told by the agent that the business of the company was in the hands of a receiver, or would be, and that he had no authority to receive the money. The complainant testifies that he offered to pay the premium due on that day, but was advised by the agent not to make any more payments until the business of the company was settled.

"It appears that on the 12th day of July, 1877, the attorney-general of the state of New York filed an information against the company, in the supreme court of that state, alleging its insolvency, and praying for an order to show cause why its business should not be closed, and for a decree dissolving the company and appointing a receiver. On the 18th day of July, 1877, an order was entered by the court in those proceedings permitting any policy-holder, until further order, to pay to the United States Trust Company any premiums thereafter becoming due on policies issued by the insurance company, with the same effect as if paid to said company. Afterward, and on the 23d day of August, 1877, which was the day when the premium on complainant's policy was due, the court made an order restraining the company from exercising any of its corporate rights, privileges and franchises, except receiving and paying moneys as thereafter allowed, and from paying out, or in any way transferring or delivering to any person, any of the effects, moneys, or property of the company, except salaries of employees and officers then due, and from collecting or receiving any debts or demands except interest, agents' balances and premiums, until the court should otherwise order. This order remained in force until October 29, 1878, with certain modifications,—such of which as are material here will be presently referred to. On the 1st day of September a further motion was made for the appointment of a receiver. Orders were duly entered postponing the hearing of this motion from September 4th to September 8th, and from the latter date to September 14, 1877, on condition that none of the policies of the company should be decreed to have lapsed nor become forfeited by reason of the non-payment of premiums due after September 3d and before the decision of the motion for a receiver; to which condition the company consented. Again, on the 14th of September, the hearing of all motions in said proceedings was adjourned until November 17, 1877. On the 13th day of October of that year an order was entered permitting the company to accept payment of debts due to it, including payments on mortgages, and restraining all persons and corporations from commencing any action or proceedings against it. On the 8th day of December, 1877, an order was made postponing the hearing of the motion for a receiver until such time as it might be brought on by the attorney-general, on five days' notice. This order also provided that the time of payment of all premiums due and to become due on outstanding policies be extended thirty days after the entry of the final order on the motion for a receiver; and all injunctions theretofore granted were continued in force until the final order of the court, except in particulars further specified, but not material here. Various proceedings were thereafter had, until, on the 29th day of October, 1878, an order was made vacating the order of August 23, 1877, so far as it restrained the company and its officers from exercising any of the corporate rights, privileges and franchises of the company, and the company, and its trustees and officers, were authorized to resume their powers in the business of the corporation and their control over its assets. This order required that a copy of the same be sent to every policy-holder, with a notice

declaring the company solvent, and requiring such policy-holder to pay his premiums, past due and unpaid, within ninety days from the day of mailing a copy of the order and notice, and provided that the company should not forfeit any insurance, by reason of the non-payment of past-due premiums until after the expiration of said ninety days; the court reserving the power to relieve from any forfeiture by reason of the non-receipt of a copy of the order and notice, on good cause shown.

"It appears that about the 21st day of July, 1877, the company deposited in the mail at New York a postal card, upon which was printed so much of the order of the court in New York, of date July 17, 1877, as permitted policy-holders to pay premiums thereafter becoming due on their policies to the United States Trust Company, which was undoubtedly intended to be sent to the complainant, but was in fact addressed to Honora Coffey, Milwaukee, Wisconsin. Prior to August 23, 1877, a postal card was also mailed, giving notice of the amount of the premium falling due on the complainant's policy on August 23d, and of the time when due, and that it could be paid at the office of the company, or to an agent, when such agent produced a receipt signed by an officer of the company; but this was also addressed to Honora Coffey. Neither of these postal cards was received by the complainant, but he was informed by letter from the secretary of the company, of date March 9, 1878, of the order of July 17, 1877. Correspondence between the attorneys for complainant and the company, extending from August 3, 1878, to March 29, 1879, shows that about the 25th of February, 1879, the former were informed of the entry of the order of the court, of date October 29, 1878, and that about the 17th day of March, 1879, the complainant formally offered to receipt and transmit his policy to the company, and requested the issuance of a paid-up policy to him, or an opportunity to pay the back premiums then unpaid. The company declined to comply with either of these requests, on the ground that the notices before mentioned were duly sent; that the complainant was advised of the situation of affairs when the proceedings against the company were pending, and failed to seasonably take any steps either to keep his policy in force, or by receipt and transmission of the same to procure a paid-up policy. The complainant, in his testimony, says that he did not receipt and transmit the policy within sixty days after August 23, 1877, because he did not think the company was in existence, and because he had no instructions so to do."

Upon this state of facts it is contended in behalf of the complainant that by the payment of nine years' premiums he purchased paid-up insurance to the amount of \$600; that the transmission and receipt of the policy within sixty days after default in any payment of premium was not a condition precedent to the right to have a paid-up policy; that by the proceedings against the company in New York it was then disabled to issue such a policy, even if the original policy had been receipted and transmitted within the sixty days, and therefore strict performance of the condition by the complainant was excused; that, under all the circumstances, the ultimate offer to receipt and return the policy, and the demand of a paid-up policy, were seasonably made; and that the court ought not to make such a decree as would operate to enforce a forfeiture of the complainant's rights under his policy. The grounds for relief thus urged are all combated by counsel for defendant, who insists that time was of the essence of the condition requiring transmission and receipt of the policy within sixty days after default in the payment

of any premium; that by the failure to make payment, and then the further failure to receipt and transmit the policy within the required time, the policy lapsed, and all right to a paid-up policy was lost; that the temporary disability of the company did not excuse non-compliance with the condition requiring action on the part of the insured within the prescribed time; and that the offer to receipt and return the policy after such disability was removed was not seasonably made.

§ 1583. *Construction of policy in regard to issuance of paid-up insurance. Condition precedent.*

The case has been argued rather upon bare propositions of law touching the proper construction of the clauses in the policy, and the strict rights of the parties under the literal letter of the policy, than in the light of the exceptional facts and circumstances of the case. Looking alone at the policy it may be said of it, in substantially the language of the court in *N. Y. Life Ins. Co. v. Statham*, 93 U. S., 30 (§§ 1577-81, *supra*), that the contract is not an assurance for a single year, with a privilege of renewal from year to year by paying the annual premium, but that it is an entire contract of assurance for fifteen years, or for life, if the assured should die before the expiration of that period, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums, except that in case of default in any payment after two full years' payments had been made, the policy might be exchanged for a paid-up policy for a certain amount, on transmission of the original policy, duly receipted, to the company within sixty days after such default. This was the contract. In the absence of anything to save the case from the operation of the letter of the policy, it was undoubtedly the duty of the assured, if he wished to keep the policy in continuing force, to pay the premium due August 23, 1877, on that day. If, on the other hand, he wished to secure a paid-up policy, he could make default in the payment of the premium, and then his duty was to transmit the original policy, duly receipted, to the company within sixty days after such default. These were conditions precedent in the one case to the maintenance of his rights under the original policy, and in the other to his right to a paid-up policy. Failure to perform either, if there were no circumstances adequate to excuse non-compliance with these conditions, involved a lapse of the policy and loss of all rights thereunder. This conclusion is sustained by the better authorities on the subject.

But cases of the general character of this sometimes arise, in which the circumstances are deemed adequate to justify the courts in relieving a party from such consequences, and in which such relief is deemed consonant with proper observance of the rights of parties under their contract. Does this case fall within that category?

§ 1584. *Non-payment of premium at time agreed. Excuse of failure to notify.*

On the 23d day of August, 1877, the assured applied to the company's agent to pay the premium then due. He had paid the premiums in all previous years to local agents. The company had authorized it, or at least had sanctioned it, by acceptance of the payment. With reference to the premium due August 23, 1877, he received no notice to do otherwise. A notice that the premium would be due on that day and that the holder of the policy might pay it at the office of the company in New York, or to an agent who should produce a receipt signed by an officer of the company, was mailed by the company, but it was not addressed to the complainant and was not received by

him. This was no fault of his. The agent to whom he offered to pay the premium refused to accept it. This, under the circumstances, was the refusal of the company. In the beginning, then, we find that the assured was deprived of the opportunity to pay his premium on the day it was due, and thereby keep his policy in force, by refusal of the company to accept the premium. Moreover, the agent informed the assured that the business of the company would be or then was in the hands of a receiver, and advised him not to make any more payments until the business of the company should be settled. Perhaps the agent was not authorized thus to speak for the company, but it is still a material fact that this information and advice emanated from one with whom the assured was authorized to deal as the local representative of the company; and the assured, it appears, was led to rely and rest upon this information. Meantime, the fact was that proceedings had been instituted and were then pending in the courts of New York for a dissolution of the corporation; and, on the very day the assured was seeking to pay the premium on his policy in Wisconsin, the company was enjoined in New York from exercising its corporate rights, privileges and franchises, except in certain very limited particulars. It is true that on July 18, 1877, an order was made permitting policy-holders to pay their premiums to the United States Trust Company; but again, by the fault of the insurance company, notice of this order was mailed under the wrong address and was never received by the complainant, nor, so far as the proofs show, did he know that such an order had been entered until March, 1878, when mention was made of it in a letter which he received from the secretary of the company. Under the circumstances stated, the complainant rested from August, 1877, until February, 1878, when it appears he wrote a letter, addressed to the receiver of the Universal Life Insurance Company, which the proofs indicate was a letter of inquiry, and which was probably thus addressed because he had been led to suppose, from statements made by the local agent of the company in August previous, that a receiver was in charge of the affairs of the company. To this letter the secretary of the company made answer by communication of date February 18, 1878, as follows:

"We beg leave to state to you that no receiver has been appointed for this company, and, further, to state to you that we think it is quite unnecessary to answer the questions you propound to the receiver, for the reason that your policy No. 4472 became absolutely forfeited, according to its terms, for the non-payment of the premium due August, 1877. You have, therefore, no such interest in the company's affairs as would warrant any reply to your questions."

Thus, after the company, by its own agent, had refused to accept the premium offered on the day it was due, and had given the assured no notice of opportunity to pay it elsewhere, and he had been led to rest inactive for months, when first he sought information to which he was, under the circumstances, then clearly entitled, he was curtly told, in substance, by the secretary of the company, that his policy had become absolutely forfeited for non-payment of the August premium, and that therefore he had no such interest in the company's affairs as would warrant a reply to his inquiries. In this manner was the assured dealt with at a time when, upon a showing of the facts then existing, no court deserving the name of a court of equity would have hesitated to compel either the acceptance of the unpaid premiums for the purpose of keeping the policy in force, or the acceptance of a surrender of the

policy as the basis of a right to a paid-up policy, as the policy-holder might elect.

But the complainant, still persistent in efforts to obtain information, on the 5th of March, 1878, addressed a letter to the superintendent of insurance of the state of New York, which, it seems, was put into the hands of the secretary of this company, and he replied, stating, among other things, that prior to the date when the premium of August, 1877, became due the company had mailed to the complainant a notice that that premium could be paid to the company direct, or to the United States Trust Company; that, if paid to the trust company, it would be subject to the order of the court in the matter, and that an order to that effect was made by the court on the 17th day of July, of which all the policy-holders had due notice. This statement was incorrect in several particulars. No such notice had been sent to the complainant, nor did the notice which the company misdirected, according to its own proof, state that the premium could be paid to the company direct, nor did the order itself so provide. The complainant was then informed that he had chosen to act upon reports and public assertions in reference to the affairs of the company, instead of making inquiry direct at the office. And this was said in the face of the secretary's letter of February 18th, in which the assured was informed that his policy was forfeited, and his requests for information were summarily refused, and treated as the inquiries of an impertinent intruder. In the letter of March 9th the secretary further says:

"As the matter now stands the company is still, under the order of the court, prevented from entering into any agreement or reviving any policies which have lapsed, or doing anything except to the extent permitted by the special order of the court issued in reference thereto. However much disposed we might be to reinstate your policy, *we cannot do so until we are clear of the court proceedings.* Then we can give the matter further consideration. We, of course, can make no promise to hereafter restore the policy on the payment of the premium, and can only say that we will consider such facts as you may have to present when we are able to act as a company."

Here the matter was left to rest until August, 1878, when correspondence began between the company and the complainant's solicitors. Now, if it be said that in March, 1878, the complainant was thus advised that the court in New York had in July, 1877, authorized the payment of premiums to the United States Trust Company, and that the complainant should then either have made payment, or within sixty days thereafter have transmitted his policy, duly receipted, and asked for a paid-up policy, it may well be replied that in the preceding February the secretary of the company had asserted to the complainant that his policy was already forfeited; and the statements in the letter of March 8th, just recited, were such as to naturally lead the assured to understand that his policy had wholly lapsed, and that if anything was thereafter done in the way of reviving it, it could only be done after the company was clear of the court proceedings, and after it could act as a company, and then only as an act of grace or favor. And thus the action of the company made it natural to suppose that nothing could be done by either it or the complainant until after its original power and authority to act were restored to it; and it was upon this theory, evidently, that the complainant's counsel acted from August, 1878, to March, 1879, as is shown by their letters of inquiry, in evidence, written to the company.

It is noticeable, also, that although the order of the court in New York,

made October 29, 1878, by which the company was authorized to resume business, required notice of the order to be sent to policy-holders, and gave to the latter ninety days after sending such notice in which to pay past-due premiums, no notice in obedience to that order was sent to the complainant, and it was not until about February 25, 1879,—nearly a month after the ninety days had expired,—that the complainant, by his counsel, was informed of that order, although his counsel had been in correspondence with the company since August, 1878. Finally, in March, 1879, the company was requested either to recognize the policy by accepting the past-due premiums or to issue a paid-up policy on transmission of the original, duly receipted. The reasons assigned by the company for refusing so to do were that the notices before mentioned were duly sent to the complainant; that he did not write to the company; and that he made no attempt to ascertain the facts, either from the company or its local agent in Milwaukee,—most of which reasons were, as we have seen, unfounded in fact. And further, as late as March 14, 1879, it was represented by the company that it was still in the hands of the court, with the order of October 29th yet in force and the application for a receiver still pending. Now, undoubtedly, if the circumstances were such as to excuse the complainant from literal compliance with the condition of the policy as to its transmission, duly receipted, it was his duty, if he would avail himself of the right to a paid-up policy, to act with requisite promptness after those circumstances ceased to exist. And I think such action was taken when a surrender was offered in March, 1879. In the light of all the facts and circumstances of the case, I have no hesitation in holding that the complainant had at that time a right to take the necessary steps to secure a paid-up policy. After all that transpired between the complainant and the company, from August 23, 1877, to March, 1879, I think the company should be held estopped to assert that the complainant forfeited his rights by failing either to pay the premium on the 23d day of August, 1877, or to transmit the policy receipted and to demand a paid-up policy within sixty days after such default.

I have carefully examined and thoroughly considered the authorities cited on the argument, and especially the case of *Whitehead v. Universal Life Ins. Co.*, decided by the supreme court of Mississippi, unreported, and in which a manuscript copy of the opinion has been furnished. In that case the court held that the clause in the policies of this company requiring the policy to be transmitted, duly receipted, within sixty days after default in the payment of any premium, if a paid-up policy was desired, was a condition precedent; that time was of the essence of the contract, and that to entitle the assured to a paid-up policy, he must have strictly complied on his part with the literal terms of that condition, notwithstanding the company was disabled by the proceedings against it in the courts of New York to issue a paid-up policy. The question arose in that case on demurrer to a bill to enforce the issuance of a paid-up policy, filed by the representatives of the assured after the latter's death; and it was undoubtedly well decided that the election to take a paid-up term policy should have been made during the life of the assured, and on that ground alone the demurrer was sustainable. But, on the general question decided, it is to be observed that the case does not show that the bill set out the proceedings in New York against the company, further than to state the institution and general character of the proceedings, the injunctive order of the court of August 23, 1877, and that such order continued in force until October 29, 1878. In view of the manner in which the question there arose,

the fact that the bill was filed after the death of the assured by his representative, and of the absence of many of the most material facts brought out in the case at bar, I do not regard the decision in the Mississippi case as an authority that should be deemed controlling here.

Referring again to the proceedings in New York, it is, perhaps, worthy of observation that it appears from the order of the court made October 29, 1878, by which the company was declared solvent, that pending those proceedings the company procured releases of policies from the holders to the extent of over \$7,000,000, and that policies which had become claims by the death of the insured and matured endowments, to the extent of over \$600,000, had been released one-half by the holders thereof. These facts were recited in the order, in connection with the judgment of the court, that the company had become solvent, and show that there was cause for the institution of the proceedings, and that the disability of the company to act arose from its financial condition and the consequent intervention of the court; and that it was only removed when solvency was brought about by the cancellation of a large amount of its liabilities.

A decree will be entered requiring the defendant to issue and deliver to the complainant a paid-up policy for \$600, on surrender of the original policy, properly receipted,—the special terms of which decree can be settled hereafter.

WATTS v. PHOENIX MUTUAL LIFE INSURANCE COMPANY.

(Circuit Court for New York: 16 Blatchford, 228-232. 1879.)

Opinion by BENEDICT, J.

STATEMENT OF FACTS.—This action was tried before the court by consent. It is brought to recover damages for the breach of a contract of insurance upon the life of the plaintiff, James R. Watts.

The defendant, by its policy, agreed, in consideration of \$103.20 paid by Catherine Ann and Mary Watts (mother and sister), and of the annual payment of a like amount until he shall have paid ten full years' premiums, to assure the plaintiff's life in the amount of \$1,000, and to pay that amount to him on the 28th day of February, 1883, when he shall have attained the age of forty years, or, should he die previous to attaining that age, to Catherine Ann and Mary Watts, equally. The policy contained this further provision: "It being understood and agreed, that if, after the receipt by this company of not less than two or more annual premiums, this policy should cease in consequence of the non-payment of premiums, then, upon a surrender of the same, provided such surrender is made to the company within twelve months from the time of such ceasing, a new policy will be issued for the value acquired under the old one, subject to any notes that may have been received on account of premiums, . . . without subjecting the assured to any subsequent charge, except the interest annually, in advance, on all premium notes remaining unpaid on this policy." The plaintiff paid the premiums, as agreed, for nine years, in cash. For the remaining part he gave four notes, still outstanding, upon which he has paid the interest annually. In May, 1877, the plaintiff determined to surrender the policy and take a new policy for the value acquired under the old one, in accordance with the provisions above quoted. A dispute arose as to whether the defendant had the right to insert in such new policy a provision that the policy should be forfeited by

the failure to pay, when due, the annual interest on the outstanding notes that had been given for part of the premiums. The defendant tendered a policy containing such a clause, which the plaintiff at first refused to accept. Subsequently, he concluded to waive his objection, and tendered to the defendant, for signature, a policy drawn out in writing, which, while differing somewhat in form from the printed form used by the defendant, was the same, in legal effect, as the policy first tendered by the defendant and rejected by the plaintiff. The defendant refused to sign the written policy, in the following language: "As we have a regular printed form, upon which we issue all paid-ups, it would be neither fair nor consistent to make an exception in your case." It appeared in evidence, that, prior to tendering the written policy, the plaintiff had applied to the defendant, without success, for one of their printed forms, stating that he desired it, to enable him to tender a policy for their signature. Upon the refusal to sign the written policy, the plaintiff brought this suit, wherein he seeks to recover, as damages for a breach of the agreement to issue a new policy for the value acquired under the old one, the full amount of the premiums for the nine years, including that portion paid in cash and the part for which his notes are still outstanding.

§ 1585. *Agreement for paid-up policy on surrender of existing one, broken how.*

The question discussed by counsel, whether the policy tendered in the first instance by the defendant was a compliance with the contract contained in the original policy, does not require to be decided on this occasion, for the reason that the refusal of the defendants to execute the written policy subsequently tendered by the plaintiff for their signature, was, in legal effect, a refusal to deliver any new policy at all. It was not unreasonable for the defendant to prefer to sign a policy according to its printed form, but when the plaintiff presented for execution a policy to which the defendant could make no other objection than that it was not one of its regular printed forms filled up, it was incumbent on the defendant, if it preferred to use its own blank, to fill up such a blank and give it to the plaintiff, in lieu of the written one he had sent to it for signature; and this the more because the plaintiff had applied to it for a printed blank and had been refused. The defendant contented itself with refusing to execute the written policy and returned it to the plaintiff unexecuted. This action was, in legal effect, a refusal to issue any new policy, and constituted a breach of the provision above quoted from the old policy.

§ 1586. *Joinder of beneficiaries of policy in suit thereon.*

But, the objection is taken to any recovery herein, because the action is brought in the name of the plaintiff, without the mother and sister, to whom, in case of death, the amount insured was to be paid. The objection appears to be fatal. It is a general rule that, on a life policy in the ordinary form, when the money to become due upon the death of the insured is payable to a certain person named as beneficiary, the policy and money payable upon the death belongs, from the time of the delivery of the policy, to the person designated to receive the money, and he alone can maintain an action upon the policy. *Martin v. The Franklin Ins. Co.*, 9 Vroom, 140. The present policy differs from the ordinary policy only in this — that, in case the insured shall live to attain the age of forty years, the money is then to be paid to him. But, the mother and sister are none the less beneficiaries under the policy; and the agreement in the policy, to issue a new policy in place of the old one, wherein the mother and sister were to be beneficiaries as in the old one, is an

agreement with them as well as with the person whose life is insured. It follows that, in any action to recover damages for the breach of that agreement, the mother and sister should be joined as parties plaintiff. If this be otherwise, still the plaintiff can only recover nominal damages.

§ 1587. *On refusal to issue paid-up policy no rescission can be made after lapse of years.*

The plaintiff claims to recover back the premiums paid, upon the theory that the contract is rescinded. But this contract has been in force and acted upon by the parties for nine years, during which time the life of the plaintiff has been insured and the defendant has been subject to the risk. It is impossible, therefore, to put the parties back in their original position, and there can be no rescission of the contract. The case made by the plaintiff is that of a breach by the defendant of a contract partly executed; and it was not enough to prove the breach charged. There must, also, be proof of the damage sustained. The case is wholly bare of such proof. There is evidence of the amount paid in premiums, but this evidence furnishes no basis from which to compute the actual loss resulting from the failure to obtain the new policy provided for in the contract sued on. In the absence of any evidence from which the damage can be arrived at, the recovery must be limited to nominal damages.

SHATTUCK v. MUTUAL LIFE INSURANCE COMPANY.

(Circuit Court for Massachusetts: 4 Clifford, 598-611. 1878.)

STATEMENT OF FACTS.—Defendant, an insurance corporation of New York, having complied with the statutes of Massachusetts, issued a policy on the life of plaintiff's intestate through an agent, providing that it should be void and premiums paid forfeited for non-payment of premiums; which were not all paid up to the death. The question is, was the policy kept in force by reason of the Massachusetts Statutes of 1861, chapter 186.

§ 1588. *Contract of insurance complete when and where. Agency.*

Opinion by CLIFFORD, J.

Contracts of insurance are complete when the proposals of the one party have been accepted by the other by some appropriate act signifying such an acceptance, and it follows from that rule that the place or seat of the contract is the place where it was accepted. Consequently if an agent appointed in a state other than that which chartered the company, and in which the company has its home office, forwards the requisite papers to that office, and a policy is thereupon executed there, and mailed directly to the applicant, the contract is a contract made in the state where the home office is situated; and since the acceptance of the proposals is the test of completion, it follows that a transmission of the policy by mail to the agent, to be delivered by him to the applicant, if the policy conforms in all respects to the proposals, would have the like effect, unless by the terms of the policy it was not to be binding until it was countersigned by the agent who forwarded the proposals. May on Insurance, § 66; Hyde v. Goodnow, 3 N. Y., 266; Huntley v. Merrill, 32 Barb., 566; Western v. Ins. Co., 12 N. Y., 263.

Agents are appointed by the defendant corporation for certain specific purposes, but the agreed facts show that they are not authorized to make, alter or discharge contracts, or to waive forfeitures. Policies are issued by the company in consideration, among other things, of the payment by the assured of

the first and each succeeding premium, at his office in New York, where the policy in this case was issued, and where the loss, if any, is payable. For the convenience of such of the assured as transmit their premiums to the home office, the company appoints agents who are authorized to receive such premiums, but only on the production of the company's receipt, duly signed by the president, vice-president, secretary, assistant secretary or cashier thereof. These agents are only authorized to receive applications from persons desiring insurance, and to forward the same to the home office of the corporation, where, if the application is accepted, a policy is issued and sent by mail to the agent in the state in which the application is made, to be there delivered by said agent to the insured upon payment by the insured, to the agent of the first premium. Applications of the kind, however, are not forwarded by the agents to the home office of the company until the applicants have been examined by physicians appointed by the company in the state in which the applicants reside, and have been recommended by said physicians as suitable subjects for insurance in said company. Receipts for all subsequent premiums are, for the convenience of the policy-holders, forwarded from the home office to the agent, to be delivered by him in his state to the insured upon payment of the same.

On the 22d of November, 1869, the policy in this case, on the life of the plaintiff's intestate, was issued at the home office, in New York, by the defendant corporation, in the sum of \$1,000, a copy of which is annexed to the agreed statement. Before that date the company had complied with the requirements of the General Statutes of Massachusetts in respect to the appointment of an agent in the state, upon whom all lawful processes against the company might be served. Gen. Stat., ch. 58, secs. 68, 69. Said policy was sent by mail to the agent of the company, and was by him delivered to the insured, and the agreed facts show that the insured died November 8, 1875, and that due notice and proof of his death was given by the plaintiff to the defendant corporation. It is admitted by the counsel of the plaintiff, in his argument, that proposals for insurance were made by the decedent in due form, and that they were properly forwarded by the agent of the company to the home office of the defendant corporation, and that the defendant corporation, at their home office, accepted the proposals, and there issued the requested policy, and sent the same by mail to the agent who forwarded the proposals, to be delivered by said agent to the insured upon payment by the insured, to the agent, of the first premium. Beyond all question the admissions of the plaintiff to that extent conform in every particular with the agreed facts, and the plaintiff also admits that the contract in such a case is complete when the proposals of one party have been accepted by the other by some appropriate act signifying the acceptance, and that the place of the acceptance is the place of the contract.

Suppose that is so, of which there can be no reasonable doubt, the court is then of the opinion that the proposals of the decedent were accepted by the defendant corporation at their home office, within the plaintiff's own rule of law; that the defendant corporation in issuing the policy in exact accordance with the terms of the proposals, and in sending it by mail to the agent who forwarded the proposals of the applicant to be delivered there by said agent, to the insured, upon payment by the insured, to the agent, of the first premium, did signify the acceptance of the proposals by an appropriate act, if not by the only act adapted to make known their intention to insure the life of the ap-

plicant. What the plaintiff contends is, that before the premium was paid, the applicant had not assented to the policy, and that he had not complied with the conditions upon which the policy was issued; but the agreed facts show that the premiums were paid by the insured and were received by the defendant corporation up to and including May 22, 1874, four years and a half from the date of the policy, since which time no money was paid on account of premiums. Nor can the proposition submitted by the plaintiff be sustained, for three reasons: 1. Because the proposals were submitted by the decedent. 2. Because the contract became complete when the proposals were accepted by the defendant corporation. 3. Because acceptance of the proposals without variation was made known to the applicant in the usual and accustomed mode.

Attempt is made to support the theory of the plaintiff by reference to the case of *Ins. Co. v. Young*, 23 Wall., 85, in which the opinion was given by Mr. Justice Swayne, but it is obvious that the case affords no support whatever to the theory, for reasons which pervade the whole opinion. 1. Because the acceptance was a qualified one. 2. Because new terms were added to the proposals. 3. Because the proposals contained conditions. 4. Because the delivery was conditional. 5. Because the policy did not conform to the proposals.

§ 1589. *Home office of an insurance company the place of contract.*

Much discussion of the other points in the case is unnecessary, as they are the same as those decided in the preceding case, to which reference is made for the reasons which induce the court to hold that the home office of the defendant corporation is the place of the contract, and that the Massachusetts statute referred to is not applicable in such a case. Pursuant to the agreed facts the defendants are entitled to judgment. Judgment for defendants.

IN RE PROTECTION LIFE INSURANCE COMPANY.

(Circuit Court for Illinois: 9 Bissell, 188-198. 1879.)

Opinion by BLODGETT, J.

STATEMENT OF FACTS.—This is an application by the assignee of the bankrupt, the Protection Life Insurance Company, for an assessment upon the policy-holders, which it is claimed the company should have made, but neglected to make, prior to the institution of winding-up proceedings by the auditor of this state.

The material facts bearing upon the application seem to be these: The original charter granted the company by the general assembly of Illinois in March, 1867, authorized it to do a life insurance business as a mutual company, all policy-holders becoming members and being entitled to a vote and a voice in its management, and to participate in its profits. By an amendment to the charter made in 1869, the company was authorized to insure lives on the non-participating plan, and to transact the business of the company, on the joint stock or mutual principle, or both, and authorized a capital stock of \$100,000, to be divided into shares of \$100 each, which stock was to be issued to the owners of the guaranty capital theretofore issued by the company, and the company was empowered to declare such dividends to the stockholders as its trustees should deem advisable.

Some time in 1871 the company commenced to issue policies upon a plan not indicated in its charter or its amendment, called the "contributory plan."

The substantial features of this plan were that each policy-holder was to pay to the company, on the death of the holder of a policy in force, a sum fixed or provided for in the policy, and the money thus collected by the company was to be paid over to the person or persons to whom such death-loss was payable. A small sum as a membership fee was to be paid to the company. The company was to make the assessment on the death of a policy-holder, and give notice thereof in the manner provided by the terms of the policy, and a failure or refusal to pay such assessment was to forfeit all rights of the person so assessed under his policy. The plan cannot be called a "mutual plan," within the meaning of the original charter, because the policy-holders had no voice in the management of the business and had no interest in the profits of the company.

During the time the company transacted business several forms of policies were used, which are referred to as policy No. 1, policy No. 2, policy "A," policy "B," policy "B B," and policy "B B 2," and "Commercial League." The assignee states that the policy-holders to be affected by the proposed assessment are as follows:

Holders of old "A" policies, about.....	2,000
Holders of old "A" policies, about.....	5,000
Holders of old "B" policies, about.....	6,000
Holders of old "B B" policies, about.....	3,000

I shall therefore consider only the liability to assessment of the holders of these policies, and this liability must be found, if at all, solely in the contract or policy itself, because this kind of contract of insurance is *sui generis*, and not provided for either in the general laws of this state regulating insurance, or in the special charter of the company. The obligations of the company and policy-holders to each other must be found wholly in the terms of the contract. The terms of the forms "A" and "B" do not essentially differ. I read from the "B" policy the terms upon which it is issued, which are as follows:

"The Protection Life Insurance Company, of Chicago, in consideration of the representations and agreements made in the application therefor, and the sum of \$14 for membership fee, and a deposit equal to ten assessments, as hereinafter stated in condition 1 of this policy, for payment of death losses in advance of collection of assessments, amounting to \$——, and of the further sum of \$4 to be paid on the —— day of —— in each year hereafter, for expenses, does hereby issue this policy to ——, of ——, county of ——, and state of ——, with the following agreements:

"Upon the death of the said ——, he having conformed to all the conditions hereof, and on satisfactory proof of said death being filed with the secretary of the said company, an assessment shall be made upon all the policy-holders of the company at the time of the assessment, according to the policy then held by each, for as many dollars as there are policy-holders in the company whenever the number of policy-holders does not exceed twenty-five hundred, and whenever the number of policy-holders is more than twenty-five hundred, then the assessment shall be for an amount in proportion to the membership of the company, not exceeding the limit of this policy, in the ratio of \$1 for each \$5,000 policy-holder, and such a proportional part of \$1 for each \$2,500 policy-holder as \$2,500 is of the total number of policy-holders in the company, and the sum collected on such assessment, less the added cost of collection, shall be paid to ——, or his legal representatives, at the

office of the company, in Chicago, within ninety days from the time of acceptance of said proof of death; provided, however, that in no case shall the payment upon this policy exceed \$2,500, and in case any of said policy-holders who shall have paid all dues and previous assessments refuse or neglect to pay the assessment made upon them on this policy, the company agrees to pay the said defaulted assessment.

"And it is further agreed that the company guaranties the payment of at least \$1,000 upon this policy, if in force, in case of the death of the said insured within one year from the date hereof. And the application of such further sums thereon in excess of the \$1,000 above guarantied as may be collected by assessment, as hereinbefore stated, from the policy-holders, not exceeding the sum of \$2,500."

Condition 2 of this policy provides for the manner in which the assessment shall be made and notice thereof given, and the time within which it shall be paid; and provides for a forfeiture of the policy in case the payment is not made within the time required. I will here say, in regard to this condition, that it is but a statement in detail of the manner in which the company is to proceed to collect the assessment, and provides that the assessments shall be made monthly for the death-losses of the preceding month; and notice shall be given through the mail to the parties assessed, who shall have until the 5th day of the next ensuing month in which to make payment, and if they do not make payment within that time their policies are to be forfeited. And it specially provides that estimates for monthly assessments are to be based on the number making timely payment of the last assessment, and will include all claims proven and accepted prior to the making of such assessment, and not previously assessed.

It will be seen from a study of these policies that two leading principles run through them all. *First.* That the means for paying a death-loss were to come from assessments upon the other policy-holders. The company had no treasury or fund to meet these losses, but the policy-holders were each to contribute, if they deemed it for their interests to do so, and the contributions so collected were to be paid the beneficiary of the death-loss. *Second.* A policy-holder when assessed was at liberty to pay or not as he elected. The assessment was to be made upon "the policy-holders at the time of the assessment," thus showing that those who had defaulted on previous assessments, and thus lapsed out, were not to be treated as liable to assessment.

For the purposes of the business contemplated by this plan, the company was a mere machine to take proof of death-losses, make assessments and pay over the money contributed to the party entitled thereto. By the "A" and "B" forms of policy the company guarantied the collection of at least \$1,000 on the assessments, and also agreed, in case any of said policy-holders who had paid all previous dues and assessments should refuse or neglect to pay the assessments made on them, to pay the defaulted assessments; but I presume it will hardly be claimed that this guaranty gives the company a right of assessment — certainly not until the company has fulfilled its guaranty. Aside from these guaranties the "A" and "B" policies create no obligation on the part of the company save to make an assessment and pay over what is received upon it.

An assessment under these two forms of policy does not make the policy-holders debtors to the company, so as to authorize the company to bring a suit in case of neglect or refusal to pay an assessment, and it is very clear to me

that if the company could not obtain a right of action by making an assessment, as provided in the policies in case of a death-loss, the court cannot confer such a right on the assignee by an assessment on the policy-holders. If the company could not coerce payment, I do not see what power of the court can be invoked to aid the assignee in the premises. The whole organization seems to have been purely voluntary.

It is claimed on the part of the petitioner that the terms of the application and the condition of the policy, when taken together, make out a promise by the policy-holder to pay his assessments; but when the whole of the "A" and "B" policies are taken and construed together, I think it very plain that the company did not intend to assume any obligation to the holder of a death-loss beyond its undertaking to assess and its guaranties.

The "BB" policy reads as follows: "The Protection Life Insurance Company, in consideration of the representations and agreements made in an application therefor, and of the membership fee paid, and of an advance premium for the payment of all death-losses and costs of collection for one full year from the date hereof, to be paid and used as in condition 2 of the policy, does hereby insure the life of ———, in the sum of ———, for the term of one year from the date hereof."

Condition 2 provided for the payment of a fixed amount of cash to the company at the time of the issue of the policy sufficient to meet all assessments for death-losses during the year, or for giving a premium not payable on demand, to be used on the payment of the policy; and the cash paid to the company or the premium note was to be apportioned in payment of death-losses and expenses, as follows:

"On the death of each policy-holder in said company the said insured agrees to pay in common with all contributing members thereto, according to the age and amount of insurance in each, as shown in said company's schedule of assessment rates (printed on the back hereof), his or her proportion of the loss; and for all such death-losses in monthly groupings or payments, as hereinafter described, and ten (10) cents to cover the cost of collection. The estimate for assessments to pay death-losses are to be made monthly, on the basis of the number that made timely payments on the last assessment, and will include all claims proven and accepted prior to the making of such estimate and not previously assessed for; and printed notices, giving the name and residence of each deceased member, and the amount of his or her insurance, the names of parties joining in the proofs of death, and the amount of assessment therefor, will be dated and sent (as hereinafter stated) to said party insured, or to his or her legal representative, on or about the 6th day of the month thereafter; and the full amounts of all monthly assessments are to be paid by the said party insured from and after the date of this policy, and so long as the same remains in force.

"If the premium of the said party insured consists of current funds (or of a sufficient amount of advanced money), the notices of assessment will be receipted before being sent, and their amount will be taken from the moneys held by the company; but if the premium consists of a note made payable to said company on demand, the mailing of each assessment notice to the said party insured, or to his or her legal representative, shall be considered and held as a proper and legal demand for the payment of at least that amount of said note; and it shall be the duty of said party insured, or his or her legal representative, to pay the amount thus demanded, inclosing the assessment notice

with the remittance, at the home office of the company, in Chicago, on or before the fifth (5th) day of the next month, after the printed date of such assessment notice; then on receipt thereof, said company will mark the assessment notice 'paid,' and forward it (in manner provided in condition 4) to the said party insured, to his or her legal representative, and all such payments of assessments are hereby acknowledged by said company as payment on the annual premium note of the said party insured. But, if any such monthly assessment is not paid within the time and in the manner above specified, then this policy shall be null and void, and no person shall be entitled to damages, or the recovery of any moneys paid for insurance while the policy was in force; nor shall the said premium note be nullified or impaired in legal and binding force until the defaulted monthly assessment and all damages and costs of collection and expenses attending are paid, and this policy is returned to said company for cancellation. If the said party insured shall at any time during his or her insurance year pay the last assessment for which he or she was enumerated, and return this policy to said company for cancellation, then the said premium note will be canceled and returned, and any balance of moneys held will be refunded, without any further lien or claim by said company; and at the end of the insurance year, all monthly assessments being paid to that date, the premium note or any balance of premium money held will be returned by the said company to the said party insured; and any moneys paid on premium notes for quarterly or semi-annual payments will be indorsed by the company on such notes and held subject to the same rules of use or return as hereinbefore specified."

The "B B 2" policy does not differ in any material particular, for the purposes of this case, from that of the "B B" form; and the leading provision in both is that a fixed sum is to be paid in advance or secured by a note for the payment of death-losses for a full year, and the sum of money so paid, or the note, is to be assessed monthly for the death-losses which have occurred during the preceding month "on all policy-holders who have made timely payment of the last assessment" — of which assessment due notice is to be given; and in case a note is given, the assessment must be remitted to the company by the 5th of the next month, and a failure to so remit makes the policy null and void, but leaves the person assessed liable on his note for the assessment which he thus neglects to pay.

§ 1590. *Assessments cannot be made at instance of assignee in bankruptcy.*

It will be remembered that the assignee shows to the court, as the reason for this application, that the company neglected to make assessments, and that over sixty death-losses accrued against the company for which assessments should have been made, but which the company neglected to make, and therefore the court is asked to exercise the functions of the company, and make now the assessments which the company should have made from month to month.

It is obvious that no assessment need be made on those who paid their cash into the hands of the company, as an "advanced premium for one year," while as to those who gave notes liable to monthly assessments, it is evident that they had the right to have these assessments made monthly in strict conformity with the terms of the policy, so that they might elect to lapse out if the assessments were too heavy, or for any other reason. In my view, the failure of the company to make the assessments regularly from month to month cannot now be retrieved by an assessment by the court. The parties

by their contract, if it is a contract, had provided a certain agent for the making of these assessments, and the court cannot substitute itself in the place of the agent which the parties agreed upon. Only those are to be assessed for payment of a death-loss who have made timely payment of the preceding assessments, showing beyond doubt that this was the intention of all parties to this association to allow any one who chose to do so, to let his policy lapse on any monthly assessment; and while there are words in condition 2 of the "B B" and "B B 2" policies, which show that the company might collect one defaulted assessment, yet it is also provided that by so paying he was to have a surrender of his premium note.

§ 1591. *It seems that loss should be paid before levying assessment.*

The main feature of the plan on which the company started is still substantially retained — that death-losses were to be paid by voluntary contributions of the other policy-holders; and in the light of this distinctive feature of the relations between the company and the policy-holders, I have doubts whether the company can have any legal claim upon policy-holders until it had paid the loss for which an assessment is made. The case is widely different from the cases in this court, where assessments have been made by the court on stockholders, for their unpaid stock liable to assessment; and also from the liability of members of a mutual company, to assessments under the terms of their charter.

§ 1592. *After bankruptcy of a "contributory" company no assessments for death-losses can be made.*

There seem to me, also, other very cogent reasons why this assessment cannot and should not now be made. This contributory plan, so far as it had the elements of a contract, was based upon the understanding that those who paid assessments did so with the expectation that their policies would be paid when a death-loss thereon accrued; that the company, by its exertions, would keep up its organization and membership so as to give assurance of payment when the contingency occurred which should entitle these persons to demand payment, and I take it that all will concede that no one should be compelled to pay unless he thereby secured to the beneficiary of his policy a right to compel payment. But this company is now dead. All money paid on any assessment which the court might make would be hopelessly lost. It would secure no right to the person paying, and I cannot see what conscionable reason there is for enforcing this assessment. Suppose the company, in the exercise of its delegated functions under any of these policies, had sent out with its notice of an assessment information to the person so assessed that none of their policies would be paid; can it be supposed that payment of an assessment thus demanded would or could be enforced in a court of justice? True, the party in whose favor this last supposed assessment was made might say all the assessments on his policies had been paid up to the time of the death of the insured, and he had earned the right to have his loss paid, but that answer would hardly satisfy those who had the right to demand an equivalent for their money before parting with it. The dilemma in which the holders of these death-losses find themselves is one which, it would seem, might well have been anticipated when they became parties to a scheme like this. It was an experiment, and depended for its success entirely on keeping up the confidence of the policy-holders in each other and the company to such an extent as to keep the classes of insured liable to contribute full by new members being induced to join as fast as old ones lapsed or died out.

§ 1593. *Amount to be assessed not assets.*

But the main and insuperable objection in my mind to making this assessment is that under all the policies on principle, and under most of them by their terms, the amount to be assessed is not an asset of the company. It is so much money which each policy-holder agrees to contribute to pay a death-loss, and when collected does not belong to the company, nor to its general creditors, but to this special class of creditors, most of whom could only maintain a suit against the company on its guaranties or for damages by reason of its neglect to make the assessment. The money which might be realized would not be general assets but only come to the assignee to be paid over at once to these special creditors, while in cases of assessments upon stockholders and upon members of mutual companies the money collected becomes a general fund for the payment of all creditors.

The prayer for assessment is therefore denied and the petition dismissed.

§ 1594. Assent.—When an application for life insurance was made to the agent of a company, and the note of the applicant, which was never paid, was given for the first instalment of premium, the receipt of the agent setting forth the terms of the policy to be issued, conditioned upon the company's acceptance of the application, and providing for the return of the premium if the application should be rejected, and where the company thereupon issued a policy, the terms whereof were different from those described in the receipt, and to the disadvantage of the applicant, who never accepted the policy with such modified terms, *held*, that there was no binding contract of assurance. *Insurance Co. v. Young*,* 23 Wall., 85.

§ 1595. Wager.—An insurance upon a man's life taken out by himself for the benefit of another, which is a mere cover for a wagering contract, cannot be made the basis of a valid claim by the beneficiary. *Brockway v. Mutual Benefit Ins. Co.*,* 9 Fed. R., 249.

§ 1596. Insurable interest; fraud.—A debtor insured his life in the sum of \$2,000, and assigned the policy, with consent of the underwriter, to a creditor. The judge instructed the jury that if the creditor was such at the time of the loss, he could recover the amount insured though the debt due him might be much less than that. But there could be no recovery on the policy if the assured confederated with the alleged creditor to obtain and then assign the contract to him, there being in fact no relation, or agreement for a relation, of debtor and creditor between such parties. *Swick v. Home Ins. Co.*, 2 Dill., 160 (§§ 1662-68).

§ 1597. If there was an understanding between H., the assured, and S., the alleged creditor, that the policy should be taken with a view of meeting the claim of S., and if S. paid the premium with the knowledge of the underwriter's agent, and afterwards the policy was assigned to S. for debts due or agreed to be created, and the underwriter agreed to the assignment, the policy and assignment were valid. *Ibid.*

§ 1598. Payment of premium.—An underwriter may insist upon a provision of the policy requiring payment in advance of interest on premium notes on pain of forfeiture. Nor is a clause in the policy providing for commutation on failure to pay the annual premiums inconsistent with the provision for forfeiture on failure to pay the interest as agreed. *Anderson v. St. Louis Ins. Co.*,* 1 Flip., 559.

§ 1599. Equity will not relieve against a forfeiture of a life insurance policy. *Ibid.* See *Tait v. New York Ins. Co.*,* *id.*, 288.

§ 1600. Where it is provided in a policy of life insurance that the premium must be paid in advance, in the life-time of the assured, tender of the same after his death will not suffice, and this though a policy has been issued and sent forward for delivery. *Giddings v. Insurance Co.*,* 102 U. S., 108.

§ 1601. Where a condition is subsequent and it is broken, relief may be given upon equitable terms; but where it is precedent, and neither fulfilled nor waived, no right or title vests, and equity can do nothing for the party in default. *Ibid.*

§ 1602. Tender of payment of interest on the last day of grace of a premium note is good against a provision in a life insurance policy for a forfeiture if interest is not paid when due. *Jarman v. St. Louis Ins. Co.*,* 1 Flip., 548.

§ 1603. Tender of a past due premium during the mortal illness of the assured will not of itself save a policy otherwise forfeited. *Winindger v. Globe Ins. Co.*,* 3 Hughes, 257.

§ 1604. Same — Notice.—A life insurance company is not bound to give the assured notice when his premium becomes due; nor is the mere personal promise of a local agent, not authorized to act in the matter for the company, binding upon the latter; nor is the failure of the

company to put into the hands of the local agent a premium receipt at the time of the falling due of the premium a waiver of a requirement of the payment at such time. *Morey v. New York Ins. Co.*,* 2 Woods, 663.

§ 1605. *Same.*—A life insurance company may waive forfeitures, so as to give renewed effect to the insurance, where the premium has not been paid when due; and such a waiver is effected by the act of the company in receiving and retaining the premium after that time. *Jacobs v. National Ins. Co.*,* 1 MacArth., 632.

§ 1606. *Same.*—Any agreement, declaration, or course of action on the part of an insurance company, which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop the company from insisting on a forfeiture, though that might be claimed under the letter of the contract. This principle applied to the case of a discontinuance by an underwriter of an agency at a particular place, followed by notice of different places where payment was to be made in particular years, and then by an omission of such notice, without knowledge on the part of the assured. *Insurance Co. v. Eggleston*,* 96 U. S., 572; *Phoenix Ins. Co. v. Doster*,* 106 U. S., 30; *Insurance Co. v. Wolff*,* 95 U. S., 326; *Seamans v. Northwestern Ins. Co.*,* 1 McC., 508; *Winindger v. Globe Ins. Co.*,* 3 Hughes, 257.

§ 1607. *Same.*—If the conduct of an insurance company has been such in dealings with the assured as to induce a belief that so much of the contract as provides for a forfeiture if the premium be not paid on the day it is due would not be enforced if payment were made afterwards, within a reasonable time, the company cannot be permitted to allege such forfeiture against the assured if he has acted upon that belief. But this principle does not apply to a forfeiture not affected by such action of the company. *Insurance Co. v. Wolff*,* 95 U. S., 326.

§ 1608. *Same.*—Receiving premium from an agent of the assured without notice that the assured is at the time within a prohibited district is no waiver of a forfeiture unless the fact was known when the premium was received. *Ibid.*

§ 1609. *Paid-up policy.*—An insurance company issued a policy upon the life of A., on the endowment plan, giving A. the right, after two annual payments of premium, to a paid-up policy for as many tenths of the amount originally assured as there had been annual premiums paid *in cash*. Two annual premiums were paid, part in cash and part by note, receipts being given specifying the cash payments and referring to the balance, represented by the notes, as a loan. *Held*, that the assured was entitled to a paid-up policy without deduction of the amount due on the notes, but that the amount due on them should be a lien upon the new policy, and payable on the death of the assured, especially where this had previously been the practice of the company in other cases. *Insurance Co. v. Dutcher*,* 95 U. S., 269.

§ 1610. *Continuous construction of policy.*—An insurance company is bound by the construction which it has for years put upon the same kind of contract with the one in question. So *held* of a case in which a company had followed the practice until a certain time of issuing paid-up policies in certain cases to policy-holders on demand, without deducting the loans to such holders, and then, without changing the terms of the policies, which were not clear upon the subject, refused to do so thereafter. *Dutcher v. Brooklyn Ins. Co.*,* 3 Dill., 87.

§ 1611. *If it has been the invariable custom of an insurance company to transmit to the assured a statement of the amount of the premium due after deducting the dividend, with notice of the time when and place where and the person to whom the premium could be paid, the insured has good reason to rely on a continuance of such action, and the responsibility is with the company for a failure so to act whereby the time of payment passes by.* *Contra* if such case had not been uniform. *Phoenix Ins. Co. v. Doster*,* 106 U. S., 30. See *Seamans v. Northwestern Ins. Co.*,* 1 McC., 508.

§ 1612. *Receiving draft.*—An insurance company receiving for a premium a negotiable draft is bound to present the same for acceptance and payment, and to protest it if dishonored, and cannot declare the policy forfeited if it neglects to do so; nor is the case affected by a clause to the effect that the omission to pay at maturity any note or obligation for premium shall render the policy void, "without notice to any party or parties interested herein." *Pendleton v. Knickerbocker Ins. Co.*,* 7 Fed. R., 169. See S. C.,* 5 Fed. R., 238.

§ 1613. *Massachusetts non-forfeiture act.*—Policies of life insurance issued by foreign companies, though doing business in Massachusetts and insuring its citizens, are not within the non-forfeiture law of that state. *Smith v. Mutual Life Ins. Co.*,* 5 Fed. R., 582.

§ 1614. *Re-insurance.*—The Union Central Life Insurance Co. assumed the insurance contracts of the Cincinnati Mutual Co., and issued the paid-up policy in question. "If at that time the Cincinnati Mutual held the notes of the assured for a part of the annual premiums of three years, and instead of requiring their payment transferred them to the Union Central Life, who, in issuing the new policy, instead of requiring their payment agreed to treat them as a loan upon the policy, requiring the assured to pay interest annually upon them, it could not be claimed that such interest should be treated as a premium to be paid in from the paid-up

PARTIES ENTITLED TO BENEFIT OF THE CONTRACT. §§ 1615-1625.

policy." Swing, D. J., in an action upon the paid-up policy. *Gardner v. Union Ins. Co.*,* 5 Fed. R., 430.

§ 1615. **Time of essence of contract.**—Where a life policy provides that it shall be void upon the non-payment of the premium within the prescribed time, such payment is a condition precedent, and time is of the essence of the contract. Impossibility of performance constitutes no exception to the operation of the rule. *Tait v. N. Y. Ins. Co.*, 1 Flip., 288.

§ 1616. **War.**—A policy of insurance which indemnifies a public enemy against loss in time of war is unlawful; and if previously entered into is abrogated when war occurs. *Ibid.*

§ 1617. **Distinction between a contract of insurance and the relation of debtor and creditor considered with reference to a state of war.** *Ibid.*

§ 1618. **The effect of the late civil war upon contracts of life insurance previously entered into by parties residing in the insurrectionary states, with underwriters in the north, was merely to suspend, not to destroy, the same; and upon tendering, at the close of the war, premiums that fell due during the war, such contracts would be reinstated. It was the duty of the underwriter to provide an opportunity for the assured to pay the premiums where he resided, during the war; and payment to an agent of the underwriter in the state in which the assured resided would not have been unlawful.** *Hamilton v. Mutual Life Ins. Co.*,* 9 Blatch., 234.

§ 1619. **The relation of the assured in such a case towards the insurance company is not that of a partnership dissolvable by war, though the insurance is upon the mutual plan.** *Ibid.*

§ 1620. **The case of New York Life Ins. Co. v. Statham, 93 U. S., 24, on the effect of the rebellion upon policies issued before the war, by a company in the north upon parties in the south, re-affirmed. Unless both underwriter and agent agreed to continue the agency during the war, the agency, being in the south, was abrogated.** *Insurance Co. v. Davis*,* 95 U. S., 425.

II. PARTIES ENTITLED TO BENEFIT OF THE CONTRACT.

SUMMARY—*Policy of wife for benefit of husband*, § 1621.—“*To A. and his assigns*,” § 1622.—“*For the benefit of K.*,” § 1623.—*Right to change beneficiary*, §§ 1624, 1625.

§ 1621. **A married woman insured her life for the benefit of her husband, she paying the premiums. Before her death the husband became bankrupt. Held, that upon her death the husband, and not his assignee in bankruptcy, was entitled to the insurance money.** *In re Murrin*, § 1626.

§ 1622. **One part of the life insurance policy ran to A. and his assigns, another part to him and his representatives. By general words A. assigned the policy to H., who had no interest therein, and who appeared to have taken the life of A. H. paid the premium. Held, that the administrator of A. was entitled to the insurance money.** *Armstrong v. Mutual Life Ins. Co.*, §§ 1627-28.

§ 1623. **A policy on the life of a father for the benefit of his daughter K. was, after several years, surrendered to the underwriter and a paid-up policy, payable to K., issued in lieu thereof. Held, that K. had a vested interest in the latter policy which the father could not control; and if K., being an infant, entered into any agreement affecting her rights therein, she could disaffirm the same on attaining majority.** *Brockhaus v. Kenna*, §§ 1629-31.

§ 1624. **Where power is given to the assured in a life insurance policy to substitute a new beneficiary in case of the death of the one named therein, such power must be exercised within a reasonable time after the death of the party first named as beneficiary; and this time should end with the next ensuing payment of premium.** *Eiseman v. Judah*, §§ 1632-34.

§ 1625. **The power of appointment in this case not executed by the will of the assured in attempting to dispose of the policies in question.** *Ibid.*

[NOTES.—See §§ 1634-1640.]

IN RE MURRIN.

(Circuit Court for Missouri: 2 Dillon, 120-126. 1873.)

Opinion by DILLON, J.

STATEMENT OF FACTS.—The wife of the petitioner being possessed of a separate estate, secured to her by an ante-nuptial marriage settlement, applied in the spring of 1869 for two policies of insurance of \$5,000 each, upon her life, *payable upon her death to her husband*. They were issued accordingly, and she paid the premiums for one year, one-half in cash and one-half by

note. Before the year expired her husband was adjudicated a bankrupt. Out of her own estate she paid the premiums for the two following years, 1870 and 1871, and before the next premium fell due she died. The question is, whether the assignee, as against the bankrupt, is entitled, for the benefit of the estate, to the proceeds of the policies. The assignee does not claim that his right is strengthened by reason of having obtained, in the manner stated, the actual possession of the proceeds, and the only contest is as to the respective legal or equitable right of the assignee and bankrupt thereto.

Counsel on both sides, in their well-considered briefs, have argued many points which, though pertaining to the general subject of life policies for the benefit of others, are, nevertheless, not necessarily involved in the decision of the case.

§ 1626. *Husband entitled to policy of wife made for his benefit, though he becomes bankrupt.*

The counsel for the assignee claims that at the date of the bankruptcy of the husband, November 30, 1869, the husband had a right of property in the policy (which it is contended is a *chose in action*) of such a nature that it vested in the assignee by virtue of the adjudication in bankruptcy. Bankrupt Act, sec. 14. Under this section, property and rights which are acquired by the bankrupt after the commencement of the proceedings in bankruptcy do not vest in the assignee; and to make good his claim the assignee must show that the right to the benefit of the policy was one which not only existed in the husband at the time he was proceeded against in bankruptcy, but is one of such a nature as to vest in the assignee as of that time, by virtue of the provisions of the bankrupt act. This act should receive such a construction as accords with its well known purpose, which is, that if an insolvent debtor will surrender all *his* property (not exempt) for distribution among his creditors, he may, on the terms provided in the act, have his discharge. If the wife's death had happened before the bankruptcy, there being no statute protecting the husband's rights under the policy, the right to collect and hold the money would, it may be admitted, pass to the assignee. But her death did not happen until over two years afterward, during which time the wife continued to pay the premiums. It is admitted that she could not have been compelled to pay them, either by the husband or by the assignee. Her payment of them proceeded purely from her bounty. It is certain, to a practical intent, that if she had not paid the subsequent premiums, the first payment, made before the bankruptcy, would have been of no benefit, either to the assignee or to the husband, for she did not die during the year. It is also certain, to a practical intent, that, had the last premium not been paid, there would have been no proceeds here about which to litigate. Her intention, her object in making these payments, in virtue of which the policy was kept *in esse*, must have been to make provision for her husband; and what equity, let me ask, have creditors, or the assignee representing them, to thwart the purpose which she had in view, and for which she paid *her* money — money to which they had no claim? The assignee, if it be conceded that he could have done so for the benefit of the estate, which I do not admit nor decide, took no steps to pay the premiums, but asks the benefit of those paid by the wife. It is inconceivable that she made or intended to make the payments for the benefit of the assignee, and she doubtless died in the confident belief that she had made provision for her husband.

Without discussing the questions which have been argued at the bar as to

the nature and extent, before the death occurs, of the interest of a person designated by the bounty of another as the one to whom a policy is ultimately to be paid, I am quite confident that the husband, at the time of his bankruptcy, had no such interest in these policies as to give the assignee the right to retain their proceeds against manifest intention and purpose of the wife.

Could the assignee, as against the wish of the wife, have said, "I demand the policy, and intend to keep up the premiums for the benefit of the estate?" If it were necessary to answer this question, it would seem that he had no such right, and that she could properly say, "This is a matter of my own; a provision originating in my bounty, one upon which my husband's creditors have no claim, and with which they have no right to interfere." But the assignee took no such steps; on the contrary, he allowed, or did not prevent, the wife from making the payments which kept the policy alive; and I rest my judgment against him on the broad ground that, under the circumstances of the case, the creditors for whose benefit the money is sought have not the shadow of a shade of equity to it, nor to defeat the provident and just provision which the wife intended to secure for her husband, not for them. The policy was kept up by her for the benefit of her husband after her death, not for the benefit of his creditors before his bankruptcy. The district judge, in deciding the case, seized the considerations which control it, when he remarked: "Looking at the nature of the contract for the insurance as being a provision by one married party for the benefit of another, and kept in force by the wife out of her separate estate without any step being taken by the assignee, her equities should be carefully regarded. The policy was for the benefit of the husband, and was kept alive by the wife after the bankruptcy, and it would be inequitable that a sum becoming payable after the bankruptcy under such a contract should, by relation back to the time of commencement of proceedings in bankruptcy, be held to belong to the assignee. The design of such charitable acts for the benefit of a third party was not intended to be defeated by the bankrupt law, in a case like the present, where such a result would be against all equity." *Affirmed.*

ARMSTRONG v. MUTUAL LIFE INSURANCE COMPANY.

(Circuit Court for New York: 11 Federal Reporter, 573-577. 1882.)

Opinion by WHEELER, J.

STATEMENT OF FACTS.—This is an action of *assumpsit* upon a policy of insurance issued by the defendant upon the life of John M. Armstrong, the plaintiff's intestate, and has now, after verdict for the plaintiff and before judgment, been heard upon a motion of the defendant for a new trial in review of questions of law. The policy was issued upon an application signed by Armstrong, and in its operative and material parts in question ran:

"The Mutual Life Insurance Company of New York, . . . in consideration of the application for this policy of insurance, . . . which . . . every person accepting or acquiring any interest in this contract . . . warrants . . . to be the only statements upon which this contract is made, and . . . of the payment . . . at the date hereof, . . . and of the payment . . . to be made . . . during the continuance of this contract, does promise to pay to John M. Armstrong, of Philadelphia, Pennsylvania, his assigns, on the 8th day of December, in the year 1897, the sum of \$10,000, . . . at the office of the company in the city of New York,

or, if he should die before that time, then to make said payment to his legal representatives. . . . If any statement made in the application for this policy be in any respect untrue, the consideration of this contract shall be deemed to have failed and the company shall be without liability under it. . . . The contract between the parties hereto is completely set forth in this policy, and the application therefor, taken together. . . . If any claim be made under an assignment, proof of interest to the extent of the claim will be required."

Armstrong executed an assignment of the policy to Benjamin Hunter and left it with the company, and both were delivered by the company to Hunter. Armstrong died; and from the evidence received and that offered it is to be taken that he died by the hand of Hunter, who planned his death before the insurance, induced him to effect it and make the assignment, paid the first and only premium that was paid, and took his life for the purpose of obtaining the money on this and other policies. They were not related in any way, and no evidence was introduced or offered of any interest in fact which Hunter had in the life of Armstrong. The second defense set out in the defendant's pleadings alleges that Hunter, "being or pretending to be a creditor" of Armstrong, did so and so, and the defendant offered evidence to prove the facts set forth in that defense, without offering to prove that he was a creditor any more than that he pretended to be; and this was not understood to be, and is not now understood to have been, any offer to prove any fact of indebtedness or other interest. The defendant requested the court to instruct the jury that if the company made no contract with Armstrong, or if the real contract was between the company and Hunter, or if the policy was in fact made and issued for the benefit of Hunter, the plaintiff could not recover. These instructions were not given, and no question was submitted to the jury upon those aspects of the case. The principal questions are whether the facts stated would defeat the plaintiff's recovery, and whether these instructions ought to have been given.

There is no evidence in the case of any intent to defraud or want of good faith on the part of Armstrong, and none was offered to be shown, nor any claim made that there was such. The misconduct and criminality relied upon for defense were wholly on the part of Hunter, and Armstrong was only his victim. The first two of these instructions could not be given without submitting to the jury questions of contradiction or variation of the policy, which would be a subversion of one of the most important principles of the law of evidence relating to the effect of written contracts, that parol proof is not admissible to alter, contradict, enlarge, or vary them, and not only would violate the ordinary presumption of law that the stipulations of the parties are written down in such contracts as finally settled upon and intended, but also the express provisions of this contract, that the whole contract and its inducing statements are contained in itself. The other request would submit the effect of the contract and assignment to the jury, when such construction, when the facts to which the instruments apply are ascertained, is always for the court. The whole of this part of the case must depend upon the true legal effect of these contracts. The defendant promised Armstrong to pay his legal representatives \$10,000 if he should die before December 8, 1897. He did die before that day. The term "representatives" or "legal representatives"—which is the same thing, for none but legal would be intended—indicates the administrators. *Wason v. Colburn*, 99 Mass., 342.

The plaintiff is the administrator in Pennsylvania, the place of the domicile, and in New York, the place of the contract, although some question was made about the effect of the letters in the latter place. She has brought this suit upon this contract, and upon these facts is entitled to recover, unless something further is shown to defeat it. If he parted with his contract to Hunter, so that his life was insured to Hunter, and to Hunter only, from the issuing of the policy to the day named, it is plain that no one could recover for this death. Not Hunter, for he criminally caused the death, and could become entitled to nothing by his crime. Not the administratrix, for she would have nothing to recover upon, and could acquire nothing from Hunter, for he could confer no greater right than he had. The contract was with Armstrong, and ran to his representatives who would be included in him, so it was doubtless at his disposal. So the question is whether he did dispose of it to Hunter. The payment of the premium by Hunter would not make the insurance his. *Triston v. Hardey*, 14 Beav., 232; *Ætna Life Ins. Co. v. France*, 94 U. S., 561 (§§ 1550-52, *supra*).

§ 1627. *Assignment of policy.*

The question must turn upon the construction of the written instruments. Choses in action were not assignable at common law, although for a valuable consideration paid they were assignable in equity. *Bouv. Bac. Abr.*, "Assignment, D;" "Obligation, A;" *Winchester v. Hackley*, 2 Cranch, 342. There is, however, no cause of action accrued upon a policy of life insurance until the death insured against happens. Still there is no question but that the accruing right may, with the consent of the insurer, be transferred, so that when it does accrue it will accrue to the assignee, and become a right of action in his favor. Nor but that before it accrues it may be so assigned as to make the assignee an appointee to receive the funds. *Page v. Burnstine*, 102 U. S., 664. Nor but that after it has accrued it may be assigned in equity like other rights of action not made negotiable in terms. These limitations do not apply to contracts made negotiable in terms, like notes or bonds payable to the bearer or to the order of a payee named. These policies commonly run to some person, and his or her executors, administrators and assigns. There are many cases in which they have been held to be assignable, but stress is laid upon that form.

In *New York Life Ins. Co. v. Flack*, 8 Md., 341 (1 *Bigelow, Ins. Cas.*, 146), *Le Grand, C. J.*, laid stress upon the word "assigns." In *Pomeroy v. Manhattan Life Ins. Co.*, 40 Ill., 398, *Walker, C. J.*, said: "The policy declares in terms that it is assignable. It provides for the payment of the money to the assured or to her assigns. So far, then, from such an instrument being prohibited, it is authorized by the terms of the policy." In *Mutual Protection Ins. Co. v. Hamilton*, 5 Sneed, 269, *McKinney, J.*, said: "By the terms of the policy the contract is with the assured, his personal representatives and assigns, and the promise in fact and in law is to pay the money to the personal representatives or the assignee, as the case may be." And in *Emerick v. Coakley*, 35 Md., 188, *Grayson, J.*, said: "So far from an assignment being prohibited by the terms of this policy, the amount of the insurance is made payable to her and her assigns." In *Koshkonong v. Burton*, supreme court of the United States, *Chicago Legal News*, April 29, 1882, the expression of opinion whether the phrases payable to the order of some person, or payable to some person or his order, would in a statute include a contract payable to a

railroad company or its assigns, was expressly waived in the opinion of the court by Mr. Justice Harlan.

§ 1628. *What a general assignment of insurance policies will carry.*

A general assignment of all insurance policies, where the assignor has some which are assignable and some not, will not carry those not assignable, nor such as would be made void by assignment. *Lazarus v. Commonwealth Ins. Co.*, 19 Pick., 81. This assignment is to be looked at in the light of these principles. One branch of the contract ran to Armstrong and his assigns, the other to his representatives. One was by its terms assignable and the other not, and by general words he assigned. The two expressions stand side by side in the instrument, so that their difference is apparent. According to these principles it would seem to follow that the assignment was intended to carry the branch made to be carried, and not the branch not so made; that the general words of the assignment are restrained by the particular words creating the subject of the assignment. The assignment could not rise higher than the instrument assigned. And further, the instrument itself limits the rights to be passed to assignees. Such right could not extend beyond an interest in the life of the assured which could be proved. If the interest was that of a creditor, it would be limited by the amount of his probable debt. *Cammack v. Lewis*, 15 Wall., 643 (§§ 1542-43, *supra*); *Thatch v. Metropole Ins. Co.*, 11 Fed. R., 29. As no debt is shown no interest is shown, and nothing is shown to have passed to the assignee. What did not pass to the assignee was left in Armstrong, and accrued to his representative, the plaintiff. As Armstrong was innocent, no right of his, or of those claiming through him, would be cut off by the wickedness of Hunter.

Other questions were saved by exceptions taken at the trial and allowed, but they have not been argued or relied upon in this hearing. The motion is overruled. Judgment is ordered upon the verdict, and the stay of proceedings is vacated.

BROCKHAUS v. KEMNA.

(Circuit Court for Wisconsin: 7 Federal Reporter, 609-621. 1881.)

STATEMENT OF FACTS.—This was a bill filed by Brockhaus against his daughter and her husband. It alleges that he, as her guardian, had held a fund accruing from a paid-up life insurance policy on the endowment plan, by which his daughter, the defendant, became entitled to about \$1,755.12, which he as guardian had received for her; that the insurance had been on his own life, and he had adopted this mode of providing for his family, and paid up the premiums for a number of years on that policy and two others in favor of his other two daughters, but that, the amounts being different, it was agreed between him, his wife and his three daughters (they, however, being under twenty-one years of age), that the amount of each of the three beneficiaries should be the same, the aggregate of the endowments being divided equally among the three. The defendant being apparently entitled to the largest share, under the influence of her husband, repudiated this agreement and brought suit against her father and the sureties on his bond as guardian, claiming the whole of the endowment that under the policy inured to her. The bill prayed for an injunction and appropriate relief, and defendants demurred to it.

Opinion by DYER, J.

The determination of the first ground of demurrer involves the consideration of the rights and equities of the parties springing from the procurement of the policies of insurance upon the life of the complainant, and from the transactions recited in the bill. And first, I do not see how even a court of equity can enforce against Mrs. Kemna, as a bar to any legal right she otherwise had, the arrangement first made in family council and subsequently reduced to writing, and executed as a written agreement, by which the proceeds of the insurance policies should be put into the hands of Franziska Brockhaus and distributed and used by her for the equal benefit of the three children. It may be that this arrangement was, in a measure, the inducement to the exchange of the original policies for new and paid-up policies, though it would seem from the averments of the bill that the surrender of the first policies had been determined upon before the family arrangement was made, and that the real and original occasion of it was the inability of the insured to pay the premiums and keep those policies in force. When the arrangement was made, and when it was subsequently put in the form of a written agreement and formally executed, Mrs. Kemna was under the disability of infancy. As to her the agreement was voidable, and if she had any rights in the insurance on her father's life, that agreement was liable to be disaffirmed and repudiated on the attainment of her majority. And, if she has now chosen to repudiate it, the court does now perceive how, even in equity, it can be interposed against legal rights, which, without such agreement, would exist in her favor. I am of the opinion, therefore, that in considering the case we are remitted to the question whether Mrs. Kemna had any vested right or interest in the paid-up policy of insurance in which she was named as beneficiary, or in the proceeds of that insurance, though in passing upon that question it may be necessary to further consider the effect of the alleged family understanding or agreement.

§ 1629. *The beneficiary in a policy of life insurance has a vested interest in a paid-up policy substituted for it.*

In support of the demurrer it is contended that Mrs. Kemna had such vested interest; that the complainant, whose life was insured for her benefit, could not revoke the policy or change its destination by his own act; that the transaction was in its legal effect an executed gift; and that there was nothing in the family arrangement or agreement that can be construed as an assignment of the policy from the complainant to his wife, or as a valid appointment of her as a new beneficiary.

In support of the bill it is claimed that a change of beneficiary was made before the original policy was exchanged for a paid-up policy; that the law of gifts must be applied to the case; that there was no such delivery of either of the policies to Mrs. Kemna, or to any one in trust for her, as to make a valid, executed gift; that Mrs. Kemna had no vested interest in the policies; and that the transaction was nothing more than a voluntary executory settlement, which was subject to revocation at any time before it was fully executed, and which was not susceptible of gift as a chose in action. Furthermore, it is insisted that by bringing suit on the guardian's bond, Mrs. Kemna has ratified the contract which she made with her father, before recited, because, as it is claimed, she had no absolute vested interest in the first policy, and the paid-up policy in which she is claiming a vested interest was procured after the contract was originally made, and in pursuance of it. Precisely what are the

rights, and what is the interest, of a designated beneficiary in an ordinary policy of life insurance, and to what extent the insured may control or change the ultimate destination of the insurance proceeds, is a vexed question, and some of the cases in which the question has been determined cannot be reconciled.

§ 1630. *Authorities reviewed.*

In *Clark v. Durand*, 12 Wis., 248, the facts were peculiar. The insured procured insurance on her life, payable to Henry S. Durand as guardian of her son. Durand was not in fact such guardian, but advanced the money to pay the premiums. Subsequently, the assured, in consideration that Durand would thereafter continue to pay the premiums, transferred the policy to him, and he kept the policy in force until her death. He then collected the insurance and appropriated the money to his own use. Thereupon Henry W. Clark brought suit against Durand for the proceeds of the insurance, claiming that he was the beneficiary in the policy, and that his mother could make no assignment of the policy which would defeat his alleged vested interest therein. The action was held not maintainable, the theory of the decision being that the insured could not be compelled to keep the policy in force; that the insurance, so far as Clark was concerned, was merely a proposed gratuity, and that he was a mere volunteer, having no present beneficial interest or vested right in the policy, or the moneys secured by it, prior to the transfer of the policy to Durand. The policy is characterized in the opinion as an executory contract, which it was held the insured could transfer to Durand with the assent of the company, he agreeing to pay the premiums. Although the court in this case do in effect lay down the rule contended for by counsel in the case at bar, it is not to be overlooked that the peculiar state of facts in *Clark v. Durand* might well support the judgment, because, as is pertinently said by Justice Cassoday, in commenting upon that case in *Foster v. Gile*, decided by the same court and hereafter referred to, "it would seem that the equitable interests of the mother, and her assignment to Durand, who paid all the premiums, were sufficient to vest the absolute title in Durand, to whom the insurance was in fact made payable. . . . Thus the legal and equitable estate became united in Durand, and the only question was whether the infant was entitled as *cestui que trust*."

In *Kerman v. Howard*, 23 Wis., 108, it was held that where a husband survives his wife, having previously procured a policy of insurance on his own life for her benefit and himself paid the premiums thereon, he may dispose of it by will or otherwise. The construction of a statute of the state was involved in this case; but, independently of the statute, the court in effect held that the insured might change the policy in favor of some other person, or use or assign it as a means of credit or security, or discontinue payment of the premiums and let the policy lapse, or that he might bequeath or assign the beneficial interest in the policy as he should think proper. It must, therefore, be said of this case that it follows in the track of *Clark v. Durand*.

The latest enunciation of the supreme court of this state on the subject is found in *Foster v. Gile*, 3 Wis. Legal News, 87. In this case the person insured had procured a policy insuring his life for the benefit of two children. The father survived the children and died intestate, leaving a widow surviving him, and the question was whether the proceeds of the insurance belonged to the estate of the children or to the estate of the father. It was held that the beneficial interest of the children did not lapse by their death, but passed to

their administrator to be distributed as intestate estate of such children. From the opinion of Mr. Justice Lyon it is evident that the court were not satisfied with the rule laid down in *Clark v. Durand*; and, though it is said that the rule must be adhered to, the learned justice, speaking for the majority of the court, expresses the opinion that there is a middle ground upon which the judgments in *Clark v. Durand* and *Kerman v. Howard* may rest, which is that the taking of a policy by the insured, payable to another, is so far in the nature of an executed voluntary settlement that it vests in the person to whom the insurance money is made payable an actual subsisting interest in the policy, but that this interest is subject to the right of the insured to revoke the same, and retain it himself or vest it elsewhere. With great respect for the view thus taken, which really leads to the same result as that reached in *Clark v. Durand*, I am constrained to think that in such a case there must be an actual vested interest or right in the beneficiary named in the policy, which the insured cannot of his independent volition take away, or no vested interest or right whatever, for the existence of a subsisting vested interest in the beneficiary seems inconsistent with a reserved right of revocation in the insured. And this evidently is the view of Mr. Justice Cassoday, who files a separate opinion in the case, marked by his usual research, and in which the authorities are industriously collected; for, while he concurs in the conclusion of the majority of the court, as I understand him, he plants his opinion on the ground that the children of the insured acquired an absolute vested interest in the policy as between them and their father.

These are decisions upon the question in this state, and they are substantially followed by *Charter Oak Life Ins. Co. v. Brant*, 47 Mo., 419, and *Gamb v. Covenant Mut. Life Ins. Co.*, 50 Mo., 44.

In *Ricker v. The Charter Oak Life Ins. Co.*, 6 N. W. Rep., 771, decided by the supreme court of Minnesota, precisely the opposite view was taken from that held in *Clark v. Durand*. The facts were that a person procured insurance on his own life, payable on his death to his then wife, if then living; otherwise, to his children. His wife died, leaving her husband and their children surviving her. At her death all premiums had been paid. Afterwards the insured again married, and then, without the consent of his children, surrendered his policy to the company and took a paid-up policy, payable to his second wife. It was held that the transaction, on his part, was in the nature of an irrevocable and executed voluntary settlement upon his first wife and the children, and that the surrender of the first policy was invalid, as against the children.

In *Sandrum v. Knowles*, 22 N. J. Eq. Rep., 594, a policy of insurance was taken by a wife on the life of her husband in favor of her children. After the payment of a succession of premiums she assigned the policy in payment of a debt of her husband, and the assignee paid the premiums thereafter accruing. After the death of the husband, the children claimed the whole sum due on the policy, and it was held that up to the time the mother ceased to pay the premiums, the transaction was an executed gift by the mother, enforceable in equity by the children, but that the acquisition of a further interest, by the payment of subsequent premiums, was executory, and was not acquired by her, and could not, therefore, be claimed by her beneficiaries. This ruling goes clearly on the ground that, up to the time of the assignment of the policy, and for all which the policy then represented, the children had a vested interest acquired by executed gift.

Mr. Bliss, in his work on Life Insurance, section 317, states it as the general rule, "that a policy, and the money to become due under it, belong, the moment it is issued, to the person or persons named in it as the beneficiary or beneficiaries, and that there is no power in the person procuring the insurance, by any act of his or hers, by deed or will, to transfer to any other person the interest of the person named." These, including the Wisconsin cases, are some of the leading authorities on this question. Others are cited in the opinion of Cassoday, J., in *Foster v. Gile, supra*. They are referred to rather for the purpose of showing the state of decision on the subject than otherwise, for the facts set out in the present bill are somewhat peculiar, and seem to make this case distinguishable, except as some general principles are involved, from any of the decided cases to which I am referred.

Whatever principle of law might be regarded as applicable and controlling, if the right of Mrs. Kemna to the first policy in which she was named as beneficiary, or its proceeds, was involved, an important fact in the case is that the complainant surrendered that policy and received from the company a paid-up policy, payable to Mrs. Kemna in 1878. The same was done with reference to the other policies in which his other daughters are named as beneficiaries. This new policy, payable to Mrs. Kemna, was an absolute promise on the part of the company, in consideration of the past payments of premiums, to pay her \$1,690. It was not a policy liable to lapse, but it constituted an absolute, fixed liability, and the question is whether, as between the father and the daughter, it was not an executed gift from him which he could not revoke. I can have no doubt that it was, unless the circumstances under which the act was done can have the effect to create other rights between the parties.

§ 1631. *What constitutes an executed gift.*

The complainant did all that he could do to make the gift of the policy to his daughter complete and effectual. He paid the premiums while the original policy was running, and procured the paid-up policy to be issued, payable in express terms to his daughter Alma at a specified time, and without any condition or stipulation in the policy reserving a right to change or alter it, so far as the bill shows; and, in the language of some of the cases cited, this was all that could well be done under the circumstances, so far as the father and child were concerned, to vest in his appointee the entire interest in the policy and all rights thereunder. As between those parties no further ceremony or fact was needed to the perfection of the gift. *Sandrum v. Knowles, supra*. The gift was voluntary, but it was completely executed, and nothing further remained to be done but to await the period when the insurance company could be called on to make payment. That period was reached, and the complainant then received the proceeds of the insurance, not for himself or in his individual name or right, but as the guardian and representative of his daughter, so that in legal effect the payment was made to her as the beneficiary. This, if it were essential, was the consummative act, completing the gift beyond recall, unless, as before stated, the circumstances of the whole transaction so affected the relations of the parties as to qualify or change what would otherwise be strictly legal rights. Did the circumstances have that effect? I cannot think they did. Mrs. Kemna was not bound by the arrangement made in the alleged "family council," nor by the subsequent agreement which she signed. She was under the disability of infancy, and she could if she would, on attaining her majority, disaffirm and repudiate the agreement. The

bill shows that the complainant was unable to continue the payment of premiums on the original policies, and that it was therefore determined that those policies should be surrendered and exchanged for policies fully paid up; and it may be fairly inferred from the allegations of the bill that this was determined upon before any understanding was had that the proceeds of the paid-up policies should ultimately go to Mrs. Franziska Brockhaus. It was then arranged, for reasons stated in the bill, that such proceeds when realized should be received by Mrs. Brockhaus, but for the benefit of all the children. It is true that this transpired before the actual surrender of the original policies, and consequently there was a change of beneficiary, if any was in fact or legal contemplation made, before the paid-up policies were taken. But I can hardly think that the arrangement made in family council should be held to have operated as an assignment of the original policy running to Alma, least of all of the new paid-up policy which was subsequently made to her; and in this connection it is not to be overlooked that, notwithstanding what had previously transpired between the parties, the new policy was in terms made payable to Alma. The alleged change of beneficiary was not, in name at least, carried into that policy. It may, perhaps, be fairly presumed that the complainant, in taking a paid-up policy, relied on Mrs. Kemna's adherence to the understanding with reference to the ultimate appropriation of the proceeds; but I do not think it can be said, upon the present allegations of the bill, that the family arrangement was the substantial consideration which prompted the exchange of the old policies for new paid-up policies. And on the whole, with reference to the circumstances which preceded and which accompanied the surrender of the first policy running to Alma for the paid-up policy, as also with reference to the subsequent written agreement, it must, I think, be said that a change of beneficiary could not be made without the legal consent of Mrs. Kemna, and such consent was not given beyond her power of disaffirmance.

It is alleged that the complainant caused himself to be appointed guardian of Mrs. Kemna for the receipt of the insurance moneys, at the instance of the insurance company, and because it required him so to act. But I do not think this can avail him against the legal consequences of the act, when taken in connection with the legal import and effect of the contracts by which the insurance company obligated itself to make payment.

[The remainder of the opinion is given up to a consideration of the question whether Mrs. Kemna had ratified the action taken at the time of the surrender of the old policy, by suing on complainant's bond as guardian. *Held*, that she had not.]

The demurrer to the bill will, therefore, be sustained.

EISEMAN v. JUDAH.

(Circuit Court for Tennessee: 1 Flippin, 627-631. 1877.)

Opinion by TRIGG, J.

STATEMENT OF FACTS.—This is a controversy over a portion of the proceeds of a policy of insurance on the life of one Emanuel Ackerman, issued by the Globe Mutual Life Insurance Company of New York, October 19, 1870, for the sum of \$5,000, premiums on which were payable semi-annually on the 12th days of October and April in each year during the life of the insured. The

policy was payable at the death of Ackerman to his wife Ellen, if then living, or, if not living, then to her children; with the proviso, "that in case of the decease of the wife during the life-time of the assured, the said assured may, at his option, substitute any other beneficiary under this policy." Ellen Ackerman died in the year 1872, leaving five children, to wit: Delia and Carrie, the issue of a previous marriage, and Emma, Rosa and Jacob, the issue of her marriage with the insured. The three latter are minors, and their regular guardians, B. Eiseman and G. H. Judah, are the complainants in the original bill. Delia, now the wife of Abram Judah, and Carrie, now the wife of Leo Judah, are, with their husbands, complainants in the cross-bill. Emanuel Ackerman died October 15, 1873. His last will, executed October 11, 1873, contains this clause: "My life being assured as follows: Globe Mutual Life, of New York, \$5,000; Newark, of New Jersey, \$5,000; New York Life, \$5,000; Northwestern, paid up; . . . the above amount of \$15,000 and over, I wish divided among my three children as follows: \$5,000 — Emma Ackerman, five thousand; \$5,000 — Rosa Ackerman, five thousand; \$5,000 — Jacob Ackerman, five thousand; the remainder I will and bequeath to my brother, Jacob Ackerman, in Germany, the sum of \$300 — three hundred dollars." No other act of Ackerman, except this provision of the will, is set up as an attempt to execute the reserved power of substitution of a new beneficiary under the Globe policy. The policy in the New York Life Insurance Company was payable "to Ellen, wife of Emanuel Ackerman, and children, share and share alike, or their legal representatives." The policy in the Mutual Benefit Life Insurance Company of Newark was payable to the said Ellen, if living; but, if dead, then to "their children." The policy in the Northwestern Mutual was payable to "Ellen Ackerman, his wife, and his children by her, share and share alike." The defendants, Delia and Carrie Judah, have received their two-fifths share of the New York Life policy, without question made by the guardians of the minors. The first semi-annual premium, which fell due after the death of Ellen Ackerman, to wit, on April 12, 1873, was paid by Emanuel Ackerman. The next premium, which fell due October 12, 1873, was paid by Abram Judah, on behalf of himself and his wife, Ackerman being then ill and upon his dying bed. It is contended by the guardians of the minor children that the clause of the will above referred to operated as a sufficient appointment of a new beneficiary, and a valid execution of the power of appointment; and this is the question now to be considered.

§ 1632. *Power to substitute new beneficiary to be executed within reasonable time after death.*

1st. Was the supposed execution of the power of appointment, by will, interposed in time to affect the rights of the defendants if otherwise sufficient? Although the cause has, in the argument of counsel, been treated as a case of an ordinary power of appointment, I am unable to determine this question with reference to any of the authorities cited in behalf of the construction contended for by complainants. In this case Ackerman had not the slightest personal interest of a pecuniary character in the policy, although it insured his own life. The rights of the children of Ellen Ackerman, as beneficiaries under the policy, vested immediately upon her death. It cannot be considered that there was even a moment of time, after her decease, during which the beneficial interest in the insurance was in want of an object on which to rest. We cannot suppose it floating about *in nubibus*, waiting for a person or an object upon which it might rest, to be supplied by the act of Emanuel Ack-

erman or otherwise. All the authorities upon life insurance agree that the rights of the children of the wife, in such cases, become, upon the death of their mother, vested rights in the fullest sense of the term. This is not, then, a case in which, like most cases of appointment under a power, no reason can be assigned for an immediate execution of the power, so that the whole lifetime of the donee of the power is allowed for its execution. Here there are reasons for a prompt execution; for, if the power be executed, the rights under the policy already existing are to be taken away. Within what time, then, will the law allow the act of Ackerman to take away the rights thus already vested, by the death of his wife, in her elder children? This period cannot be indefinite. Justice and equity require that the power thus conferred shall be exercised at some precise time, in order that the fact of its exercise may be duly made known to all persons interested; and no further latitude can be allowed to the donee of the power, than to give him a reasonable time within which he shall act under it, if at all. This reasonable time may well be the period ending with the next ensuing payment of premium. At that date the policy will lapse by its own terms, unless a new premium is paid. Such payment will continue the policy in force, and will thus be, in some sense, the making of a new contract. The beneficiaries may well wish to know whether the policy is to continue in force for their benefit, or whether their interest is to cease. If the divestiture of their rights by the appointment of a new beneficiary could be accomplished a year after those rights accrued, it might equally well be postponed for twenty years, during which time the beneficiaries might pay forty semi-annual premiums, instead of one, as in this case. I am constrained to hold the provision for such an appointment, "in case of the decease of the wife," to mean "upon the decease," indicating that event as the proper time; and to treat the time of the next succeeding payment of premium as the latest hour which can equitably be allowed for a divestiture of rights theretofore existing. The time of the execution of Ackerman's will was too late for the appointment, conceding that the provisions of the will were otherwise sufficient.

§ 1633. — *such power not executed in this case by will of assured.*

2d. But I do not construe the will as an execution of the power. The testator treated as his own property four policies of life insurance, all which belonged to the children of his wife. Two of them were in law the property of his own three children, and in the two others the defendants were also beneficiaries. None of these were subject to his bequest, yet he attempted to bequeath them all.

§ 1634. — *what necessary to the execution of a power of appointment.*

No reference is made to the power of appointment reserved in the Globe policy. It is true that policy is referred to by name; and, under some of the authorities, a plain and unambiguous reference to the subject of the power has been held sufficient to treat the devise or bequest of the property as an execution of a power of appointment. But in all cases to which the attention of the court has been called, the intention of the testator has been the objective point of inquiry and construction. It is impossible to impute to this testator an intention to execute this power. His intention, on the contrary, clearly was to bequeath this particular policy, with others, as a part of his personal estate. This controlling intent is inconsistent with any idea of an execution of the power. Without giving any other construction to any part of the will, construction contended for by complainants must be refused.

These considerations render unnecessary any reference to the other legal and equitable questions raised by the defendants. It follows that the defendants, Abram, Delia, Leo and Carrie Judah are entitled to two-fifths of the proceeds of the Globe policy, which will be paid to them by the guardians of the minors, who collected the same under decrees made in this cause. The last semi-annual premium paid on the policy by the defendants, and the costs of the cause, will in like manner be equitably apportioned between the parties.

§ 1635. **Title to policy.**—The legal title to a policy of insurance on the life of a husband, taken out by him for the benefit of his wife, is in the wife. *In re Bear*,* 1 Cent. L. J., 607.

§ 1636. **Payment of premium.**—Where a husband takes out a policy of insurance on his own life, for the benefit of his wife, the wife may pay the premium from her own means, or they may be advanced by a friend, other than the husband. If advanced by the husband, it is but an advancement by him for her benefit, which, if solvent at the time, he has the right to make; and advances thus lawfully made are valid, as to subsequent creditors. *Ibid.*

§ 1637. **Assignment of policy by husband — Bankruptcy.**—Where a husband takes out a policy on his own life for the benefit of his wife, and the premiums are paid by her from her own means, or by a friend, or by the husband, he being solvent at the time of such payment, the title, both legal and equitable, is in the wife, and cannot be assigned or controlled by the husband. *Ibid.*

§ 1638. **Payment of premium by insolvent husband.**—Any payment, by a husband, after he has become insolvent, upon a premium of insurance upon his own life for the benefit of his wife, is a fraud upon his creditors, whether so intended or not, and his assignee in bankruptcy may recover from the wife the amount so advanced, with interest, from the proceeds of the policy when paid; and the claim for such recovery he may sell, when it is ascertained, and the purchaser will acquire the contingent right to it. *Ibid.*

§ 1639. Under Missouri laws an insolvent husband may withdraw from his estate \$300 annually to insure his life for the benefit of his wife; if he withdraw more than that, his wife will hold part of the insurance money received on his death in trust for her husband's creditors. *Smith v. Missouri Ins. Co.*,* 4 Dill., 353.

§ 1640. A policy of insurance on the life of a husband was payable to his wife. *Held*, that under the Missouri laws she could sue thereon in her own name. *Ibid.*

III. WARRANTY, REPRESENTATION AND CONCEALMENT.

SUMMARY—*Full answers*, §§ 1641-1643.—*Intemperance*, §§ 1644-1646.—*Voluntary answers*, §§ 1647, 1648.—*Statements in any respect untrue*, §§ 1649-1654.—“*Never sick*,” § 1655.—“*Serious disease*,” § 1656.—*Certificate of examining physician*, § 1657.—*Representations made to reinstate lapsed policy*, § 1658.—*Statements in proof of loss*, § 1659.—*Misrepresentations by underwriter*, § 1660.

§ 1641. An application and the policy issued thereon contained a warranty that answers of the assured were full, correct and true, and that nothing was concealed, withheld or unmentioned in relation to the risk which might render the same more than usually hazardous. *Held*, that a failure to make full answers must relate to some circumstance rendering the insurance unusually hazardous, while an untruthful or incorrect answer to a question would render the policy void though not material to the risk. *Swick v. Home Ins. Co.*, §§ 1662-66.

§ 1642. If the underwriter rely upon the breach of an affirmative warranty, he must prove the breach. *Ibid.*

§ 1643. The answers of the assured were warranted true. The court instructed the jury with regard to certain statements concerning health, that if at the date of the policy the health of the assured was not good, or if he knew of any symptom of disease which he did not disclose in answer to the inquiries made, there could be no recovery on the policy. *Contra*, if specific facts were known to the underwriter's agent and disregarded by him. *Ibid.*

§ 1644. The assured stated that he was not addicted to the excessive or intemperate use of liquor. *Held*, that the occasional use of liquor would not make the statement false, nor any use not making his habits those of a man not uniformly and strictly sober and temperate. *Ibid.*

§ 1645. Upon a question whether the assured was a man of temperate habits, the judge instructed the jury that if they found the habits of the assured in the usual, ordinary and everyday routine of life were temperate, then he was a man of temperate habits, and this though he

may have had an attack of delirium tremens from an exceptional debauch. *Insurance Co. v. Foley*, §§ 1667-68.

§ 1646. A life insurance policy provided that if any of the statements and declarations made in the application therefor should be found in any respect untrue, the policy should be void. The insured truly answered that he was temperate. Evidence was offered in an action upon the policy that after the policy was issued the assured became addicted to intemperate habits. *Held*, admissible. *Shultz v. Mutual Life Ins. Co.*, §§ 1669-70.

§ 1647. An applicant for insurance was asked, "Has father, mother, brother, or sister of the party died, or been afflicted, with consumption, or any disease of the lungs, or insanity? If so, state full particulars of each case." Answer, "No. Father died from exposure in water; age 58." The answer was untrue in relation to the father's age at death. The policy declared the contract void if the answers given by the applicant were in any respect untrue. *Held*, that the answer in regard to the age of the father was voluntary and not responsive to the question, and was only a representation, its untruth avoiding the policy only in case it was material. *Buell v. Connecticut Ins. Co.*, §§ 1671-72.

§ 1648. Where the answers are responsive to direct questions asked by the insurance company, they are to be regarded as warranties (under a policy such as the one above mentioned), and where they are not so responsive, but volunteered without being called for, they should be construed to be mere representations. *Ibid*.

§ 1649. If a policy declared that if any of the statements of the assured are in any respect untrue, the question of their materiality is excluded. *Aetna Ins. Co. v. France*, § 1678.

§ 1650. An applicant for insurance falsely represented that he was only thirty years of age, the policy containing a provision to the foregoing effect. The judge charged the jury as follows: "If the jury believe that the answer . . . was *materially* untrue as to the age of the said A. J. C., the policy is void," and proceeded to say: "And if he was thirty-seven, or even thirty-five years old," according to evidence in the case, "the difference was not immaterial." *Held*, that no valid exception could be taken. *Ibid*.

§ 1651. A policy on the life of G. provided that if any of the statements or declarations made by him in his application were in any material respect untrue, and, in another place, that if any of his answers were untrue or fraudulent, the policy should be void. To a question whether his parents, uncles, or other relatives named, had been afflicted (*inter alia*) with insanity or other hereditary disease, the assured replied: "No hereditary taint of any kind in family on either side of house, to my knowledge." *Held*, not enough to falsify this statement and avoid the policy, for the underwriter to show that an uncle of the assured had died in an insane asylum more than twenty years before the application was made. *Insurance Co. v. Gridley*, §§ 1674-75.

§ 1652. A life insurance policy contained a provision that the statements therein were "in all respects true, and without the suppression of any fact relating to the health or circumstances of the assured affecting the interests of the company." The assured, in answer to questions in the application, falsely stated that he was single, also that he was not insured in any other company. *Held*, that there could be no recovery on the policy, and that it mattered not whether the statements were material or not. (See *Jeffries v. Union Life Ins. Co.*,* 1 McC., 114.) *Jeffries v. Insurance Co.*, §§ 1676-78.

§ 1653. Where a policy is to be void in case any of the answers of the assured are untrue, and the questions are clear, it is no excuse for a false answer that the applicant was a foreigner and did not fully understand the questions. But in determining whether an answer is true or not the jury may consider, when such is the fact, that it was made by a person ignorant of the language, who for that reason may not have understood, and did not intend, the literal accuracy of a particular answer. *Insurance Co. v. Trefz*, §§ 1679-82.

§ 1654. The answer "never sick," to a number of questions concerning the applicant's previous health, is to be taken to mean, not that the party was never sick at all of any disorder, but only that he never had any of the enumerated diseases so as to constitute an attack of sickness. *Ibid*.

§ 1655. A series of interrogatories enumerating a number of diseases, including diseases of the brain, but not mentioning sunstroke, was put to an applicant for insurance, who answered the whole "never sick." There was evidence tending to show that he once had either a sunstroke, or something which he had himself called sunstroke. *Held*, that it was for the jury to say, on all the evidence, whether or not he had sunstroke properly so called, and whether the trouble which he did have, whether sunstroke or not, was a disease of the brain. *Ibid*.

§ 1656. The question whether a party has had, during the seven years next preceding his application for insurance, any serious disease, means such disease as commonly impairs the constitution and tends to shorten life, and such as, if known, would deter the insurer from taking the risk without further information. It does not refer to an affection of the bowels which entirely ceased within two or three months. *Holloman v. Life Ins. Co.*, §§ 1668-85.

§ 1657. The certificate of the examining physician of an underwriter is binding upon the underwriter in the absence of evidence showing that he was deceived in his examination, either by false statements or by the suppression of facts without a knowledge of which he could not come to a correct conclusion, the facts being such as not to be discovered by the usual examination. *Ibid.*

§ 1658. Upon an application for reinstatement of a lapsed policy, the representations and proofs of health made by the assured relate to the day they are made and the premium paid, and not to the interval between that date and the renewal policy, especially where the new policy is dated back to the time of the expiration of the old one. *Insurance Co. v. Higginbotham*, §§ 1686-87.

§ 1659. The statements made in the proofs of loss are not to be taken as evidence to establish other and independent facts, such as the state of health of the assured at a particular time. *Ibid.*

§ 1660. One who is induced to contract for insurance with an underwriter, and to give notes for premium, upon representations concerning the amount of business which would thereafter be done by the underwriter, to the effect that the profits would be enough to pay the notes, which profits, in fact, are not realized, cannot have the contract rescinded. But such person may have an accounting to see what part of the profits of the business should be applied to the payment of the notes. *Hale v. Continental Ins. Co.*, §§ 1688-89.

[NOTES.—See §§ 1690-1706.]

SWICK v. HOME INSURANCE COMPANY.

(Circuit Court for Missouri: 2 Dillon, 160-166. 1873.)

STATEMENT OF FACTS.—Henry insured his life for \$2,000, and with the consent of the insurers assigned the policy to Swick, and died a few months afterward. Further facts appear in the charge of the court.

Charge by DILLON, J.

1. The first defense relates to the assignment of the policy and the plaintiff's rights under such assignment. The plaintiff claims that prior to and at the time of the application for the policy, he was a creditor of Henry, and remained such creditor until his death, and that the policy was assigned to him as security for the debt, and for any sums he might afterwards advance to Henry.

§ 1661. *Assignment of policy to secure debt; rights of assignee.*

If upon the evidence you find this to be the case, then the plaintiff can recover on such policy if Henry's executor could have recovered thereon if the policy had not been assigned. And in such case the plaintiff can recover, if entitled to recover at all, the full amount of the policy, although the debt of Henry to him may be much less than the amount insured. On this subject we may observe that no life policy is valid if taken for the benefit of a person who has no insurable interest in the risk. Hence if this policy on the life of Henry had been taken directly for the benefit of Swick, and Swick at the time was not a creditor of Henry, and there was no agreement or understanding that it was for the purpose of securing him for advances to be made to Henry, and if the plaintiff had in no way an insurable interest in Henry's life, then the policy would have been void. The law forbids such mere wager policies, and also forbids any scheme or contrivance whereby its requirements in that respect are sought to be evaded.

Hence if Swick and Henry confederated together to procure this policy for the benefit of Swick, who was not or had not agreed to become a creditor of Henry, and with the view of having the same assigned thereafter to Swick, without consideration, or not as security for a debt due or to become due, or for any other lawful purpose, then such contrivance would make the policy void.

§ 1662. *Fraudulent contrivance to effect insurance for one having no insurable interest.*

If, on the other hand, Swick was a creditor of Henry, and if the purpose in procuring the policy was to have the same assigned thereafter to Swick for his (Swick's) indemnity, and Swick paid the premium, and the facts were known to the agent of the company, the policy is not void. So if there was, as plaintiff contends, an understanding between Henry and Swick, the latter being a creditor of Henry, or having agreed to become such, that this policy should be taken on Henry's life, with the view of having Henry, or Henry's estate in the event of his death, in a condition to meet his debt to Swick, and if Swick paid the premium with the knowledge of the company's agent, and thereafter the policy was assigned to Swick when such creditor of Henry, or as a security for debts due or agreed to be created, and the company agreed in writing to such assignment, then the policy and assignment were not invalid. In other words, the law exacts fair dealing in these respects from all parties in interest. It will not uphold a policy made or fraudulently contrived to be made for the benefit of a person who has no insurable interest in the risk. Mere speculative risks in the lives of others, or gambling policies of any kind, are forbidden for the good of society. It is not necessary for the purposes of this case to discuss what may, under different circumstances, be a mere speculative risk, or what interest will be non-speculative; for in the case before the jury the question is merely on the one hypothesis, whether Swick was a creditor of Henry at the date of the policy, and continued so to be at the date of assignment; and on the other hypothesis presented—that if he had no understanding at the date of the policy concerning its subsequent assignment—whether Swick was Henry's creditor when it was assigned, and remained such until Henry's death.

2. The main defense upon the trial has been rested upon alleged misrepresentations by the assured in the application, respecting his health and his habits as to the use of alcoholic drinks.

In the application the following questions were asked of Henry and answered by him: 6. "Is your health good, and, as far as you know, free from any symptoms of disease?" Answer—"Yes." 9. "Are your habits uniformly and strictly sober and temperate?" Answer—"Yes." 10. (a) "Have you ever been addicted to the excessive or intemperate use of any alcoholic stimulants or opium?" Answer—"No." 10. (b) "Do you use habitually intoxicating drinks as a beverage?" Answer—"No."

§ 1663. *Construction of warranty of good health and freedom from any symptoms of disease.*

By the terms of the contract between these parties, these answers are warranted to be true, and it is agreed in the policy that if the answers are untrue or deceptive in any respect, the policy shall be void and of no effect. The parties have the right thus to agree, and are bound by their agreement, and hence the importance of understanding what the questions asked were, and the answers given thereto. This is the more important, because if the answers given are untrue, the policy is avoided, although there are no intentional or fraudulent misstatements, and although the party's habits as to intoxicating drinks did not in fact cause or even accelerate his death. We remark to you, first, that the questions as to health and habits in respect to intoxicating drinks will be taken to mean what the words employed by those questions usually and commonly mean. They are not words of art, but words of every-

day meaning, and this is a contract not between professional men or lawyers, but a contract that these companies profess to make with the world, and when they ask a man if his health is good, there is no mystery in the question.

If you find from the evidence that at the date of the application Henry's *health was not good*, or if Henry knew of any symptom of disease which he did not disclose, then there can be no recovery on the policy. If you find the fact to be as the company contends it was, that Henry's general health was at the time impaired by exposure, or from the use of intoxicating liquors, or from any other cause, there can be no recovery on the policy. But if it was known to the company, or its agent taking the risk, that the assured had, as certified by the family physician to the company, been sick a few days before, and if this was a mere temporary illness, which was over at the time, and was disregarded by the company, or its agent taking the risk, as not being within the purview of the question asked of the assured in this respect, the policy would not be thereby avoided.

§ 1664. *Construction of warranty as to previous or existing use of intoxicating liquors.*

3. Now as to the questions respecting *intoxicating liquors*. These relate to the habits of the party. The applicant stated that he had never been addicted to the excessive or intemperate use of alcoholic stimulants. This is not a statement that he had never been addicted to the use of intoxicating liquors at all, but a statement that he had never been addicted to the excessive or intemperate use of them, and it is untrue if Henry had, and only in case he had, been addicted to the excessive or intemperate use of alcoholic stimulants.

The application, in answer to other questions, stated that his habits were uniformly and strictly sober and temperate, and that he did not habitually use intoxicating drinks as a beverage. These questions and answers you will perceive relate to the *habits* of the party in that respect. If the company did not intend to insure any person who used intoxicating liquors at all, it would be very easy to ask such a question. But they have not done so. The occasional use of intoxicating liquors by the applicant would not make these answers untrue; nor would they be rendered untrue by any use of intoxicating drinks which did not make his habits those of a man not uniformly and strictly sober and temperate, or which did not amount to a habitual use of such drinks as a beverage.

It is your province to decide from the evidence whether the assured was or was not, at the time the application was made, a man whose habits were uniformly and strictly sober and temperate, or whether he did or did not habitually use intoxicating stimulants as a beverage; and if you find his answer to either question to be untrue, there can be no recovery on this policy, although, as above remarked, he did not intentionally make false answers, and although those habits did not in fact cause, hasten or contribute to the death.

§ 1665. *Distinction between untruthful answers and failure to make full answers.*

4. We have been asked by the defendant to instruct you that if the answers as to the health and habits are not *full*, correct and true, the plaintiff cannot recover, even though the failure to make full answers was unintentional.

The application referred to and made part of the policy contains the provision: "The undersigned does hereby covenant . . . that the preced-

ing answers and this declaration shall be the basis of the policy; that the same are *warranted* to be full, correct and true, and that no circumstance is concealed, withheld or unmentioned, in relation to the past or present state of health, habits of life, or condition of the said party whose life is to be assured, which may render an insurance on his life more than usually hazardous, or which may affect unfavorably his prospects of life," and that if the foregoing answers and statements be not in all respects full, true and correct, the policy shall be void. The policy repeats or adopts this provision. Now a distinction is to be taken, we think, between untruthful answers to specific questions and the mere failure to make full answers. Such failure, under these provisions, to defeat the policy must relate to some circumstance which might render an insurance on his life unusually hazardous, or which might affect unfavorably his prospects of life; while an untruthful or incorrect answer to the specific questions asked renders the policy absolutely void, though made in relation to a matter not material to the risk.

§ 1666. *If defendant avers breach of warranty of existing fact, burden of proof rests on him.*

5. The statements and declarations in the application are warranties, and the defense here is that there has been a breach of some of these warranties. Where a party relies on the breach of such a warranty, he must establish it by evidence. This may not be the rule as to *promissory* warranties — that is, where the party warrants that he will not thereafter do or will refrain from doing something stipulated in a policy as to the future. In this case the alleged breach of warranty is as to the statement of existing facts — the facts as to his health, and the facts as to his habits; and the defendant avers the breach, and therefore it is for the defendant to show that there has been such a breach, and not for the plaintiff to prove that there was no breach.

These observations cover, it seems to us, all that is necessary to state relating to the law of the case. The *facts* the law commits to your decision, to be decided upon the evidence, and upon the evidence alone, and it expects that your verdict will be one not influenced by any considerations arising from the nature of the parties — that it will be one which is the expression of your unbiased judgment upon the testimony before you. (Verdict for plaintiff.)

INSURANCE COMPANY v. FOLEY.

(15 Otto, 350-355. 1881.)

ERROR to U. S. Circuit Court, District of South Carolina.

STATEMENT OF FACTS.—In January, 1872, Foley obtained a policy of life insurance on the life of Badenhop, his debtor, to the amount of \$5,000, and subsequently two other policies for much smaller amounts. In January, 1875, Badenhop died. This suit was brought upon the policies, and the defense made that both Foley and the insured had represented the latter to be of temperate habits, whereas he was intemperate, and consequently that the policy was void.

The evidence was conflicting; witnesses for the plaintiff testifying that the deceased was a man of temperate habits, and on the side of the defendant, that he was intemperate.

The defendant requested the court to charge: That where witnesses testify of their own knowledge of the party and his habits, that he was not a man

of temperate habits, their testimony is entitled to greater consideration than witnesses who testify otherwise, because they have not seen or known of his intemperate habits.

This instruction was refused, and the court instructed the jury . . . that if they find that his habits in the usual, ordinary and every-day routine of life were temperate, then the representations made by him and the plaintiff were not untrue — and this although he may have had an attack of *delirium tremens* from an exceptional debauch before the issuance of the policy. There was a judgment for the plaintiff.

Opinion by MR. JUSTICE FIELD.

The instruction requested by the defendant, treating it as applicable to the case at bar, and not as containing a mere abstract proposition of law, is open to several objections.

§ 1667. *The instruction asked by the defense, ut supra, considered and held improper.*

In the first place, it assumes that there was a difference in the sources of knowledge of the witnesses in the case; which was not the fact. All of them testified from their observation of the conduct of the deceased; and the jury would properly give weight to the testimony, not according to the positiveness of the averments of the witnesses as to their knowledge, but, other considerations being equal, according to their opportunities of observation of the deceased's conduct, and the manner in which those opportunities had been improved. No witness testified, from his own knowledge, that the deceased was of intemperate habits at the time he applied for the insurance, and that he had always been so. No instruction should be given which thus assumes, as a matter of fact, that which is not conceded or established by uncontradicted proof. *New Jersey Mutual Life Ins. Co. v. Baker*, 94 U. S. 610.

In the second place, the instruction requested does not present the law with entire accuracy. Whether the testimony of the persons alleging knowledge is entitled to greater consideration than that of persons asserting opinions mainly depends upon the subjects with respect to which the testimony is given. If the subject be, as in this case, the habits of a party, affirmations of knowledge will be weighed with reference to the opportunities of the witnesses to obtain the knowledge they assert. If they are not intimate with him, and see him only occasionally, the assertion of knowledge of his habits, however strong, will amount to no more than the assertion of an opinion, and will not be entitled to equal weight with less positive testimony of other witnesses founded upon a more extended acquaintance.

In the third place, the instruction requested omits the consideration of the character of the witnesses, as an element in determining the weight to be given to their testimony. The force of testimony often depends as much upon the intelligence and judgment of the witnesses, disclosed by their manner of testifying, as upon confidence in their general veracity.

§ 1668. *"Man of temperate habits."*

The charge given by the court, as stated above, correctly presented the law of the case. The question was as to the habits of the insured. His occasional use of intoxicating liquors did not render him a man of intemperate habits, nor would an exceptional case of excess justify the application of this character to him. An attack of *delirium tremens* may sometimes follow a single excessive indulgence. Ray, in his treatise on Medical Jurisprudence, says that, though it most commonly occurs in habitual drinkers, after a few days

of total abstinence from spirituous liquors, it may be the immediate effect of an excess or series of excesses in those who are not habitually intemperate as well as in those who are. Sec. 545. In the American Encyclopædia, under the head of "Delirium Tremens," it is stated that it "sometimes makes its appearance in consequence of a single debauch;" though commonly it is the result of protracted or long-continued intemperance. Vol. V, p. 782.

When we speak of the habits of a person, we refer to his customary conduct, to pursue which he has acquired a tendency, from frequent repetition of the same acts. It would be incorrect to say that a man has a habit of anything from a single act. A habit of early rising, for example, could not be affirmed of one because he was once seen on the streets in the morning before the sun had risen; nor could intemperate habits be imputed to him because his appearance and actions on that occasion might indicate a night of excessive indulgence. The court did not, therefore, err in instructing the jury that if the habits of the insured, "in the usual, ordinary and every-day routine of his life, were temperate," the representations made are not untrue, within the meaning of the policy, although he may have had an attack of *delirium tremens* from an exceptional over-indulgence. It could not have been contemplated from the language used in the policy that it should become void for an occasional excess by the insured, but only when such excess had by frequent repetitions become a habit. And the testimony of the witnesses, who had been intimate with him for years and knew his general habits, may well have satisfied the jury that, whatever excesses he may at times have committed, he was not habitually intemperate. Judgment affirmed.

SCHULTZ v. MUTUAL LIFE INSURANCE COMPANY.

(Circuit Court for New York: 6 Federal Reporter, 672-676. 1881.)

STATEMENT OF FACTS.—Action on a policy of life insurance. Defense, that the assured, after the contract, became addicted to a pernicious habit tending to shorten life, the habit of hard drinking. Evidence was offered to support the defense, under a clause in the policy stated in the opinion.

Opinion by SHIPMAN, J.

The question pending at the adjournment yesterday was to the admissibility of evidence to show that after the date of the policy the person whose life was insured, though previously temperate, formed the habit of intemperance. The clause in the policy referring to this subject is as follows: "This policy is issued and accepted by the assured upon the following express conditions and agreements: . . . If any of the statements and declarations made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue, then, and in every such case, this policy shall be null and void."

§ 1669. "*If any statements . . . shall be found in any respect untrue*" refers to all statements, material or not.

The general character and legal effect of a similar clause in a life policy was considered by the supreme court in *Jeffries v. Life Ins. Co.*, 22 Wall., 47 (§§ 1676-78, *infra*). The clause in that policy declared that the policy was made by the company upon the express condition and agreement that the statements and declarations made in the application for the policy, and on the faith of which it was issued, were in all respects true. The question before the court was whether the untruth of any statement or declaration made the policy

void, or whether the untruth of such statements only as were material to the risk had such effect. The court say: "This stipulation is not expressed to be made as to important or material statements only, or to those supposed to be material, but as to all statements. They need not be representations, even, if this term conveys an idea of an affirmation having any technical character. Statements and declarations is the expression; what the applicant states, and what the applicant declares. Nothing can be more simple. If he makes any statement in the application it must be true. If he makes any declaration in the application it must be true. A faithful performance of this agreement is made an express condition to the existence of a liability on the part of the company."

§ 1670. — *such language is promissory, and by incorporation into the policy binding for the future.*

The policy, then, having been issued upon the express condition that each statement and each declaration shall be found to be true, the only remaining question is whether this language includes declarations in regard to existing alleged facts, or includes also declarations in regard to the future existence of facts which are or are not to take place. I was at first inclined to the opinion that the adjective "untrue" was inapplicable to express the violation of a promise or agreement in regard to the future; that a declaration that a person would not do a thing could not be said to be untrue although the person did subsequently do the act which he had declared he would avoid. A consideration, however, of the stress which is laid by courts in analogous cases upon language in a policy which implies that a future act material to the risk is to be done or omitted, leads me to a different conclusion. In fire policies the application or survey is made generally a part of the policy. The answers to questions which indicate or declare that in future a certain state of things is to take place and exist in the insured property,—as, for example, that after a certain time the property will not be used at night, or that a chimney will be built, or the location of a stove will be changed,—have frequently been held to be binding upon the assured, and to be a promissory engagement or warranty that the named act would happen or continue to exist; so that in *Bilborough v. Ins. Co.*, 5 Duer, 587, the principle is stated as follows: "Language in a policy which imports that it is intended to do or omit an act which materially affects a risk, its extent, or nature, is to be treated as involving an engagement to do or omit such act." In this policy such statement and declaration is, in substance, incorporated into and made part of the policy. The language in regard to future pernicious habits is far more than a declaration of intention. It is a positive representation of a future fact, and is not to be regarded as an expression of the expectation or belief of the insured.

I am, therefore, led to the conclusion that the clause in the policy imports an agreement that future pernicious habits shall not be entered into, and that if the insured thereafter practices any pernicious habit that obviously tends to shorten life, the policy will be thereby avoided. The evidence is admitted.

BUELL v. CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

(Circuit Court for Ohio: 2 Flippin, 9-14. 1877.)

Opinion by WELKER, J.

STATEMENT OF FACTS.—This suit is founded upon a policy of insurance upon the life of Jephtha C. Buell, for the benefit of his wife, the plaintiff. The de-

fendant, as a second defense to the action, sets up in its answer that in the declaration made at the time of the application for insurance, among other things, the plaintiff says: "And I do hereby agree that the answers given to the following questions and the accompanying statements, and this declaration shall be the basis and form part of the contract or policy between me and said company; and if the same be not in all respects true and correctly stated, the said policy shall be void."

That among the questions in said declaration above referred to was the following question: "Has father, mother, brother, or sister of the party died, or been afflicted, with consumption, or any disease of the lungs, or insanity? If so, state full particulars of each case." That the answer to the above question given by the plaintiff was as follows: "No. Father died from exposure in water; age fifty-eight. Mother living, age about fifty." That the policy issued upon said declaration and questions and answers, and sued upon, contains the following conditions, to wit: "And it is also understood and agreed to be the true intent and meaning hereof, that if the proposals, answers and declaration made by the said Anna M. Buell, and bearing date the 19th day of March, 1866, and which are hereby made part and parcel of this policy as fully as if herein recited, and upon the faith of which this agreement is made, shall be found in any respect untrue, then, in such case, this policy shall be null and void." The defendant avers that the said answer above stated was not in all respects true and correctly stated, but was incorrect and untrue in this, the father of said Jephtha C. did not die at the age of fifty-eight, but he died before he was of the age of thirty years. Wherefore the defendant says said policy was and is void and of no effect, and said plaintiff is not entitled to recover any amount against the defendant.

To this answer the plaintiff files her demurrer, alleging as reason therefor, that all of said statements and allegations are redundant and irrelevant, and constitute no defense to the plaintiff's action. The demurrer admits that the answer to the question as stated in respect to the age of the father at the time of his death was untrue and incorrect. That being the fact, does it constitute a defense to this action?

§ 1671. *Distinction between warranties and representations.*

Statements in the application for insurance in the declaration, or answers to the questions, are either *warranties* or *representations*. If warranties, then materiality, or want of materiality, as to the risk has nothing to do with the contract. The only question is, were they untrue? and if so the policy is void. But if representations, then to avoid the policy they must be *substantially* and *materially* untrue, or made for the purpose of fraud.

In 2 O. S. R., 464, the supreme court of Ohio say: "The distinction between a warranty and a representation is easily comprehended; the difficulty only arises in its application to particular cases." "An express warranty is a stipulation in writing on the face of the policy, on the literal truth or fulfillment of which the validity of the entire contract depends." "It may be contained in another paper, if distinctly referred to in it and expressly made a part of the contract between the parties." A representation is defined to be "a verbal or written statement made by the assured to the underwriter before the subscription of the policy, as to the existence of some fact or state of fact tending to induce the underwriter more readily to assume the risk by diminishing the estimate he would otherwise have formed of it."

In the case of *Campbell v. N. E. Ins. Co.*, 98 Mass., 381, in defining what is

a warranty and what is merely a representation, the court say: "When statements or engagements on the part of the insured are inserted or referred to in the policy itself, it often becomes difficult to determine to which class they belong. If they appear on the face of the policy they do not necessarily become warranties. Their character will depend upon the form of the expression used, the apparent purpose of the insertion, and sometimes upon the connection or relation to the other parts of the instrument."

Upon this subject our supreme court, in 2 O. S. R., say: "But it is by no means . . . clear that what is in its nature preliminary, and designed for the information of the underwriter, will so change its character as not to be satisfied by a substantial compliance; from the fact that it is, by appropriate words in the policy, made a part of it."

But I am referred to the case of *Jeffries v. Economical Life Ins. Co.*, 22 Wall., 47 (§§ 1676-78, *infra*), recently decided by the supreme court of the United States, as decisive of the question made upon this demurrer. In that case there were two questions asked the insured: 1. Whether he was married or single? The answer to which was that he was single. 2. Had any application been made to any other company, and if so, when? The answer to which was "No." The answers to both questions were alleged to be untrue. The court held that the answers to these questions constituted a part of the contract, and if untrue, whether they were material to the risk or not, would avoid the policy. The court did not seem to put this upon the ground alone that the answers constituted warranties, but that they formed a part of the contract and were expressly made so by the parties, and the court would not inquire as to the materiality, because the parties had themselves deemed them material. How did they become material? It will be observed that both of these answers were direct responses to the questions, and that by the direct form of the questions the answers necessarily became a part of the contract. How is it in that respect in the case before us?

§ 1672. *Matters not inquired of. "State full particulars."*

The falsity complained of in the answer consists only in reference to the age at which the father died. This certainly was not inquired of in the question, unless we are to find it in that part of it which reads: "If so, state full particulars of each case." This part of the question was evidently intended to reach simply the particulars of the death or affliction of the near relatives, to ascertain the character and nature of the disease—its extent, whether produced from recent causes or hereditary in the family, in order to determine whether Buell was a proper subject to insure. It is exceedingly doubtful whether the question is really definite enough to require the answer to state whether the father was dead at all, if he did not die of consumption or disease of the lungs or insanity. I think the question fairly means, not whether the father, etc., had died of *any disease* or *from any cause*, but whether he had died of, or been afflicted with, consumption or any disease of the lungs, or insanity. This being the fair import of the question, "No" was a complete answer to it, and the remainder of the answer was uncalled for and not responsive to the question. But suppose that be so, defendant claims that it is nevertheless an answer of some sort and therefore an important part of the contract. The reply to that is that the declaration which relates to the answers to questions to be made by plaintiff, and which it was agreed should be made part of the contract, must be construed to, and does, mean such answers as are responsive to the questions and such as may be called for by the defendant, and that it does

not cover such answers as may be volunteered and irrelevant and that amount to mere representations.

In the light of the cases in 98 Mass. and 2 O. S. R., I may be allowed to say that not all the statements in the application or writing are to be regarded as warranties, but some may be regarded as mere representations. I do not think the case of *Jeffries v. Economical Ins. Co.* is at all at variance with this construction. In that case the questions directly called for the answers, and the asking and the answers constituted the mutual agreement of the parties. In this case the age of the father was not called for, and is only voluntarily given by the plaintiff, and the mutual agreement cannot arise as it did in that case so as to say the parties themselves settled the question of materiality.

I believe the true rule in relation to the question of what amounts to a *warranty*, or what amount only to *representations*, in the answers to questions in this class of applications, is: Where the answers are responsive to direct questions asked by the insurance company they are to be regarded as warranties, and where they are not so responsive, but volunteered without being called for, they should be construed to be mere representations. The part of the answer in question in this case in reference to the age of the father at death, being a mere representation, does not constitute a defense unless it appears to have been material as well as false. The demurrer is therefore sustained.

ÆTNA LIFE INSURANCE COMPANY v. FRANCE.

(1 Otto, 510-516. 1875.)

ERROR to U. S. Circuit Court, Eastern District of Pennsylvania.

Opinion by MR. JUSTICE HUNT.

STATEMENT OF FACTS.—The action was *assumpsit* to recover \$10,000, the amount of a policy insured upon the life of Andrew J. Chew in July, 1865. The issuing of the policy, the death of Chew, and the service of the necessary proofs of his death, are not seriously disputed.

The policy contained the following clause: "And it is also understood and agreed to be the true intent and meaning hereof, that if the proposal, answers and declarations made by said Andrew J. Chew, and bearing date the 12th day of July, 1865, and which are hereby made part and parcel of this policy as fully as if herein recited, and upon the faith of which this agreement is made, shall be found in any respect false or fraudulent, then and in such case this policy shall be null and void."

The issuing of the policy was preceded by a proposal for insurance, which contained a number of questions propounded to Chew by the company, with the answers made by him. In relation to such questions and answers, the policy contained this clause: "It is hereby declared that the above are correct and true answers to the foregoing questions; and it is understood and agreed by the undersigned that the above statements shall form the basis of the contract for insurance, and also that any untrue or fraudulent answers, any suppression of facts in regard to the party's health, or neglect to pay the premium on or before the day it becomes due, shall render the policy null and void, and forfeit all payments made thereon."

Among others were the following questions and answers; viz.:

"4. Q. Place and date of birth of the party whose life is to be insured?

"A. Born in 1835, interlined (Oct. 28), Gloster county, N. J.

"5. Q. Age next birthday?

"A. Thirty years.

"11. Q. Has the party ever had any of the following diseases? if so, how long, and to what extent?—palsy, dropsy, palpitation, spitting of blood, epilepsy, yellow fever, consumption, rupture, apoplexy, asthma, convulsions, paralysis, bronchitis, disease of the heart, disease of the lungs, insanity, gout, fistula, affection of the brain, fits.

"A. None."

Evidence upon both sides was given as to the age of Chew, tending to show that he was thirty-seven years old, or at least thirty-five years old, when he signed the application, and upon the question of his having suffered from a rupture. Before the case was submitted to the jury, a number of requests to charge were made by the judge, which will be referred to presently.

§ 1673. "*Statements in any respect false*"—*must be exactly true.*

In its main features, this case bears a close resemblance to that of *Jeffries v. Life Ins. Co.*, decided at the last term of this court. 22 Wall., 47 (§§ 1676–78, *infra*). In that case, as in this, it was insisted that the falsity of a statement made in the application did not vitiate the policy issued upon it, unless the statement so made was material to the risk assumed. The opinion then delivered contains the following language in answer to that claim:

"The proposition at the foundation of this point is this, that the statements and declarations made in the policy shall be true.

"This stipulation is not expressed to be made as to important or material statements only, or to those supposed to be material, but as to all statements. The statements need not come up to the degree of warranties. They may not be representations even, if this term conveys an idea of an affirmation having any technical character. Statements and declarations is the expression,—what the applicant states, and what the applicant declares. Nothing can be more simple. If he makes any statement in the application, it must be true. If he makes any declaration in the application, it must be true. A faithful performance of this agreement is made an express condition *to the existence* of a liability on the part of the company."

This decision is so recent, and so precise in its application, that it is not necessary to go back of it. It is only necessary to reiterate that all the statements contained in the proposal must be true; that the materiality of such statements is removed from the consideration of a court or jury by the agreement of the parties that such statements are absolutely true, and that, if untrue in any respect, the policy shall be void.

The judge was requested to charge, 5. If the jury believe that the answers to questions Nos. 4 and 5 in the application for insurance, as to the date of birth, and age next birthday, of said Andrew J. Chew, were false and untrue, the policy issued upon the application is void, and their verdict must be for the defendants.

In response to this request the judge said: "If the jury believe that the answers to the questions numbered 4 and 5 were materially untrue as to the age of the said Andrew J. Chew, the policy is void, and the verdict must be for the defendants." The defendants were entitled to the charge they requested, without the addition made by the judge of the word "materially." The judge, however, proceeded to say: "And if he was thirty-seven, or even thirty-five years old, the difference was not immaterial. I give the fifth instruction as requested."

The process of reasoning by which the learned judge reached his conclusion on this point we have held to be erroneous, viz., that, to make the representation important, it must be material to the risk assumed; that the representation that he was but thirty years old, when he was thirty-seven or even thirty-five, was material to the risk; and, if the jury believed that he was of the greater age mentioned, their verdict must be for the defendants; and therefore he charged as requested. The charge should have been that, as Chew had represented himself to be but thirty years of age, if the jury found him then to be thirty-five years old, the false statement would avoid the policy, and they must find for the defendants, resting his direction upon the falsity alone of the statement.

Still we do not see that the defendants can ask relief for this reason. The charge was right, and could not be misunderstood by the jury. The allegation of the defendants was that Chew had misrepresented his age in the manner stated, and therefore the policy should be adjudged void. The judge charged that, if he had so misrepresented, the policy was void, and the verdict must be for the defendants. We think no valid exception can be taken to this charge.

Upon the subject of the disease of rupture, or of having been ruptured, the record gives this statement, viz.: The defendants requested the court to charge the jury: 6. If the jury believe that the answer to question No. 11 in the application for insurance, whether said Andrew J. Chew ever had any of the diseases therein specified, etc., was false and untrue as to any of said diseases, the policy issued upon the application is void, and their verdict must be for the defendants.

7. If, at the time when the application for insurance was made and the policy issued, Andrew J. Chew was or had been ruptured, he was bound, in answer to question No. 11, to state the fact, and also how long and to what extent; and, if the jury believe that at the time mentioned he was or had been ruptured, his answer "None" to said question No. 11 was untrue and false, and their verdict must be for the defendants.

The judge declined thus to charge, but said, "If you believe that Andrew J. Chew was ruptured at the time, or at any such previous period that the rupture may have been material to any question of the soundness of his health when his life was insured, or if at that time, or within any such prior period, he wore a truss in order that he might repress hernial extrusion, your verdict should, in either case, be for the defendants. But though he was ruptured in 1846 and 1854, and although the rupture accidentally recurred in a worse form in 1870 from an extraordinary exertion of strength in lifting a heavy weight, yet if you find that from 1855, or thereabouts, until after the last insurance in 1865, he had no such disease, and was in all this interval in the habit of working and using bodily exercise, and occasionally dancing, bathing and traveling, and could walk long distances without being fatigued, and either did not wear a truss or wore it only from continuance of early habit; that his health was not impaired or affected by the former rupture; that it would not, if mentioned, have increased the risk or the premium; and that there was, in this respect, no falsehood or wilful suppression,—I cannot give the instruction seventhly requested in the absolute form in which it is expressed."

This charge was erroneous. It left to the decision of the jury, and under circumstances of much embarrassment, a question which the parties had themselves determined. An ordinary jury of twelve men, without the aid of ex-

perts, are poorly qualified to determine a question of medical science. To submit to a jury the question, conceding the fact that Chew was ruptured in the year 1846, and again in the year 1854, and again in a worse form in the year 1870, whether, during an intermediate period from 1855 to 1865, he had no disease of rupture, and that the jury might decide that because he walked and worked and danced and bathed without fatigue, and either did not wear a truss or wore it only from continuance of early habit, that his health was not impaired, is to impose a great strain upon the powers of a jury. In the ordinary course of things, persons not skilled in medical science could not know what caused a rupture, whether at any particular time the disease was conquered, because its appearance was not then present, or whether it was suspended to reappear sooner or later. Hernia, or rupture, appears in infants of but a few days old, in youth, maturity, and extreme old age. It manifests itself in the abdomen, the groin, the scrotum, the navel, and the thigh. It is external, or may be internal only. Laurence on Rupture, pp. 4, 10. The author quoted says that this "complaint affects indiscriminately persons of both sexes, of every age, condition, and mode of life. . . . It is true," he says, "that a hernia, if properly managed, is not immediately dangerous to the patient, does not affect his health, or materially diminish his enjoyments; but it is a source of constant danger, since violent exercise or sudden exertion may bring it from a perfectly innocent state into a condition which frequently proves fatal. . . . The treatment of rupture," he adds, "demands from all these circumstances as great a combination of anatomical skill, with experience and judgment, as that of any disorders in surgery." Pages 2, 3.

These facts illustrate the gravity of the error committed on the trial of the cause. The facts and circumstances stated should not have been given to the jury for their judgment. The parties had themselves adjudged and agreed what should be the result if certain facts existed. It was for the jury to determine whether the facts existed; and, according as they determined upon that point, the one or the other result must necessarily follow. Thus the applicant, when she asked for a policy of insurance, expressly agreed that the answers made by Chew to the questions put to him should be true, and that, if any of them were false, the policy issued to her should be void. She expressly declared again, that the answers made by him were true, that they formed the basis of the contract of insurance, and that any untrue answer should render the policy void.

It was alleged by the defendants, that when Chew was asked whether he "had ever had any of the following diseases," among which was "rupture," and to which he answered "None," that such answer was untrue.

We decided, in the case of *Jeffries v. Life Ins. Co.*, *supra*, that the question of the materiality of the answer did not arise; that the parties had determined and agreed that it was material; that their agreement was conclusive on that point; and that the only questions for the jury were, first, was the representation made? second, was it false? This principle was precisely embraced within the requests 6 and 7 made in this case, and the judge erred in not charging as therein requested.

New trial granted.

INSURANCE COMPANY v. GRIDLEY.

(10 Otto, 614-617. 1879.)

ERROR to U. S. Circuit Court, Eastern District of New York.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—This is an action upon a policy of insurance insuring the life of Fayette R. Gridley in the sum of \$10,000, for the benefit of his wife, the defendant in error. The policy sets forth that it was issued “in consideration of the representations made in the application therefor and of the premium,” etc. It sets forth further, that “if any of the statements or declarations in the application for this policy, and upon the faith it is issued, shall be found in any material respect untrue, then . . . this policy shall be null and void.”

The application was signed by the assured in behalf of himself and his wife. The first clause is as follows: “An answer to each of the following questions is required from persons proposing to effect insurance in this company, which answers form the basis of this contract.” It concluded with the declaration “that the above are the applicant’s own fair and true answers to the foregoing questions. . . . And it is hereby agreed that these statements with this declaration shall form the basis of the contract for assurance, and that any untrue or fraudulent answers—any suppression of facts in regard to the person’s health, habits, or circumstances—material to the risk, . . . shall vitiate the policy and forfeit all payments made thereon.”

The application contained, among others, the following question: “Have the person’s (whose life is to be assured) parents, uncles, aunts, brothers or sisters been afflicted with consumption, scrofula, insanity, epilepsy, disease of the heart, or any other hereditary disease?” The applicant answered: “No; except one brother temporarily insane six months since. Causes, domestic and financial troubles, followed by hard drinking and excessive use of opium and morphine. Recovery followed reformed habits. No hereditary taint of any kind in family on either side of house, to my knowledge.”

It was proved on behalf of the company that Abraham Gridley, an uncle of the assured, was insane for more than a year preceding his death, and that he died in the Bloomingdale insane asylum upwards of twenty years before the application for the insurance here in question was made.

The testimony being closed the counsel for the company asked the court to instruct the jury to find a verdict for the defendant. This was refused. The court thereupon instructed the jury to return a verdict for the plaintiff. The jury found as directed. The defendant duly excepted to the instruction given and to that refused, and sued out this writ.

The only question argued before us is whether the court erred in instructing the jury to find for the plaintiff. The solution of this question depends upon the construction and effect to be given to the interrogatory and the answer to which our attention was called by the counsel for the plaintiff in error.

§ 1674. *Construction of statutes and written instruments the same.*

It is a recognized rule in the construction of statutes that “a thing which is within the intention of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers.” *People v. Utica Ins. Co.*, 15 Johns. (N. Y.), 358. This proposition is equally applicable to other written instruments. The object of all symbols is to convey

the meaning of those who use them, and when that can be ascertained, it is conclusive. The intent of the law makers is the law, and here the intent of the parties is the contract.

It was material to the risk, and hence important to the insurers, to know whether either of the maladies named or any serious malady not named was hereditary in the family of the applicant. If the question were answered in the affirmative it might be a reason for declining to issue the policy. On the other hand, if either of such maladies existed in a member of the family other than the applicant, but was not hereditary, and, on the contrary, existed, according to the family history, for the first time in the person affected, and in that case was the effect of known contemporaneous causes, then it was not material to the risk, was of no interest to insurers, and it is fairly to be presumed they did not care to be advised upon the subject.

This may be illustrated by the case of insanity mentioned in the answer of the applicant. He says his brother was afflicted in that way. "Causes, domestic and financial troubles, followed by hard drinking and excessive use of opium and morphine." He adds: "Recovery followed reformed habits." This explanation took the subject wholly out of the scope and purpose of the inquiry by the company and made it, as it were, *res inter alios acta*. The last sentence of the answer is: "No hereditary taint on either side of the house, to my knowledge." The affirmation was restricted and narrowed down to what the applicant himself personally knew touching the subject. It has this extent; no more. The company might have refused to insure unless the qualification were withdrawn. Having failed to do this, such is the contract of the parties.

• § 1675. "*Not to my knowledge*" to be falsified only by showing knowledge.

To make out the defense sought to be established by the insurers three things were, therefore, necessary to be shown: that the alleged insanity of the uncle had existed; that it was hereditary; and that both these things were known to the applicant when he answered the question.

The first point was clearly proved. In relation to the second and third, there was no proof whatever. What was proved, without what was not proved, was of no account. The defense, therefore, wholly failed. It follows that the instruction complained of was properly given. The subject of questions and answers in cases like this was fully considered by this court in *National Bank v. Insurance Co.*, 95 U. S., 673. It is unnecessary to go over the same ground again, or to add anything to what is there said.

Judgment affirmed.

JEFFRIES v. LIFE INSURANCE COMPANY.

(22 Wallace, 47-57. 1874.)

ERROR to U. S. Circuit Court, Eastern District of Missouri.

STATEMENT OF FACTS.—Kennedy upon having his life insured made these statements: that he was single, when in fact he was married, and that he had made no previous application to any other company, whereas he was then insured in another company for \$10,000. The policy contained a provision that the statements and declarations made in the application . . . were in all respects true, and without the suppression of any fact relating to the health or circumstances of the assured *affecting the interest of the company*; otherwise

the policy was to be null and void. Suit was brought on the policy by Kennedy's administrator and judgment was rendered against him.

Opinion by MR. JUSTICE HUNT.

The contention in opposition to the judgment is this: that the plea does not aver that the false statements made by the assured were material to the risk assumed. Is that averment necessary to make the plea a good one?

§ 1676. *Untrue statements need not be injuriously untrue.*

It is contended, also, that the false answers in the present case were not to the injury of the company; that they presented the applicant's case in a less favorable light to himself than if he had answered truly. Thus, to the inquiry are you married or single, when he falsely answered that he was single, he made himself a less eligible candidate for insurances than if he had truly stated that he was a married man; that although he deceived the company, and caused it to enter into a contract that it did not intend to make, it was deceived to its advantage, and made a more favorable bargain than was supposed.

This is bad morality and bad law. No one may do evil that good may come. No man is justified in the utterance of a falsehood. It is an equal offense in morals, whether committed for his own benefit or that of another. The fallacy of this position as a legal proposition will appear in what we shall presently say of the contract made between the parties.

We are to observe, first, the averment of the plea: That Kennedy, in and by his application for the policy of insurance, in answer to a question asked of him by the company, whether he was "married or single?" made the false statement that he was "single," knowing it to be untrue; that in reply to a further question therein asked of him by the company, whether "any application had been made to any other company? If so, when?" answered "No;" whereas, in fact, at the time of making such false statement, he well knew that he had previously made application for such insurance, and been insured in the sum of \$10,000 by another company.

§ 1677. *Statements "in all respects true" must be strictly true.*

We are to observe, secondly, the averment that the statements and declarations made in the application for said policy, and on the faith of which it is issued, *are in all respects true*, and without the suppression of any fact relating to the health or circumstances of the insured affecting the interests of the company. We are to observe, also, that other clause of the policy, in which it is declared that this policy is made by the company and accepted by the insured upon the express condition and agreement that such statements and declarations are in all respects true. This applies to all and to each one of such statements. In other words, if the statements are not true, it is agreed that no policy is made by the company, and no policy is accepted by the insured.

The proposition at the foundation of this point is this: that the statements and declarations made in the policy shall be true. This stipulation is not expressed to be made as to important or material statements only, or to those supposed to be material, but as to all statements. The statements need not come up to the degree of warranties. They need not be representations even, if this term conveys an idea of an affirmation having any technical character. Statements and declarations is the expression; what the applicant states and what the applicant declares. Nothing can be more simple. If he makes any statement in the application it must be true. If he makes any declaration in

the application it must be true. A faithful performance of this agreement is made an express condition to the existence of a liability on the part of the company.

There is no place for the argument either that the false statement was not material to the risk, or that it was a positive advantage to the company to be deceived by it. It is the distinct agreement of the parties that the company shall not be deceived to its injury or to its benefit. The right of an individual or a corporation to make an unwise bargain is as complete as that to make a wise bargain. The right to make contracts carries with it the right to determine what is prudent and wise, what is unwise and imprudent, and upon that point the judgment of the individual is subject to that of no other tribunal.

§ 1678. *The insurer the judge of what information is material.*

The case in hand affords a good illustration of this principle. The company deems it wise and prudent that the applicant should inform them truly whether he has made any other application to have his life insured. So material does it deem this information that it stipulates that its liability shall depend upon the truth of the answer. The same is true of its inquiry whether the party is married or single. The company fixes this estimate of its importance. The applicant agrees that it is thus important by accepting this test. It would be a violation of the legal rights of the company to take from it its acknowledged power, thus to make its opinion the standard of what is material, and to leave that point to the determination of a jury. The jury may say, as the counsel here argues, that it is immaterial whether the applicant answers truly if he answers one way, viz., that he is single, or that he has not made an application for insurance. Whether a question is material depends upon the question itself. The information received may be immaterial. But if under any circumstances it can produce a reply which will influence the action of the company, the question cannot be deemed immaterial. Insurance companies sometimes insist that individuals largely insured upon their lives, who are embarrassed in their affairs, resort to self-destruction, being willing to end a wretched existence if they can thereby bestow comfort upon their families. The juror would be likely to repudiate such a theory, on the ground that nothing can compensate a man for the loss of his life. The juror may be right and the company may be wrong. But the company has expressly provided that their judgment, and not the judgment of the juror, shall govern. Their right thus to contract, and the duty of the court to give effect to such contracts, cannot be denied.

Of the authorities in support of these views, a few only will be mentioned. In *Anderson v. Fitzgerald*, 4 House of Lords Cases, 483, 487, *Fitzgerald* applied to an insurance office to effect a policy on his life. He received a form of proposal containing questions required to be answered. Among them were the following: "Did any of the party's near relatives die of consumption or any other pulmonary complaint?" and "Has the party's life been accepted or refused at any office?" To each of these questions the applicant answered "No." The answers were false. F. signed the proposal and a declaration accompanying, by which he agreed "that the particulars above mentioned should form the basis of the contract." The policy mentioned several things which were warranted by F.; among which these two answers were not included. The policy also contained this proviso: that "if anything so warranted shall not be true, or if any circumstance material to this insurance

shall not have been truly stated, or shall have been misrepresented or concealed, or any false statement made to the company in or about the obtaining or effecting of this insurance," the policy should be void. On the trial before Mr. Justice Ball, he charged the jury "that they must not only be satisfied that the various false statements were false in fact, and were made in and about effecting the policy, but also that such false statements were material to the insurance." A bill of exceptions was tendered, on the ground that the jury should have been directed "that if the statements were made in and about effecting the insurance, and such statements were false in fact, the defendants were entitled to a verdict, whether such statements were or were not material." The exceptions were argued in the court of exchequer, where judgment was ordered for the plaintiff on the verdict. A writ of error was brought in the court of exchequer chamber, where the judgment was affirmed by a majority of seven to three. The writ of error to the House of Lords was then brought. Mr. Baron Parke, Mr. Baron Alderson, Mr. Justice Coleridge, Mr. Justice Wightman, Mr. Justice Erle, Mr. Justice Creswell, Mr. Baron Platt, Mr. Justice Talfourd, Mr. Justice Williams, Mr. Baron Martin and Mr. Justice Crompton attended.

Opinions were delivered by Mr. Baron Parke, the Lord Chancellor, Lord Brougham, and Lord St. Leonards, all concurring in reversing the judgment on the ground that the question of the materiality of the statements should not have been submitted to the jury. This case was decided upon facts almost identical with the one before us, and presented the precise question we are considering. The counsel for the defendants asked for a ruling that if the statements were untrue, the defendants were entitled to a verdict, whether they were or were not material. This was refused, and the judge charged that to entitle the defendants to a verdict, the statements must not only be false, but material to the insurance. This was held to be error, and the judgment was reversed.

Cazenove v. British Equitable Assurance Co., 6 Com. B., N. S., 437 (and see *Duckett v. Williams*, 2 Crompt. & M., 348), is a familiar case, and was decided in the same way. This case was affirmed in the exchequer chamber in 1860. 6 Jurist, New Series, 826, 1860. See, also, *Price v. Phoenix Ins. Co.*, 17 Minn., 497. Many cases may be found which hold that where false answers are made to inquiries which do not relate to the risk, the policy is not necessarily avoided, unless they influenced the mind of the company, and that whether they are material is for the determination of the jury. But we know of no respectable authority which so holds, where it is expressly covenanted as a condition of liability that the statements and declarations made in the application are true, and when the truth of such statements forms the basis of the contract.

The counsel for the insured insists that policies of insurance are hedged about with so many qualifications and conditions, that questions are propounded with so much ingenuity and in such detail, that they operate as a snare, and that justice is sacrificed to forms. We are not called upon to deny this statement. The present, however, is not such a case. The want of honesty was on the part of the applicant. The attempt was to deceive the company. It is a case, so far as we can discover, in which law and justice point to the same result, to wit, the exemption of the company.

Judgment affirmed.

JUSTICES CLIFFORD and MILLER dissented.

INSURANCE COMPANY v. TREFZ.

(14 Otto, 197-208. 1881.)

ERROR to U. S. Circuit Court, District of New Jersey.

Opinion by MR. JUSTICE MATTHEWS.

STATEMENT OF FACTS.—This action was brought by Christina Trefz against the Knickerbocker Life Insurance Company upon two policies of insurance issued to her upon the life of her husband, Christoph Trefz, both dated September 6, 1873, one for \$2,500, the other for \$8,500. It resulted in a verdict and judgment in her favor. The company sued out this writ of error.

Each of the policies contained the declaration that it was "issued and accepted by the assured upon the following express conditions and agreements," and, among others, these: that if the death of the person whose life was thereby insured should be caused by the habitual use of intoxicating drinks, "or if any of the statements or declarations made in or accompanying the application for this policy, and upon the faith of which the same is issued, shall be found in any respects untrue, then, and in every such case, this policy shall be null and void."

The company pleaded *non assumpsit*, and specially that the death of the said Christoph Trefz was caused by the habitual use of intoxicating drinks, whereby the policy was made void, and issue was taken thereon. No evidence was offered to support the special plea.

It was proved on the trial that on May 25, 1867, a policy had been issued by the defendant in favor of the plaintiff on the life of her husband for \$3,000, and another on March 18, 1868, for \$10,000, both of which were surrendered on August 30, 1873, on which day two agreements in writing were entered into between the parties, each referring to the number and amount of the corresponding policy, and of one of which the following is a copy:

"The undersigned, owner of policy No. 16,772, on the life of Christopher Trefz, hereby requests the Knickerbocker Life Insurance Company of New York to issue a new policy for \$2,500, with insurance payable annually, and in consideration thereof I do hereby covenant and agree that all the statements contained in the original application and declaration for the said policy were true and valid when made, and are hereby made the basis of the contract between myself and the said company for the new policy hereby solicited."

The other agreement was in the same form, and asks for a policy of \$8,500, and both are signed by Christina and Christoph Trefz. The application for the original policy for \$10,000 was in the English language, the fifth question in which was: "Whether now or formerly, when and how long, and to what degree, subject to or at all affected by any of the following diseases and infirmities." (Here follows a long list, in alphabetical order, of disorders, beginning with "apoplexy" and ending with "yellow fever," and including "diseases of the brain, disease of the heart.") The answer was, "Never sick."

The application for the original policy for \$3,000 was in the German language. It contained a similar question, including diseases of the brain and heart, and to this the answer was "No." Both of these applications contained this stipulation: "That if any fraudulent or untrue allegation, misrepresentation, or concealment as to my health or habits be contained in this proposal, all moneys which shall or may be paid on account of such assurance or dividends due me shall be forfeited to the said company and the policy be

void." One of them is signed Christina Trefz, by Christoph Trefz, and the one in German by Christina Trefz.

It is stated in the bill of exceptions that the defendant offered evidence tending to prove that the answers of Trefz to these interrogatories were, at the time of such applications, untrue; and the evidence itself bearing on that point is set out in full.

It appears therefrom that the intention with which the testimony was offered was to establish the fact that in the year 1866 Trefz had a sunstroke. One of the witnesses called by the defense to this point was named Schimper, who was in Trefz's employ from the summer of 1866 until 1875. He knew nothing personally about it, but testified that he had heard Trefz say that he had had a sunstroke, and that he had known him to wear a cabbage leaf in his hat to prevent its recurrence; that in March, 1871, the witness having neglected to pay a premium falling due on one of the original policies, being charged as Trefz's book-keeper with the duty of payment, went with Trefz to the office of the company in New York to tender it, where he was required to submit to a medical examination, to enable the company to determine whether it would accept the premium and restore the lapsed policy. The witness further testified as follows: "The doctor asked me whether Mr. Trefz had sunstroke; I said, No. Mr. Trefz said, 'Yes; he was sunstruck on the farm once; he had a farm, and was at the farm taking in hay, and was sunstruck.'" In reply to the question, what suggested to the doctor the fact of sunstroke, the witness said: "I asked the same question of the doctor, whether he could see it. He said, 'I could see it by his queer action with his elbow, and so I could see that the man had something.'" That was the doctor's answer since to me; and he asked me whether he had sunstroke, and Mr. Trefz told he was working on the farm once and was overcome by the heat. He said that did not matter; that did not make any difference; he said, have you felt anything since? and he said, No. Was you sick any time, taken sick by the heat again afterwards? No. That is all right. He gave him a certificate." And the premium was paid and the lapsed policy restored.

In another part of his examination the witness, repeating the statement, said that Trefz told the doctor "he had a sunstroke once when he was working on the farm; he was then working, and he fell down and did not know anything about himself any more; that was his talk to the doctor." The witness was then asked to state what Trefz said. He replied, "That is as near as I can give it. Mr. Trefz spoke very bad English; that was the reason the doctor asked me first whether Trefz had sunstroke, because he did not understand him so well; so Trefz told he was overcome by the heat; he said that half English and half German."

The plaintiff, Mrs. Trefz, testified that on the occasion referred to as that of the sunstroke Trefz came home, saying he was overcome by work and the heat. She offered him his dinner, to which he said he did not care for anything to eat. After a while he ate his dinner and went off to his work again the same day, and then for two days he said he did not feel right well; after that he went about his business as usual.

There was some testimony about his going to Sharon Springs that summer, which is entirely consistent with the supposition that he went upon business as much as for his health; and some evidence, not only that he wore cabbage leaves in his own hat as a protection against heat, but that he insisted that the

drivers of his beer wagons (he was a brewer) should do the same for their own protection.

There was evidence also that Trefz frequently spoke of having had a sunstroke, and there was testimony from two or three physicians on the subject of the characteristics and consequences of sunstroke. One of them spoke of it as a brain disease, and said that whether it was a serious or dangerous thing depended upon the kind of sunstroke, and that there were degrees in its forms, the severer being frequently fatal, and diminishing down to a mere sense of fullness in the head; and that he considered it more an accident than a disease.

The charge of the court, which was at length, is given in the bill of exceptions in full. To specified parts of it exceptions were taken by the company, and they form the basis of the assignment of errors now to be considered. It is first alleged that the court erred in charging the jury as follows: "In considering whether the reply 'never sick' was an untruth of such a character as to avoid the policy, the jury had the right and ought to remember that the applicant was not a native-born citizen, and that he was not very familiar with the language in which the question was put, and did not speak it with any fluency, and it is fair to assume from the testimony that he did not understand it very fully when spoken to him."

This exception may properly be considered in connection with the sixth assignment of error, as follows: "That the court, on request, erroneously refused to charge the jury as follows: 'That if the answer of Trefz to any question was untrue in the sense in which such question and answer are commonly understood, the policy is void, even although the answer may have been true in the sense in which he understood the question;' but on the contrary charged the jury as follows: 'It seems to me that in endeavoring to ascertain the truth or falsity of the answer we ought to look at it in the light of the knowledge and understanding which the individual had in regard to the terms he uses.'"

It is objected that the court erred in mistaking the answers referred to, as made by the husband, instead of the wife, who was in fact the applicant, whose answers they were, and that there was no proof that she was not a native citizen, and fully acquainted with the English language. It is perhaps a palliation of this error, if it be one, that the counsel who makes the objection himself fell into it, in the very request which the court refused, and which speaks of the answer as that of the husband. And practically it was, and was so considered and treated by all parties to the insurance. The applicant, it is true, was the wife, and it is her agreement that the answers shall be true; but it is manifest that the party interrogated, and whose answers are relied on, are those of the person whose life is the subject of the insurance.

Indeed, the original applications themselves speak of the allegations, misrepresentations or concealments, if any, contained in the proposal, the existence of which will avoid the policy, as pertaining to "my health or habits," as though the person whose life was the subject of the insurance was himself the applicant. The whole trial proceeded upon the idea that the question at issue was the truthfulness of the husband's answers, and upon that ground the company gave evidence of his statements made at other times and places to contradict him.

§ 1679. *Statements "in any respect untrue" — must be strictly true.*

It is insisted, however, in argument that there is substantial error in the

above charges and refusal to charge, reversing the rule of interpreting contracts according to the ordinary sense of the language employed, and subverting the principle, for which *Ætna Life Ins. Co. v. France*, 91 U. S., 510 (§ 1673, *supra*), and *Jeffries v. Life Ins. Co.*, 22 Wall., 47 (§§ 1676-78, *supra*), are authorities, that in such a case as the present the right of the plaintiff to recover is defeated, upon proof that an answer to any of the questions in the application is untrue, without regard to the materiality of the question or the good faith of the answer. It is unquestionable law, that in such a case as the present the answer must be true, to justify a recovery, without regard to these considerations; and for a lack of substantial truth, it is no valid excuse that the party giving the answers did not understand, from ignorance or otherwise, the scope of the question. And so, in the present case, the court below distinctly charged the jury. The language used was, "But if you believe from the testimony that the insured, whether wilfully or otherwise, made a statement in his application which amounted to an untruth, it will not do to refuse to enforce the contract which the husband and wife entered into, on the ground that it would be a hardship to the widow." And in another part of the charge the court said, "If they are in any respect untrue, they avoid the contract and prevent a recovery upon the policies."

§ 1680. *Interpretation of words "never sick."*

The question, then, for the jury was this: Was the answer of Trefz to the question whether he had ever had any of the enumerated diseases — "never sick" — true or untrue. And undoubtedly it was material and even necessary to inquire what was the meaning of that answer. And to ascertain its meaning — the meaning the law will affix to it — it is perfectly proper to determine the sense in which the words were used by the speaker, the sense in which he intended they should be understood by the person spoken to, and in which they were actually understood by both. As was well said by Mr. Justice Swayne, in *Insurance Company v. Gridley*, 100 U. S., 614 (§§ 1674-75, *supra*), "The object of all symbols is to convey the meaning of those who use them, and when that can be ascertained it is conclusive."

The nature of this written instrument, as affected by its form, must be considered in every question of its interpretation. It is not a formal instrument, employing technical language with well-ascertained legal effect, like a deed or a bill of lading, or framed with precision and nicety as to the choice of phrases to express a certain and definite covenant which the parties, duly advised, have entered into with deliberation and in solemn form. It is, on the contrary, a conversation reduced to writing, and the writing done by one only of the parties. The language is colloquial, and in the form of a dialogue, of question and answer. It is in the shape of a deposition, where the party interrogated is giving his testimony, and where the meaning of his statements must be ascertained from his own peculiar use of language. If he is a foreigner, with an imperfect knowledge of the language, it is obviously just and reasonable that that circumstance should be considered in determining the meaning of the words he has used.

In the present instance, the apparent purpose of the charge asked by the counsel for the defendant below and refused by the court was to charge as a matter of law that the answer of Trefz — never sick — was to be taken as meaning — as it literally does, standing by itself — that he had never during his life had any sickness whatever, and thence to draw the necessary inference

that it was untrue in that sense, as it no doubt was, and that, for that reason, the plaintiff's recovery was made legally impossible.

§ 1681. *Language used by foreigner not to be literally construed, when.*

In that view it becomes the duty of the court to say to the jury, that in determining whether that statement was true or untrue, in view of the terms of the policy, they might properly consider that it was the expression of a man ignorant of the language, who did not on that account understand, and consequently did not intend, the literal scope of the expression. And whatever sense the jury, as reasonable men, in the light of that circumstance, would put upon it, might well be taken as the sense in which it was understood by the company, to whose agent it was personally spoken, for that would be the sense in which it would be understood commonly by reasonable men in similar circumstances.

Indeed, the court might well have gone further, for it is matter of law that the answer, "never sick," in the connection in which it was used in the application, must be taken to mean, not that the party was never sick at all of any disorder, but only that he never had had any of the enumerated diseases so as to constitute an attack of sickness. The generality of the language of the answer must be restrained to the particulars to which alone it was meant to be applied, and the surplusage does not fall within the agreement which warrants the answer to be true.

It is next assigned for error* that the court erred in charging the jury in reference to the testimony relating to the transaction with the company's physician, in March, 1871, as to the renewal of one of the policies, as follows: "When this testimony was given, I presume that every gentleman upon the jury at once came to the conclusion that if it was true, and if the agent of the company regarded the attack, when he was told of it, as of too little consequence to hinder the renewal of the forfeited policies, it was now too late for them to come forward and say that it was of so serious a character and nature that he ought never to have been insured at all; in other words, that the company ought not to be allowed to regard the indisposition of such a trivial character as to overlook it and take the money of the insured for a renewal of the policies, and after his death to avoid the payment of the loss on the ground that the attack was serious enough to bring it within the range of the diseases respecting which the insured gave the reply, 'never sick.'"

This charge was given in connection with a statement of the testimony of Schimper as to the conversation that took place with Dr. Derby, the medical examiner of the company, in March, 1871, at the time of the examination of Trefz for the restoration of his lapsed policy. It is not objected to this charge that it instructed the jury as a matter of law that the company was estopped by the restoration of that policy, after the information it had then acquired respecting Trefz having had a sunstroke, from making its defense on that ground to the present action. It is not claimed that that is the meaning of the charge, or that it was so understood by the jury.

It is criticised, however, for inaccuracy in referring to the renewal of the forfeited policies as if both had lapsed, instead of but one, as the fact was; but that inaccuracy could not have misled the jury, as there was no question about the fact; and so far as the charge had any bearing upon the question at issue, its effect would not be different whether one or both policies had lapsed and had been restored. The charge in question was merely a suggestion addressed

to the jury, perfectly legitimate in itself, but which they might adopt or reject as they saw fit. The court expressly disclaimed any right to influence them as to any matter of fact, and instructed the jury accordingly.

It is argued that the charge assumes from the testimony that the sunstroke spoken of occurred before the date of the original policies, when in the conversation with Dr. Derby, no date being given, he might well have inferred that it was subsequent to that date. But it is entirely immaterial, for however it may weaken the force of the suggestion upon the question of fact, it does not show that it contained any error in law. The force of the suggestion was to be judged by the jury upon their own finding as to the facts.

It is next assigned for error that the court gave to the jury the following charge: "It is for you to determine the extent of the injury received by Mr. Trefz, and whether it was of such a character or nature as to make his reply to the interrogatories a falsehood or not. It is for the jury to say from the evidence, in regard to the extent, nature and kind of sickness, whether the attack which the insured suffered from was of a character to make his answer 'never sick' a falsehood. The burden of proof is on the defendant. The company sets up the defense, and the jury must be satisfied from the evidence that the untruth of the statement has been established, otherwise their verdict should be for the plaintiff."

This is to be considered in connection with the refusal of the court to give the following charge, which is also assigned for error: "That if within one or two years the insured had such disease (sunstroke), his answer 'never sick' was untrue, although he had entirely recovered from it long before his death, or even at the time of his application;" and also in connection with the refusal to charge the following, also assigned for error: "That it is proved by witnesses unimpeached and uncontradicted, that the insured frequently stated that he had had sunstroke in the summer of 1866, and guarded carefully against its recurrence long after the insurance was effected; and that, unless you can find something in the case which renders these statements incredible, the jury are bound to treat the facts as established in the cause, and to find for the defendants on the principle asserted by the court."

§ 1682. *Sunstroke, when a "disease of the brain."*

The propositions included in these requests, and maintained on behalf of the plaintiff in error, may be stated thus: If Trefz frequently said that he had had sunstroke, it is to be taken as the fact, although the jury might be satisfied from the evidence that what he supposed to be such was not so in reality; and that if he had ever had sunstroke, his answer to the interrogatory is untrue, although the list of diseases therein enumerated does not contain that of sunstroke, and although it does not appear that whatever affection in fact he had was one of the diseases enumerated. In other words, that it is matter of law that if Trefz said he had sunstroke, that he did have it; and that it is matter of law that sunstroke, of whatever character or degree in fact, is a disease of the brain, that being the disease in respect to which it is claimed the answer was untrue.

On the other hand, the proposition of the court, as submitted to the jury, was that they must determine from the whole evidence as matters of fact whether or not Trefz ever had had sunstroke properly so called; and whether the attack which he did have, whether it could properly be called sunstroke or not, was a disease of the brain.

It is not difficult to decide that in this respect the court below committed no error. The interrogatory propounded in the application, to which the answer in question was made, did not include sunstroke in the list of enumerated diseases. It did include diseases of the brain. The answer, it is conceded, was not untrue, unless Trefz had had a disease of the brain. To establish this it was necessary to prove something more than that he had what he called sunstroke. It was essential to show that he had sunstroke in fact, and that it was such as to constitute disease of the brain.

The medical authority cited in argument by the counsel for the plaintiff in error, Dr. H. C. Wood, Jr. (*Thermic Fever or Sunstroke*, Boylston Prize Essay, p. 7), shows that what is popularly called sunstroke is not always the true disease known to the profession as such. He says:

"There can be no doubt that under the name of sunstroke, or *coup de soleil*, sudden cases of severe illness of very different natures have been described by authors. Such of these cases as have really been dependent upon exposure to excessive heat can be classified under two, or perhaps three, heads, to which the names of *acute meningitis* or *phrenitis*, *heat exhaustion*, and *thermic fever* or *true sunstroke*, may be respectively applied, as more or less expressive of the pathological conditions existing.

"Acute meningitis or phrenitis, due to exposure to the sun and the direct action of its rays upon the head, must be a very rare affection. In fact, I have no positive evidence to offer of its existence in nature, having never seen or read an unequivocal record of such a case, and, therefore, will pass this theoretical class by without further allusion.

"Simple exhaustion due to excessive labor in a heated atmosphere is an affection so very distinct from true sunstroke that it is strange it should ever have been confounded with the latter. It does not differ in its pathology or symptoms from other forms of acute exhaustion, offering like them, as its chief features, a cool, moist skin, and a rapid, feeble pulse, associated with great muscular weakness and a tendency to syncope. . . .

"As there is nothing peculiar in these cases, I do not think that they should have any special name. The term 'heat-exhaustion' might be applied to them had it not been used to signify true sunstroke. The main point to be borne in mind is, however, that such cases should not be called sunstroke, as they have not the slightest affinity with that disorder."

From this authority, then, it sufficiently appears that a man working in the heat of summer in a hay-field, exposed to the rays of the sun, may be overcome by the heat to the point of exhaustion, so as to be prostrated with weakness, and even fall into insensibility and unconsciousness, without having sunstroke in its technical sense. And thus that it might be that Trefz, notwithstanding his attack of what he ignorantly called sunstroke, might truthfully answer that he had never been sick of any disease of the brain.

It was undoubtedly, therefore, the principal question for the jury, in order to find whether Trefz's answer that he had never been sick of brain disease was true or untrue, to ascertain and determine whether the affection which he declared he at one time had was or was not a case of true sunstroke, and whether, if so, it was a disease of the brain. That question was fairly submitted to them by the court upon the charges which we have reviewed, and for the reasons assigned we find no error in them.

Judgment affirmed.

HOLLOMAN v. LIFE INSURANCE COMPANY.

(Circuit Court for Mississippi: 1 Woods, 674-680. 1874.)

Opinion by HILL, J.

STATEMENT OF FACTS.—This is an action of debt, commenced originally by attachment in the circuit court of Warren county and removed to this court. It is brought to recover the sum of \$10,000, alleged to be due on two policies of insurance, the one issued April 1, 1869, and the other April 1, 1870, for \$5,000 each, on the life of Mrs. Rebecca A. Holloman, wife of the plaintiff, and for his use.

A jury having been waived and the questions of fact as well as law having been submitted to the court, they will be considered as presented by the pleadings and proof. There is no question raised as to the issuance of the policies, the payment of the premiums, or the death of Mrs. Holloman, or the liability of the defendant, unless the policies are avoided by reason of the fraud alleged in the pleas, which applies equally to both policies. The pleas all being affirmative, and the allegations therein being denied by the replications, the burden of proving the defense is thrown upon the defendant.

The defense set up by defendant in the pleas is in substance as follows: That the policies were issued upon conditions therein expressed, among which was this: that if any of the declarations made in the application for the policies, and upon the faith of which they were issued, shall be found to be untrue in any respect, said policies shall be deemed and held null and void.

That among other declarations so made it was declared said Rebecca A. Holloman was not consumptive on the days when made, to wit, on the 25th of February, 1869, and the 25th of March, 1870, and had not previous thereto had consumption, or habitual cough, and had not for some years previous thereto had any severe sickness or disease, and was not then, or had not before that time been, affected with any disease or disorder; nor had the parents of said Rebecca A. Holloman been afflicted with any scrofulous or other constitutional disease, hereditary in character.

That said declarations were untrue in this, that the health of said Rebecca A. Holloman was not good; that she had previously had consumption and habitual cough, and she had within the seven years preceding, and did then have, severe sickness and disease; and was then afflicted with disease of the womb of a severe and dangerous character, by means whereof the life of the said Rebecca was destroyed, and that the father of said Rebecca had scrofula, a disease constitutional and hereditary in its character, and which false and fraudulent declarations were made to deceive and did deceive defendant, and induced the issuance of said policies, whereby they became null and void.

The evidence produced to establish the declarations so made are the answers made by the plaintiff to certain questions propounded to him as the basis of the contract. To the eighth question, "What is the present state of the health of the party?" the answer is, "good." To the fourteenth question, "Has the party ever had any of the following diseases?" (among which is *consumption*) the answer is "No." To the nineteenth question, "Has the party had during the last seven years any severe sickness or disease? if so, state the particulars, the name of the attending physician, or who was consulted and prescribed," the answer is "No."

The declarations made by this proof, necessary to be considered, are: 1. That Mrs. Holloman was then in good health. 2. That she had not had con-

sumption, cough, scrofula or other hereditary disease. 3. That she had not within the preceding seven years been afflicted with any severe sickness or disease.

The first and third only of these declarations need be considered, as there is no proof to show, or tending to show, that the remaining statement was untruthfully made. The first question of fact to be ascertained from the proof is, Was Mrs. Holloman in good health at the time these declarations were made? The defendant, to establish the allegation that she was not, has read the depositions of a large number of witnesses, embracing the neighbors and acquaintances of the deceased; some of the former servants of the deceased, and the nurse who attended her in her late sickness.

§ 1683. *Underwriter concluded by certificate of examining physician.*

I have carefully examined this testimony, and I find that the depositions, with the exception of three or four, fail to show that Mrs. Holloman's health was not good, at the times when the declarations were made and the policies issued. And as to the testimony of those who testify as to her ill health prior to the six months next preceding her death, it is evident they are mistaken as to the time, other than the attack while at Sharon in 1867; three of these witnesses testify that the death occurred in 1872, showing a want of memory which greatly weakens the weight to be given to their testimony. It is proved by Dr. McKie, that at the time when one witness states that the deceased was sick and using disinfectants in April, 1870, she was in fact in good health and at Sharon nursing her sick son. Besides, in addition to this rebutting testimony, a number of her relations and intimate friends testify that she was a healthy woman up to her last sickness, except an occasional attack of such malarious diseases as are common in that neighborhood. The physicians in the vicinity testify the same thing; so that aside from the testimony of Dr. Tuttle, who was the medical examiner for the first policy, and Dr. Jones for the last, the certificates of these physicians to the company upon such examination must be held as competent evidence of the facts certified to, and can only be rebutted by testimony establishing that they were deceived either by false statements or by the suppression of facts, without a knowledge of which such examining physicians could not come to a correct conclusion as to the condition of the party examined, and which could not be discovered by them upon the usual examination. The defendant must be estopped from denying the competency of the physician selected to make the examination, the physician being the agent of the defendant, and not the agent of the plaintiff. These certificates show Mrs. Holloman to have been in good health when these declarations were made; and as to the declarations made for the first policy, the good health of Mrs. Holloman is established by the testimony of Dr. Tuttle, taken upon both the examination of the plaintiff and cross-examination of defendant.

The examination made by Dr. Jones on the 25th of March, 1870, for the last policy, states that Mrs. Holloman was then in good health. Dr. Jones was the family physician of plaintiff, as well as the examining physician of defendant, but his deposition could not be taken in consequence of the recent deprivation of his mental faculties. In confirmation of the correctness of his conclusions, Dr. McKie states that in April (and it must have been at that time or shortly thereafter) the insured was in Sharon nursing her sick son for more than ten days, and was apparently healthy. In view of all the proof it cannot be otherwise held than that the allegation that Mrs. Hollo-

man's health was not good at the time these declarations were made is not sustained by the proof.

§ 1684. "*Severe disease*" — *not ordinary diseases of the country which yield readily to treatment.*

The last question of fact to be considered is, had Mrs. Holloman, during the seven years next preceding the time when these declarations were made, been afflicted with any severe sickness or disease? This does not include the ordinary diseases of the country, which yield readily to medical treatment, and when ended leave no permanent injury to the physical system, but refers to those severe attacks which often leave a permanent injury and tend to shorten life. The only proof tending to establish this allegation, not already considered, is that of her sickness while residing in Sharon in 1867. Dr. O'Leary, the physician who attended her, testifies that soon after she came there he was called to prescribe for her; that her disease was chronic diarrhea or affection of the bowels, and he thinks he prescribed for her for two or more months, when she recovered.

He states that if it lasted only a few weeks it could not be called chronic. The testimony of the eminent medical men who have been examined leaves it uncertain as to what may be considered a chronic disease of the bowels, the causes being so various. As already stated, the common understanding of the question, as to whether the party has had, during the seven years, any serious disease, is whether it was such disease as often impairs the constitution and tends to shorten life, and which, if known, would have deterred the insurer from taking the risk without further examination and information. Testing the question propounded and the answer given by this rule, it is evident that had the answer been, that Mrs. Holloman had in 1867 (two years before the first and three years before the last answer) this affection of the bowels, which entirely ceased within two or three months, and had not recurred, there would not have been the least hesitancy about taking the risk; such being the case, it must be held that the last averment is not sustained by the proof.

Insurance companies, like all other parties, are entitled to the benefit of these contracts, and to be relieved from them when procured by misrepresentation and fraud, and are entitled to have their rights declared and enforced in courts of justice as those of individuals; but, like individuals, are bound by the acts of their agents, and a knowledge of facts communicated to their agents is full notice to them.

The testimony in the case shows that Mrs. Holloman died of a disease to which females are subject, and more liable to at a certain age than any other. She had resided all her life in a malarious district; all these facts were well known to the agent and physician selected, and instructed by the defendant, and consequently known to the defendant, who assumed all the risks incident thereto.

The consideration upon which the contract is based, on the one side, is the reception of the premiums, and on the other, the payment of the policy when the death shall occur; the amount of premiums being regulated by the probabilities of the duration of life, and consequently of the amount of premiums to be paid.

§ 1685. *False statements must affect the risk materially.*

The false statement of facts, or the suppression of facts, to have the effect of forfeiting the claims of the insured and rendering the contract void, must

be of so material a character, that if not made on the one hand, or if made on the other, they would probably have induced the insurer to decline the risk, or to materially modify its terms. The questions propounded must be such as can be reasonably comprehended by the answer.

The same rules must be applied to this contract which are applied to others, to ascertain the mutual understanding of the parties, and when these rules are applied to the evidence in this case, it must be held that the defenses insisted upon are not sustained, although the agent and counsel of the defendant have certainly bestowed an unusual amount of labor, and displayed great ability in preparing and presenting the defense.

The plaintiff is, therefore, entitled to a judgment for the sum of \$10,000, the amount of the two policies, and to the further sum of \$750, interest thereon for one year and three months, making the sum of \$10,750.

INSURANCE COMPANY v. HIGGINBOTHAM.

(5 Otto, 380-390. 1877.)

ERROR to the Supreme Court of the District of Columbia.

Opinion by MR. JUSTICE HUNT.

STATEMENT OF FACTS.—This was an action by Mrs. Martha J. Day against the Mutual Benefit Life Insurance Company, incorporated by the state of New Jersey, to recover the amount of a policy of insurance issued to her upon the life of her husband, the late Dr. Richard H. B. Day, of Washington, in which judgment was rendered against the company for the amount insured, \$5,000 and interest. Mrs. Day having died *pendente lite*, her administrator was substituted here in her stead.

The policy, dated the 16th of July, 1869, was for life, and stipulated for the payment of the annual premium of \$137.50 on or before 12 o'clock on the 16th day of July in every year; and provided that, "in case the said premium shall not be paid on or before the several days hereinbefore mentioned for the payment thereof, at the office of the company, in the city of Newark, or to agents, when they produce receipts signed by the president or the treasurer, then, and in every such case, the said company shall not be liable to the payment of the sum insured, or any part thereof, and this policy shall cease and determine."

The first premium was duly paid; but when the next premium became due, on the 16th of July, 1870, it was not paid. In the following October, Dr. Day made application to the company for the reinstatement of the policy, and the company consented to reinstate it, upon the conditions and in the manner following: On the 1st of October, 1870, Dr. Day paid the premium to the agent of the company at Washington, and received a receipt for the same. At the same time he gave to the agent his certificate of health, and the physician of the company signed his certificate of examination, which were forwarded to the company at Newark, N. J. The policy was renewed and the renewal receipt was sent by the company to its agent, October 12, 1870. This receipt was dated July 16, 1870, and was given to Day on the 14th of October. On the 22d day of January following, Dr. Day died.

Eleven special pleas are interposed, to which it is not necessary particularly to refer, as the questions to be decided arise upon the rulings of the judge at the trial, made upon points not connected with the pleadings.

The chief subject of contention arises upon the refusal of the judge to charge as requested by the defendant in the following prayers:

1. If the jury find from the evidence that the certificate of health in evidence was made by Dr. Day, the insured, on or about the 1st of October, 1870, and by him delivered to the agent of the defendant, at Washington City, and by such agent sent to the principal office of the defendant, at Newark, N. J., and that the receipt in evidence, dated July 16, 1870, was thereupon forwarded from the main office of the defendant to its agent at Washington City, and by him delivered to the insured on or about the 14th day of October, 1870, and that between the time when said certificate was made and the time of the delivery of said receipt to the insured, Dr. Day had had any derangement of health, and did not disclose that fact to the agent of the defendant when the receipt was handed to him by the agent, or before, they will render a verdict for the defendant upon the sixth plea.

2. On refusing to instruct the jury as prayed by defendant, as follows: If the jury find from the evidence that when the certificate in evidence, dated October 1, 1870, was given to the agent of the defendant at Washington City, the latter was not authorized to and did not assume to reinstate the policy in suit, but accepted the premium and forwarded the certificate to his principal, and that the receipt in evidence, dated July 16, 1870, was then in the home office of the defendant, in New Jersey, and that said receipt was forwarded to the agent of the defendant on or about the 12th day of October, 1870, and by him delivered to the insured on or about the 14th day of the same month; and if the jury further find that, after the date of said certificate, and before the delivery of said receipt to the insured, the insured had had any derangement of health, or that at the time of the delivery of said receipt to him he was not in sound health,—they would render a verdict for the defendant.

The state of Dr. Day's health during the summer and autumn of 1870 was the subject of contradictory testimony. The defendant gave evidence tending to prove that he was compelled by ill-health to give up his business as a teacher on the 18th day of October, 1870; that for several weeks prior to that time he was much debilitated, and was conscious of that fact; that in November he had the consumption, of which he died in January following; and that he was in feeble and disordered health from the spring of 1869 until his death. The plaintiff, on the other hand, gave evidence tending to show that he was in sound health till the latter part of October, 1870, and that he did not have the consumption until the month of November, 1870.

The exceptions we are to consider assume that on the 1st day of October, 1870, when he presented his certificate of health to the agent at Washington, Dr. Day was in a condition of health that made him a satisfactory subject for the reinstatement or continuance of his policy of insurance.

It is contended that between the time of thus making and presenting his certificate to the agent and the date (fourteen days later) on which the agent delivered to him the receipt by which his insurance policy was continued in force until July 16, 1871, there had been a change in his health which would have caused the rejection of his application to continue the policy had such change been made known to the company, and that the failure to make known such change was a fraud, which invalidated the policy thus renewed or continued.

It is not contended that there were any false representations made on 14th of October, or any devices or contrivances to deceive the company. No

affirmative action on that occasion is complained of. The contention is that the representation made on the 14th of October was a continuing one from the time it was made till the delivery of the renewal receipt on the 14th, and that, if not true at the latter date, the contract was avoided.

§ 1686. *Application to reinstate lapsed policy. Representations to be treated as of the day when made.*

In reaching a conclusion on this point, we may notice, first, that no inquiry was made of Day or demand for information as to his condition between the 1st and the 14th of October. The company was particular and specific in its inquiries as to his condition on the 1st of the month, and required prescribed forms of evidence as to that condition. There it stopped, and neither by expression nor by implication intimated a desire for later information.

It is to be observed, secondly, that the issuance made to him on the 14th of October relates back to the 16th of July in the same year. The certificate reads: "Policy No. 59,687, on the life of Richard H. B. Day, is hereby continued in force for one year from date, July 16, 1870, settlement of the premium having been made as per margin." The settlement in the margin showed the payment of \$137.50, being the amount of the premium of insurance for one year on the sum of \$5,000, as stated in the original policy of insurance.

It will be observed, thirdly, that the distance between Washington and Newark is about two hundred miles only, and that the certificates of Dr. Day's health and the application which were forwarded by the agent to the company at Newark would, in the ordinary course of the mails, reach the office at Newark on the morning or during the day of the 2d; that all the forms of the company to authorize a renewal were complied with, and that the risk was such as the company would accept as a desirable one, and that the receipt for the renewal was received in Washington on or about the 14th of October, and was on that day delivered to Dr. Day.

The prayer of the insurance company did not include a request that the jury should determine as a matter of fact whether, upon the evidence submitted, the representation was or was not a continuous one, whether the contract was consummated on the 14th of October, or by relation on the 1st of October; but the judge was requested to charge, as a matter of law, that the representation was a continuing one.

The facts referred to, we think, show that, although actually completed on the 14th of October, the jury would have been warranted in finding that the contract was understood and intended by the parties to take effect by relation as of the 1st of that month. The money was paid to the agent at Washington on that day. The insurance was post-dated so as to include that day. The full amount of the premium for one year was paid by the applicant, viz., \$137.50. The company cut off the insured from two and a half months of his policy when they issued it on the 1st of October, and dated it as of July 16, although taking payment of the premium for a year. We think that they did not necessarily intend to cut off an additional fourteen days, but may have meant it to be as of the date when the insured paid his money and presented a risk that they were willing to take, and of the time that it would have taken effect if they had responded without a delay of two weeks. Had it been otherwise, we cannot conceive how the sagacious business men who control this company could have assented to the delivery of the policy without inquiry as to the intermediate time. More than three months elapsed before Day's death.

monthly returns being made by the agent; and the company must have known and assented to the delivery of the renewal receipt not only, but to the fact that there had been no inquiry or information as to Day's health after October 1. The jury might account for it on the theory that the whole contract was intended to be and was as of October 1, and that it spoke from that date.

There is every indication that Day thus relied upon that contract, nor is there any reason to believe that he intended to deceive or to conceal. The company made inquiries to its own satisfaction, so far, in such direction, upon such points, and within such periods, as it thought proper. It was not for him to advise the company of what it should do, or to volunteer information which it did not seek. He paid his money, delivered his certificate, received the renewal when the company chose to give it, and found upon examination that it covered the whole period from the July preceding. He lived in the same town with the agent, and received no suggestion from him that anything further was expected, and was warranted in assuming that his contract was intended to take effect from an earlier period than its actual delivery. He probably died in the honest belief that he had thus provided for his widow. It would be far from good faith to his representatives should it now be held otherwise.

In *Colt v. Phoenix Fire Ins. Co.*, 54 N. Y., 595, it is said: "The defendant must not be made liable, where by the terms of the contract it is fairly exempted, however harsh the result may appear; nor can it be excused where the exemption is claimed upon a strict and rigid interpretation of words, without regard to the circumstances surrounding the transaction, and the apparent intent of the parties." See, also, *Tipton v. Feitner*, 20 id., 423.

In *May on Insurance*, section 190, it is laid down: "Where renewals are made upon the statements in the original application, whether the truth of the statements is to be tried by the circumstances existing at the time of the renewal or at the time when the original application was made, is a question upon which the authorities do not agree; some taking the view that a renewal makes a new contract, and others that it merely continues the old one. Special circumstances, however, seem to control the decision, according as these circumstances indicate the intent of the parties."

If we assume it to be true, as a general proposition, that the policy speaks from the date of its issue, and that the obligation of the applicant to make a full disclosure continues down to the completion of the contract, and that the occurrence of a material change before the contract is consummated must be communicated to the company, we do not advance essentially in the case before us. The question recurs, When was the contract of Dr. Day consummated? If on the 14th of October, when the renewal receipt was delivered, as the company contends, then the rule mentioned bars the plaintiff's right to recover. If, as the plaintiff contends, the contract, by the intention and understanding of the parties, relates to the 1st of October, when the premium was paid by the applicant and the certificates of health presented and transmitted, or to a point of time within a few days thereafter, within which the company ought to have examined and to have accepted a risk in all respects suitable to be accepted within its own rules, then the general rule quoted is not applicable. The case is governed by different principles. It is not necessary, therefore, to question the principle assumed in the authority quoted, or to examine the cases cited to sustain it.

We are of the opinion that the exceptions to the charge of the judge, upon

the theory that the representations by Dr. Day were made on the 14th day of October, or that concealment was then practiced by him, on the ground that the previous representations, necessarily and as a matter of law, were continuous, and that the contract was consummated on that day, cannot be sustained. It was a question proper under all the circumstances for the consideration of the jury. If they had found for the plaintiff, we are of the opinion that the verdict would not have been vacated as being without or against the evidence.

In many English companies a formal acceptance of the proposal for insurance is issued. In some companies this acceptance is unconditional, so that the premium be paid within the month, the letter of acceptance running to the effect that the proposal has been accepted, and that a receipt is ready at the office for the premium, upon the payment of which the assurance will commence; but that, if the same be not paid within thirty days, a reappearance and fresh certificate will be required. In other companies the acceptance is qualified by the condition, not only that the insurance shall not commence till the payment of the premium, but that no material change shall have occurred prior thereto. Bunyon, 58, cited Bliss, sec. 99.

The practice is not uniform, and there is nothing remarkable in allowing a certificate of health to stand good for thirty days, no reappearance or examination for that interval being required. Among the cases relating to this subject, the following may be referred to as showing the effect of the contract by relation, and that the consummation of the contract does not necessarily depend upon the delivery of the policy.

In *Lightbody v. The North American Ins. Co.*, 23 Wend. (N. Y.), 18, it was held that a policy bearing date on the day the premium is paid takes effect by relation from that day, although the policy be not delivered for several days afterwards. In this case, the buildings were burned on the day after the premium was paid and before the policy was delivered.

In *Perkins v. Washington Ins. Co.*, 4 Cow. (N. Y.), 645, the rule was applied in a case where the agent was authorized to make insurances, "provided the office shall recognize the rate of premium, and be otherwise satisfied with the risk." It was held that the company was bound to issue a policy where the insurance was a proper one and the premium was paid or tendered, although before the premium was received at the home office the property was consumed by fire.

In *Case v. The Hamilton Ins. Co.*, 22 Barb. (N. Y.), 527, the agent forwarded a proposition for insurance, which was altered by the company, and the alteration communicated to and accepted by the applicant, and the premium paid to the agent. Held, that the company was bound to issue its policy, and was liable for the loss.

In *Insurance Company v. Webster*, 6 Wall., 129, the party having received his policy, it was held that he was not affected by afterwards signing a memorandum that the insurance was to "take effect when approved by E. D. P., general agent." See, also, *Cooper v. Pacific Mutual Life Ins. Co.*, 3 Big. Ins., 656; 7 Nev., 116; *Carpenter v. Mutual Safety Ins. Co.*, 4 Sandf. (N. Y.) Ch., 408; *American Horse Ins. Co. v. Patterson*, 28 Ind., 17; Bliss, sec. 172; *City of Davenport v. Peoria Marine & Fire Ins. Co.*, 17 Ia., 276; *Lefavour v. Insurance Co.*, 2 Big. Ins., 158.

At the close of his charge, the judge instructed the jury as follows: "That the plaintiff is not responsible for or in any way affected by any of the statements in Dr. White's affidavit, unless the jury find that before and at the time

of filing it with the agent of the company she had actual knowledge of its contents, and adopted and used them as her own declarations. That affidavit is her declaration or no, as she knew and was advised of it and procured and approved it." To which instruction the counsel for the insurance company then and there excepted.

§ 1687. *Preliminary proofs in evidence as such not binding as general evidence unless adopted as such.*

In establishing her case at the trial, the plaintiff was bound to prove that notice of the death of her husband, Dr. Day, had been given to the company, and that a demand of payment of the amount claimed had been made. For that purpose only she offered in evidence the proofs of loss which had been furnished to the company, except the affidavit of Dr. White, forming a part of the same, which she did not offer in evidence. Those proofs contained the sworn statement of Mrs. Day herself, the sworn statement of Dr. Isaac White, certificates of the clergyman and undertaker, and proof of identity, by J. F. Patterson.

These affidavits were all on one paper, and the court required that the proofs of loss should be put in as an entirety; that is, that all the papers containing the preliminary proofs should be put in evidence; and the same were thereupon put in evidence by the plaintiff, including the affidavit of Dr. White. In Dr. White's affidavit thus introduced occurred the following questions and answers: "How long have you known the deceased?"—"I have known Dr. R. H. B. Day seventeen years."—"How long was deceased sick?"—"About five months."—"Date of your first visit?"—"November 28, 1870."—"Date of your last?"—"January 22, 1871."—"Of what disease did he die?"—"Pulmonary consumption." It appeared further that Dr. White was not a resident of Washington, but left that city immediately after making the affidavit mentioned on the 28th of January, 1871. Mrs. Day testified that Dr. White had not seen her husband at any time between September, 1869, and the latter part of November, 1870.

The struggle as to Dr. White's affidavit and the ruling upon it are quite immaterial. He stated in answer to one of the questions, that Dr. Day had been ill about five months, and as he died on the 22d of January, 1871, this would carry his illness back to the 22d of August, 1870, of course, including all the month of October of that year. The insurance company apparently sought the benefit of this evidence on the contest in regard to Day's health.

It is, however, manifest that White's statement was not one of personal knowledge, but was upon rumor, or made without sufficient reflection. This is evident from the testimony of Mrs. Day, which is entirely unimpeached and uncontradicted, that Dr. White did not see her husband during all of the year 1870 until the latter part of November. Upon this subject she could not well be in error. It was equally evident, from the statement of White himself, that his first visit to Day was on the 28th of November, 1870.

Day's bodily health on the 1st day of October, 1870, was satisfactory to the company, and the attempt was to show an unfavorable alteration between that date and the 14th of the same month. But White had not seen him during those fourteen days, nor for months before, nor for more than six weeks afterwards.

Whether the presentation of the affidavit of White by Mrs. Day made its contents evidence, whether she knew its contents or not, whether she did or did not adopt or procure it, was not of the slightest consequence. The paper

contained nothing that was legal evidence upon the point in issue, and a verdict founded upon it could not have been sustained. The disposition of the subject by the judge was one that could not possibly work legal injury to the insurance company. There was, therefore, no error. *Starbird v. Barrons*, 43 N. Y., 200; *Pepin v. Lachenmeyer*, 45 id., 27; *The People v. Brandreth*, 36 id., 191; *Porter v. Ruckman*, 38 id., 210; *Corning v. Troy Iron and Nail Factory*, 44 id., 577.

The effect of facts set forth in preliminary proof as admissions is discussed in *Insurance Company v. Newton*, 22 Wall., 32. Where an agent of the insurance company stated that the proofs were sufficient to show the death of the insured, but that they showed that he committed suicide, it was held that the whole admission must be taken together. Where the party or her agent stated in the preliminary proofs that the deceased had committed suicide, furnishing the verdict of a coroner's jury to that effect, and where the narration of the manner of the death of the deceased was so interwoven with the death of the deceased that the two things were inseparable, it was held that the whole was competent to go before the jury. We see no occasion to question the positions of that case.

Upon the whole case, we are all of the opinion that the judgment must be affirmed; and it is so ordered.

HALE v. CONTINENTAL LIFE INSURANCE COMPANY.

(Circuit Court for Vermont: 12 Federal Reporter, 859-861. 1882.)

Opinion by WHEELER, J.

STATEMENT OF FACTS.—The bill alleges in substance that the orator was induced to take an endowment policy upon his life in the defendant company, with a right to share in profits, and to pay premiums thereon, partly in money and partly by his notes, through various representations made by the defendant's agent to the effect that the profits would amount to enough to pay and cancel the notes, and otherwise as to what the insurance would amount to; that the time has elapsed, and the defendant insists upon taking the amount of the notes from the amount of the policy, and refuses to pay what the agent represented the insurance would amount to upon the payments made, and prays that the transaction may be declared to be void, the notes decreed to be given up, the amount of premiums paid decreed to be refunded, with interest, and for general relief.

§ 1688. *Jurisdiction. Effect of appearance.*

The plaintiff is a citizen of New Hampshire, the defendant of Connecticut, and the suit was brought in the state court of chancery and has been removed to this court. The service of process was made upon a statutory agent required by the laws of the state for that purpose. The defendant demurs to the bill for want of sufficient jurisdiction acquired by the service, and for want of equity, and the cause has been heard upon the demurrer. The jurisdiction is to be measured by that of the state court of chancery. That court is a court of general equity jurisdiction, and has full cognizance of all such cases as this, if any court of equity would have, between parties properly before it. As the defendant appeared and demurred, the parties are before the court and the jurisdiction has attached, and there can be no question remaining upon the demurrer except as to the equity of the bill, and that question is to be attended to.

§ 1689. Promissory representations not equivalent to representations of fact.

The misrepresentations relied upon to avoid the contract were wholly as to what would be done thereafter, and not as to any past or then present fact. The orator had some insurance upon his life during the running of the policy. His claim now is that it does not amount to so much as the defendant represented it would, and as he expected. The fraud, if there is any, did not exist at the time of the making of the contract, and could not vitiate it. Such fraud would not work backwards. The insurance which the orator has had cannot be restored. There is no way to protect and preserve the rights of both parties but to carry out the contract according to its legal effect, as affected by such representations, estoppels, or additional contracts as may be shown. The bill essentially lacks equity in this aspect. The question remains whether there is any other ground stated for equitable relief, for if there is the bill ought to be retained to prevent multiplicity of litigation.

As the bill stands the orator is entitled to a share in the profits, to be applied on his notes. The share belonging to him is apparently a proper subject of accounting. The taking that account and applying the amount to which the orator is entitled to the satisfaction of the notes, would be a proper subject for equitable cognizance. On that ground it appears that the bill should be retained.

The demurrer is overruled, the defendant to answer over by the next rule-day but one.

§ 1690. Statements made in an application for insurance not distinctly made by the policy part of the contract are not warranties. *Conover v. Massachusetts Ins. Co.*,* 8 Dill., 217.

§ 1691. Statements in any respect untrue.—Where a policy provides that if any of the statements upon which it is based are untrue in any respect, the materiality of such statements is excluded from consideration. So held in an action upon a policy founded on misrepresentations which were in fact material but not the cause of the loss. *Ibid.*

§ 1692. A declaration on which a policy of insurance was issued contained an agreement that any untrue allegations therein should work a forfeiture. Held, that the burden of proof in regard to such allegations was on the underwriter. *Brockway v. Mutual Benefit Ins. Co.*,* 9 Fed. R., 249.

§ 1693. The burden of proof in respect of the untruthfulness of answers by the assured in his application is upon the underwriter. *Piedmont Ins. Co. v. Ewing*,* 92 U. S., 377.

§ 1694. Jury.—Under what circumstances it is error to withdraw from the jury the question whether the answers to certain interrogatories were untrue. *Moulou v. Insurance Co.*,* 101 U. S., 708.

§ 1695. The words "sober and temperate," of a person's habits, do not import total abstinence from intoxicating liquor; but to use such liquors to such an extent as to produce frequent intoxication would not be living a sober and temperate life. *Brockway v. Mutual Benefit Ins. Co.*,* 9 Fed. R., 249.

§ 1696. Throat disease.—In a proposal for life insurance the assured answered that he had not had throat disease. The court charged the jury that if a short time before the application was made he had consulted a physician, who said that his larynx was slightly inflamed, and prescribed for him three times at intervals of about a week, deeming the trouble of a nervous nature and temporary and pronounced it cured; and if the assured had reason to believe at the time the policy was issued that he was in good health, and that his throat trouble was cured, then the company was liable. *Eisner v. Guardian Mutual Life Ins. Co.*,* 3 Cent. L. J., 802; 22 Int. Rev. Rec., 152.

§ 1696a. Hereditary diseases.—The following question, put to an applicant for life insurance, to wit: "Have the person's parents, uncles, aunts, brothers or sisters been afflicted with scrofula, consumption, insanity, epilepsy, disease of the heart, or any other hereditary disease," had reference only to hereditary diseases. *Gridley v. N. W. Mut. Life Ins. Co.*,* 14 Blatch., 107.

§ 1697. Substantial truth.—If representations as such concerning the health of the assured are substantially true, that is enough. *Life Ins. Co. v. Francisco*,* 17 Wall., 672.

§ 1698. **Statements in application — Instructions.**— A clause in a policy of life insurance provided that if any statements made in the application should be found in any respect untrue, the policy should be void. In reply to the question, "How long since you were attended by a physician? for what diseases? give name and residence of such physician," insured answered, "not for twenty years." In an action on the policy it appeared in evidence that insured had, within five years previous to the application, been several times attended by a physician for a fall upon his head, alleged by the company defendant to have been a severe fall. *Held*, that an instruction to the jury in these words, — "If the fall upon the head for which Monroe Snyder (the insured) was attended by the physician was a severe one, the answer was untrue and the verdict should be for the defendants," was proper. *Mutual Insurance Co. v. Snyder*, 8 Otto, 398.

§ 1699. **Statements in affidavits of loss.**— In a suit by the wife upon a policy on the life of her husband, it was held that she was not absolutely concluded by statements in an affidavit accompanying the proofs of loss, as to the cause of the death, the affidavit having been made by a third party, and there being no proof that the plaintiff knew its contents. *Day v. Mutual Benefit Life Ins. Co.*, * 1 MacArth., 598.

§ 1700. **Reinstatement.**— A policy having lapsed on default in the payment of the premium, the assured applied, October 1, to have it reinstated, furnishing certificates as to his health and paying the premium. The renewal receipt was issued October 14. *Held*, that the assured was not required to furnish a statement as to the condition of his health between the 1st and 14th of October. *Day v. Mutual Benefit Life Ins. Co.*, * 1 MacArth., 598.

§ 1701. **Waiver.**— When a life insurance company has paid a loss it is conclusively presumed to have examined or waived all questions of the validity of the original contract except fraud; and fraud here means falsity with guilty knowledge. *Metropolitan Co. v. Harper*, * 3 Hughes, 260.

§ 1702. **Act of agent.**— If an answer is given by the assured truthfully to the question whether he has liver complaint, and the answer is written down untruthfully by the underwriter's agent, the assured is not responsible for the fact though he signed the application. *Lueders v. Hartford Ins. Co.*, * 12 Fed. R., 468. See GENERAL PRINCIPLES, XI, *ante*.

§ 1703. **Missouri laws.**— Policies of life insurance issued by foreign companies and delivered in Missouri after the act of March 23, 1874, took effect fall within its operation, where there is no provision therein to the contrary. *Quære*, if the assured could waive the benefit of the statute? *White v. Connecticut Ins. Co.*, * 4 Dill., 177.

§ 1704. The act above mentioned includes warranties as well as representations. *Ibid*.

§ 1705. **Injury**— The non-disclosure by the assured of an injury received, though serious at the time, is not material if its effects were of a temporary nature and no serious consequences followed. *Insurance Co. v. Wilkinson*, * 18 Wall., 222.

§ 1706. **Concealment.**— Where negotiations in regard to the payment of the first premium, which payment is necessary to the contract of insurance, are uncompleted, and six weeks later a friend of the applicant pays to the agent of the assured the sum due, concealing the fact that the applicant was then at the point of death, and a policy is then delivered, no action upon such policy can be maintained. *Piedmont Ins. Co. v. Ewing*, * 92 U. S., 877.

IV. WORDS OF EXCEPTION: SUICIDE AND VIOLATION OF LAW.

SUMMARY — *Suicide*, §§ 1707-1714. — *Death in violation of law*, §§ 1715, 1716.

§ 1707. A life insurance policy provided that if the assured should die by his own hand the contract should become void. The assured having committed suicide when, as it was alleged, he was insane, the court laid down the following rule: If the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches, and there can be no recovery on the policy. If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable. (Affirming *S. C.*, * 1 Dill., 408.) *Life Ins. Co. v. Terry*, §§ 1717-19.

§ 1708. A condition avoiding a policy of life insurance in case the assured die by suicide is valid. *Gay v. Mutual Life Ins. Co.*, §§ 1720-25.

§ 1709. The assured having died by shooting himself with a pistol, the judge in an action

upon a policy on his life, conditioned to be void if the assured should die by suicide, instructed the jury that if at the time he fired the pistol he was conscious of the act he was committing, intended to take his own life, and was capable of understanding the nature and consequences of the act, the underwriter is not liable, and that, if the act was so committed, it is immaterial whether he was capable of understanding its moral aspects, or of distinguishing between right and wrong. *Contra*, if he was not thus conscious, or had no such capacity, but acted under an insane delusion, overpowering his understanding and will, or was impelled by an uncontrollable impulse, the death being by self-killing, it is for the plaintiff to bring the case within the qualification. *Ibid*.

§ 1710. Though the commission of suicide creates no presumption of insanity, it is admissible in evidence in connection with proof of the previous condition and conduct of the party as a fact tending to prove insanity. *Wolff v. Connecticut Ins. Co.*, § 1736.

§ 1711. A life insurance policy contained a clause to the following effect: "If the assured shall die by his own hand . . . this policy shall be void." The assured took his own life under circumstances tending to show that he was then insane. The judge instructed the jury that the assured having taken his own life, it was a presumption in fact that he had "died by his own hand," in the sense of the policy, and that it was for the plaintiff suing upon the policy to show that he had come to his death under circumstances to make the insurance company liable; that the act of self-destruction raised no presumption of insanity; and that it was for the plaintiff to show such insanity at the time as would make the defendant liable. Further, that there must be mental disorder to constitute insanity; that if the death of the assured was not his voluntary, intelligent act, he did not die by his own hand; that if the assured was embarrassed in business, or had drawn checks without having funds upon which to draw, or had committed forgeries, and exposure was imminent, or was in a distressed state of mind from this or some other cause, and for any or all these reasons formed a determination to take his own life, because, in the exercise of his usual reasoning faculties, he preferred death to life, the company was not liable; that to make the defendant liable the mind must be so far deranged as to have made the deceased incapable of exercising rational judgment in regard to the act committed; but that if the deceased was impelled to the act by an insane impulse which he could not resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise them, the defendant was liable. And further, that if the death was caused by the voluntary act of the deceased, he knowing and intending that his death would be the result of his act, and when his reasoning powers were so far impaired that he was not able to understand the moral character, general nature, consequence and effect of the act he was about to commit, the company was liable. The words "general nature, consequence and effect" explained. *Moore v. Connecticut Ins. Co.*, §§ 1727-1731.

§ 1712. In an action upon a policy conditioned to be void if the assured should commit suicide, it appears that the proofs of loss showed that the assured died by suicide. The judge allowed a statement of the insurer to the witness as to the sufficiency of the proofs of death of the insured to be received as conclusive of that fact, but in charging the jury separated the admission of that fact from the language which disclosed the cause of the death, and said that this was an independent fact to be established by the company. *Held*, erroneous. The admission should be taken in its entirety. *Insurance Co. v. Newton*, §§ 1732-35.

§ 1713. The proofs of loss furnished to an underwriter may be offered in evidence by it to establish any facts which they show in its favor. *Ibid*.

§ 1714. Plea to an action upon a life insurance policy that the assured came to his death by his own hand, within the meaning of a provision of the policy that if the assured should die by suicide, sane or insane, the contract should become void. Replication that when the assured killed himself he was of unsound mind, and wholly unconscious of the act. Demurrer to the replication sustained. *Bigelow v. Berkshire Ins. Co.*, § 1736-37.

§ 1715. A policy insured the life of S. upon condition that the insurance should not extend to death or injury caused by dueling or fighting or other breach of law on the part of the assured, or by his wilfully exposing himself to unnecessary danger. The assured was killed by a collision while racing horses for money, in violation of a law of his state; but there was evidence tending to show that the collision was produced by the act of his competitor, G., in the race turning in to pass his (the assured's) horse which was half a length behind. *Held*, that there could be no recovery on the policy. *Held*, further, that the case was not changed by a special finding of the jury that when the sulky of S. came into collision with the sulky of G., S. jumped to the ground and was entirely clear from the sulky, harness and reins, upright and uninjured, and spoke to his horse to stop, and then started forward to get hold of the lines to stop him, and in that attempt was killed. *Insurance Co. v. Seaver*, §§ 1738-39.

§ 1716. The condition in the policy against unnecessary exposure should be construed by the court so far as it involved matters of law, and by the jury, aided by the court, when it involved

law and fact; and in neither view of it was the opinion of ordinary people, in view of the state of things where the deceased resided, or the understanding of its language in view of the circumstances of the case, a criterion for the jury. *Ibid.*

[NOTES.— See §§ 1740-1748.]

LIFE INSURANCE COMPANY v. TERRY.

(15 Wallace, 580-591. 1872.)

ERROR TO U. S. Circuit Court, District of Kansas.

STATEMENT OF FACTS.— Action upon a life insurance policy containing a provision that if the assured should “die by his own hand . . . this policy shall be null and void.” The assured killed himself by taking poison. There was evidence and counter-evidence upon an allegation of the insanity of the assured, and evidence was given that he knew the consequences of his act. The defense asked the following instructions:

“*First.* If the jury believe from the evidence in the case that the said George Terry destroyed his own life, and that, at the time of self-destruction, he had sufficient capacity to understand the nature of the act which he was about to commit, and the consequences which would result from it, then and in that case the plaintiff cannot recover on the policy declared on in this case.

“*Second.* That if the jury believe from the evidence that the self-destruction of the said George Terry was intended by him, he having sufficient capacity at the time to understand the nature of the act which he was about to commit, and the consequences which would result from it, then and in that case it is wholly immaterial in the present case that he was impelled thereto by insanity, which impaired his sense of moral responsibility, and rendered him, to a certain extent, irresponsible for his action.”

The request was refused, and the following charge given:

“It being agreed that the deceased destroyed his life by taking poison, it is claimed by defendant that he ‘died by his own hand,’ within the meaning of the policy, and that they are, therefore, not liable.

“This is so far true that it devolves on the plaintiff to prove such insanity on the part of the decedent, existing at the time he took the poison, as will relieve the act of taking his own life from the effect which, by the general terms used in the policy, self-destruction was to have, namely, to avoid the policy.

“It is not every kind or degree of insanity which will so far excuse the party taking his own life as to make the company insuring liable.

“To do this, the act of self-destruction must have been the consequence of the insanity, and the mind of the decedent must have been so far deranged as to have made him incapable of using a rational judgment in regard to the act which he was committing.

“If he was impelled to the act by an insane impulse which the reason that was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties on the act he was about to do, the company is liable. On the other hand, there is no presumption of law, *prima facie* or otherwise, that self-destruction arises from insanity, and if you believe from the evidence that the decedent, although excited or angry, or distressed in mind, formed the determination to take his own life, because, in the exercise of his usual reasoning faculties, he preferred death to life, then the company is not liable, because he died by his own hand within the meaning of the policy.”

Opinion by MR. JUSTICE HUNT.

The request for instructions made by the counsel of the insurance company proceeds upon the theory that if the deceased had sufficient mental capacity to understand the nature and consequences of his act, that is, that he was about to take poison, and that his death would be the result, he was responsible for his conduct, and the defendant is not liable, and the fact that his sense of moral responsibility was impaired by insanity does not affect the case.

The charge proceeds upon the theory that a higher degree of mental and moral power must exist; that, although the deceased had the capacity to know that he was about to take poison, and that his death would be the result, yet, if his reasoning powers were so far gone that he could not exercise them on the act he was about to commit, its nature and effect, or if he was impelled by an insane impulse which his impaired capacity did not enable him to resist, he was not responsible for his conduct, and the defendant is liable.

It may not be amiss to notice that the case does not present the point of what is called emotional insanity, or *mania transitory*, that is, the case of one in the possession of his ordinary reasoning faculties, who allows his passions to convert him into a temporary maniac, and while in this condition commits the act in question. This case is expressly excluded by the last clause of the charge, in which it is said that anger, distress or excitement does not bring the case within the rule, if the insured possesses his ordinary reasoning faculties.

§ 1717. *Cases relating to insanity of assured reviewed.*

The case of *Borradaile v. Hunter*, reported in 5th Manning & Granger, 639, is cited by the insurance company. The case is found also in 2 Bigelow, Life and Accident Insurance Cases, 280, and in a note appended are found the most of the cases upon the subject before us. The jury found in that case that the deceased voluntarily took his own life, and intended so to do, but that at the time of committing the act he was not capable of judging between right and wrong. Judgment went for the defendant, which was sustained upon appeal to the full bench. The counsel for the company argued that where the act causing death was intentional on the part of the deceased, the fact that his mind was so far impaired that he was incapable of judging between right and wrong did not prevent the proviso from attaching; that moral or legal responsibility was irrelevant to the issue. The court adds: "It may very well be conceded that the case would not have fallen within the meaning of the condition had the death of the assured resulted from an act committed under the influence of delirium, or if he had, in a paroxysm of fever, precipitated himself from a window, or, having been bled, removed the bandages, and death in either case had ensued. In these and many other cases that might be put, though, strictly speaking, the assured may be said to have died by his own hands, the circumstances clearly would not be such as the parties contemplated when the contract was entered into." In delivering the opinion of the court, Erskine, J., says: "All that the contract requires is that the act of self-destruction should be the voluntary and wilful act of a man having at the time sufficient powers of mind and reason to understand the physical nature and consequences of such act, and having at the time a purpose and intention to cause his own death by that act, and the question whether at the time he was capable of understanding the moral nature and quality of his purpose is not relevant to the inquiry further than as it might help to illustrate the extent of his capacity to understand the physical character of the act itself." Chief Justice Tindal dissented from the judgment.

In speaking of the verdict, he says: "It is not, perhaps, to be taken strictly as a verdict that the deceased was *non compos mentis* at the time the act was committed, for if this latter is the meaning of the jury, the case would fall within that description mentioned in the argument to be without the reach of the proviso, namely, the case of death inflicted on himself by the party whilst under the influence of frenzy, delusion or insanity."

This authority was followed in *Clift v. Schwabe*, 3 Com. B., 437, where it was substantially held that the terms of the condition included all acts of voluntary self-destruction, and that whether the party is a voluntary moral agent is not in issue.

These decisions expressly exclude the question of mental soundness. They are in hostility to the tests of liability or responsibility adopted by the English courts in other cases from Coke and Hale onwards. Coke said, "A little madness deprives the lunatic of civil rights or dominion over property, and annuls wills." But, to exempt from responsibility for crime, he says, "complete ignorance of the knowledge of right or wrong must exist." Lord Mansfield holds the legal test of a sound mind to be the knowledge of right and wrong, of good and evil; of which the converse is ignorance of knowledge of right and wrong, of good and evil. Lord Lyttleton held the test to be the state called *compos mentis* or sound mind. Lord Erskine (Defense of Hadfield) defined it to be the absence of any practicable delusion traceable to a criminal or immoral act. In *Pritchard, on the Different Forms of Insanity*, vol. 1, p. 16 (and see 1 Shelford on Lunatics, 46), will be found the somewhat lengthy definition of insanity by Lord Lyndhurst. The English judges refuse to apply to the act of the insured in causing his death the principles of legal and moral responsibility recognized in cases where the contract, the last will, or the alleged crime of such person may be in issue.

In *Hartman v. Keystone Ins. Co.*, 21 Pa. St., 466, the doctrine of *Borradaile v. Hunter* was adopted, with the confessedly unsound addition that suicide would avoid a policy, although there were no condition to that effect in the policy.

In *Dean v. Mutual Life Ins. Co.*, 4 Allen, 96, the courts of Massachusetts held substantially the doctrine of *Borradaile v. Hunter*.

In Kentucky, in *St. Louis Life Ins. Co. v. Graves*, 6 Bush, 268, the court were divided upon the question of the soundness of *Borradaile v. Hunter*, but held unanimously that, where the suicide was committed during an uncontrollable passion caused by intoxication, the condition was broken and the policy avoided.

In *Cooper v. Massachusetts Life Ins. Co.*, 102 Mass., 227, the doctrine of *Dean v. American Life Ins. Co.* was affirmed; the plaintiff offering to prove that the deceased was insane at the time he committed the act; that he acted under the impulse and influence of insanity, and that his act of self-destruction was the direct result of his insanity.

In *Nimick v. Insurance Company*, 10 Am. L. Reg. (N. S.), 102, McKennan, circuit judge of the United States for the western district of Pennsylvania, held that if the assured comprehended the physical nature and consequences of the act, and intended to destroy his life, the policy was void, although he did not comprehend the moral nature of the act.

On the other hand, in *Eastabrook v. Union Ins. Co.*, 54 Me., 224, the judge at the trial instructed the jury "that if the insured was governed by irresistible or blind impulse in committing the act of suicide, the plaintiff would be

entitled to recover." This decision was sustained by the supreme court of the state of Maine.

In the state of New York the question arose in *Breasted v. Farmers' Loan & Trust Co.*, 4 Hill, 73. In an action upon the policy the defendants pleaded that the deceased committed suicide by drowning himself in the Hudson river, and died by his own hand. To this the plaintiff replied that the assured was "of unsound mind and wholly unconscious of the act." The defendants demurred. The supreme court overruled the demurrer, holding that the reply afforded a sufficient answer to the plea. The case afterwards came before the court of appeals of that state (4 Seld., 299), when it was held that the provision in the policy had reference to a criminal act of self-destruction; that the self-destruction of the insured while insane, and incapable of discerning between right and wrong, was not within the provision.

In the case of *Gay v. The Union Mutual Life Insurance Co.*, cited in 2 Bigelow, *Life and Accident Insurance Cases*, 4, it was held that if the deceased was conscious of the act he was committing, if he intended to take his own life, and was capable of understanding the nature and consequences of it, the policy was void, but if the insured destroyed himself while acting under an insane delusion, which overpowered his understanding and will, or if he was impelled to the act by an uncontrollable impulse, the case did not fall within the proviso of the policy. This decision, it is stated by Bigelow, was the result of a careful deliberation between Judges Woodruff and Shipman at a circuit court of the United States held by them jointly.

In his work on Insurance, section 894, Mr. Phillips, after citing the cases, closes thus: "And I take our law to be that any mental derangement which would be sufficient to exonerate a party from a contract would render a person incapable of occasioning the forfeiture of a policy under this condition." There is a conflict in the authorities which cannot be reconciled.

§ 1718. *Charge of the court considered and sustained.*

The propositions embodied in the charge before us are in some respects different from each other, but in principle they are identical. They rest upon the same basis—the moral and intellectual incapacity of the deceased. In each case the physical act of self-destruction was that of George Terry. In neither was it truly his act. In the one supposition he did it when his reasoning powers were overthrown and he had not power or capacity to exercise them upon the act he was about to do. It was in effect as if his intellect and reason were blotted out or had never existed. In the other, if he understood and appreciated the effect of his act, an uncontrollable impulse caused by insanity compelled its commission. He had not the power to refrain from its commission, or to resist the impulse. Each of the principles put forth by the judge rests upon the same basis—that the act was not the voluntary intelligent act of the deceased.

The causes of insanity are as varied as the varying circumstances of man.

—"Some for love, some for jealousy,
For grim religion some, and some for pride,
Have lost their reason; some for fear of want,
Want all their lives; and others every day,
For fear of dying, suffer worse than death." (a)

When we speak of the "mental" condition of a person, we refer to his senses, his perceptions, his consciousness, his ideas. If his mental condition

(a) *Armstrong on Health*, book 4, v, 84. Cited in *Shelford on Lunatics*, In. 1, 48.

is perfect, his will, his memory, his understanding are perfect, and connected with a healthy bodily organization. If these do not concur, his mental condition is diseased or defective.

Excessive action of the brain whereby the faculties become exhausted, a want of proper action whereby the functions become impaired and diminished, the visions, delusions and mania which accompany irritability, or the weakness which results from an excess of vital functions, indigestion and sleeplessness, are all the result of a disturbance of the physical system. The intellect and intelligence of man are manifested through the organs of the brain, and from these, consciousness, will, memory, judgment, thought, volition, and passion, the functions of the mind, do proceed. Without the brain these cannot exist. With an injured or diseased brain, their powers are impaired or diminished.

We have not before us the particular facts on which the questions of the sanity of Terry were presented. We may assume that proof was given upon which the propositions of the charge were based. We do not know whether he was sleepless, unduly excited, or unnaturally depressed; whether he had abandoned his accustomed habits and pursuits and adopted new and unusual ones; from a quiet, orderly man had become disorderly, vicious, or licentious;—that his fondness for his wife and children changed to dislike and abuse; that jealousy, pride, the fear of want, the fear of death, had overtaken him. He may have realized the state supposed by the counsel in arguing *Borradaile v. Hunter*, viz., that his death might have resulted from an act committed under the influence of delirium, or that in a paroxysm of fever he might have precipitated himself from a window, or having been bled, he might have torn away the bandages. Whether he swallowed poison, or did the other insane acts, might result from the same condition of body and mind.

Delirium, fever, tearing away the bandages for preserving the life, the taking of poison, in a case like that before us, are all results of bodily disease. If bodily disease in these or other forms overthrew Terry's reasoning faculties, in other words destroyed his consciousness, his judgment, his volition, his will, he remained the form of the man only. The reflecting, responsible being did not exist. In the language of the successful counsel in *Borradaile v. Hunter*, "In these and many other cases, though, strictly speaking, the assured may be said to have died by his own hands, the circumstances clearly would not be such as the parties contemplated when the contract was entered into."

That form of insanity called impulsive insanity, by which the person is irresistibly impelled to the commission of an act, is recognized by writers on this subject. See Blandford on Insanity—"Impulsive Insanity." It is sometimes accompanied by delusions, and sometimes exists without them. The insanity may be patent in many ways, or it may be concealed. We speak of the impulses of persons of unsound mind. They are manifested in every form,—breaking of windows, destruction of furniture, tearing of clothes, firing of houses, assaults, murders and suicides. The cases are to be carefully distinguished from those where persons in the possession of their reasoning faculties are impelled by passion, merely, in the same direction.

Dr. Ray, cited by Fisher (Fisher on Insanity, p. 83), approves the charge of the judge in Haskell's case, where he says: "The true test lies in the word *power*. Has the defendant in a criminal case the power to distinguish right from wrong, and the power to adhere to the right and avoid the wrong?"

The question of sanity has usually been presented upon the validity of an agreement, the capacity to make a will, or upon responsibility for crime. If Terry had made an agreement under the circumstances stated in the charge, a jury or a court would have been justified in pronouncing it invalid. A will then made by him would have been rejected by the surrogate if offered for probate. If upon trial for a criminal offense, upon all the authorities, he would have been entitled to a charge that, upon proof of the facts assumed, the jury must acquit him. *Freeman v. People*, 4 Denio, 9; *Willis v. The People*, 32 N. Y., 719; *Seaman's Society v. Hopper*, 33 id., 619; *The Marquess of Winchester's Case*, 6 Reports, 23; *Combe's Case*, Moore, 759.

We think a similar principle must control the present case, although the standard may be different.

§ 1719. *The rule applicable to the case declared.*

We hold the rule on the question before us to be this: If the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches, and there can be no recovery. If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse, which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable.

In the present instance the contract of insurance was made between Mrs. Terry and the company; the insured not being in form a party to the contract. Such contracts are frequently made by the insured himself, the policy stating that it is for the benefit of the wife, and that in the event of death the money is to be paid to her. We see no difference in the cases. In each it is the case of a contract, and is to be so rendered as to give effect to the intention of the parties. Nor do we see any difference for this purpose in the meaning of the expressions, commit suicide, take his own life, or die by his own hands. With either expression, it is not claimed that accidental self-destruction, death in endeavoring to escape from the flames, or the like, is within the proviso.

Judgment affirmed.

MR. JUSTICE STRONG dissented.

GAY v. UNION MUTUAL LIFE INSURANCE COMPANY.

(Circuit Court for Connecticut: 9 Blatchford, 142-155. 1871.)

STATEMENT OF FACTS.—Action on a policy of insurance on the life of Gay. The defense was, that the policy was void because Gay had died by suicide. To this plaintiff replied, that when he took his life he was insane. He shot himself on a railroad train, December 10, 1868. Further facts appear in the charge to the jury.

Charge by WOODRUFF, J.

Gentlemen of the jury: The case to which you have listened so patiently during several days is one of no inconsiderable importance. To the plaintiff it involves the question whether she shall recover the provision which was made for her in contemplation of the loss of him to whom she looked for sup-

port, maintenance and protection; and to the defendants, as claimed by them, and as conceded by the plaintiff, it involves not merely the loss of the money that is demanded, but the construction and effect of an important contract in general use, in the meaning and effect of which rests, as the case may be, their responsibility to great numbers who have effected like insurances with them. This special importance is not, perhaps, very material. It is always important, in courts of justice, that the court and jury should feel that, whether amounts in controversy are great or small, their duty is single, and is to be performed under a serious sense of responsibility, and with the sole purpose to render justice according to the evidence and according to the law.

The action is brought upon a contract by which these defendants, in general terms, and in their principal assumption, agree to pay to the plaintiff \$5,000, on the death of Sheridan Gay, and on due notice and proof thereof, but, nevertheless, with a condition that, if he die by suicide, the policy shall be void, and the obligation, thus assumed in such general phrase, shall be of no force or effect.

It was entirely competent for the parties to the instrument to make just that agreement. Parties to a contract may consent to any stipulation not in violation of law; and, when they voluntarily enter into an agreement, or when they voluntarily annex to an engagement conditions and limitations, they are entitled to have those conditions and limitations observed, according to their true import and meaning. It is not for the court, and it is not for you, to pause in your deliberations to consider whether such conditions, rightly interpreted, are wise — whether their enforcement is humane — whether, under any circumstances, such enforcement may seem harsh or unkind. It is not for you to yield to considerations suggested by the infirmities or even misfortunes of our poor human nature. These considerations belong to the parties who enter into the engagement, who, when agreeing together, consent that their contract shall bear its just construction, and shall, if it be enforced, be enforced according to its proper legal effect. Both are bound by it; and I may add to this, that upon this trial, as it seems to me, both parties come into court ready and willing to be bound by this instrument, with its conditions. They differ, however, as to its meaning in reference to the facts to which it is to be applied; and, next, they differ as to the facts themselves. The plaintiff claims that, Sheridan Gay having died, the sum insured is due to her; and that the circumstances of his death are not within the condition of the contract relieving the defendants from liability to pay the money to her. The defendants, on the other hand, claim that, although the subject of the insurance, the life of Sheridan Gay is at an end, and he is dead, nevertheless, his death occurred in a manner which is within the meaning of the term "suicide," as that is used in the condition annexed to the policy; and that, therefore, the money, the sum named in the policy, is not due. Each party, plaintiff and defendant, is here asking that this case may be decided according to their legal rights, neither asking, nor having any right to ask, anything out of pity for the deceased, sympathy for his widow, or regret that the defendants should be subjected to loss. Each is doubtless sincere in the views presented by the respective counsel. It is right that the plaintiff should insist upon payment of the sum insured for her benefit, if it is rightly due to her; and it is right that the defendants, if the money is not payable, should decline to pay it. The officers of the defendants' company would have been derelict in the performance of their duty if they had

not resisted the claim of the plaintiff, if they had good reason to believe, and did believe, that the defendants are not liable.

The candor of the counsel, and the distinctness of the uncontradicted evidence, have reduced the subject of examination and decision to two inquiries, one of which is addressed to the court, and the other to you.

The making of the contract, its terms and conditions, the payment of the premium to the defendants, the death of the person whose life was the subject of insurance, and that his death was caused by the physical act of that person, or, in the language of the concession, by self-killing, the instrument of that killing being a pistol discharged by himself, the ball penetrating his head and causing death, are all conceded. From this point the parties differ. The plaintiff insists that this self-killing was not "suicide," within the meaning of that term as employed in the policy; but, on the contrary, that when Sheridan Gay discharged the pistol, he was insane, by reason of disease, and, at the time, was so far unconscious of the nature and the consequences of the act which he was committing, and so beyond the government of his will, by the pressure of delusion and other blind, ungovernable impulse, as to be incapable of legal understanding, and not the subject of legal responsibility, and, therefore, in judgment of law, incapacitated to do any act which could operate to defeat this policy. The defendants, on the other hand, insist that when Sheridan Gay killed himself, he had consciousness enough, sufficient power to choose, understanding sufficiently capable of comprehending what he was doing and the consequences of his act, to make the act suicide, within the condition of the policy. This exhibits the case as I first stated it. The parties differ as to the meaning of the term "suicide" as employed in the policy, and to be applied to the facts which you may find to be established by the evidence; and they differ as to the actual facts which, in reference to the contract, you ought to find to be established.

§ 1720. *Meaning of the term "suicide."*

The first point of difference, that is to say, the meaning and legal effect of this condition of the policy, is for the court to determine. In regard to that the duty and responsibility is upon us and not upon you. With it you have no concern, except to see to it that you accept the instruction of the court, and, in good faith, make it your guide in determining the other question, which is, what facts the proofs do establish. This should be so. The question is a grave one, one upon which just and learned men have differed. If we should err in our instructions to you, the matter can be further considered, and even more deliberately than on this occasion, in this, and if need be, in a higher tribunal; while, if you should make a mistake in the matter, it might be impossible, according to our modes of judicial administration, to prevent the injustice. In the discharge of our duty, we shall not attempt to give a definition of the word "suicide," as employed in this and like policies of insurance, which will necessarily be apt to every supposable case, and cover the whole question as it may arise in other cases. What we say will be with sole reference to what is conceded or uncontroverted, or which may, perhaps, be found by you to be established, in this particular case. We are not called upon to speak of accidental self-killing, when there is not merely no intention to kill, but every instinct and desire to continue in life is in full force; nor of a choice of the mode of death, when death itself is absolutely certain, as if, to escape the torture of death by gradual burning in a burning ship, the sufferer should cast himself, as an act of choice and will, into the water; nor of a case

where erroneous opinions and unbelief of a future leads one (as perhaps it has many) to make the question of life or death one of mere choice to endure, or not longer to submit to live; nor of a case where the opinions of the subject are such that the question of life or death has no moral aspects whatsoever. Of these, or like cases, we say nothing. Not, however, to intimate any doubt in relation to them, but to say that the rule we give for your guidance is not given to be applied to them. It is enough, if it be a just rule in this case, whatever more restricted or more comprehensive rule might be necessary, if it be possible, by any rule, to reach and cover all cases. Nor are we called upon, nor do we intend to go, beyond the claim which the defendants make in this case. We understand them to concede that, if Sheridan Gay, when he fired the pistol, was unconscious of the act, did not intend to take his own life, or was incapable of understanding the physical consequences of the act, then the act was not "suicide," within the meaning of the condition of the policy, and the company are liable. But they claim that, whether he was capable of appreciating the moral consequences of the act, as an act right or wrong, is immaterial; and their claim, therefore, is that, if the deceased intended to kill himself and did kill himself, when capable of understanding the physical consequences of the act, irrespective of its moral bearings, as right or wrong, the defendants are not liable. They further claim that the contract is governed by the law of Massachusetts, or, rather, the exposition of the law, applicable to contracts like this, by her judicial tribunals; and that the rule claimed by them here is in accordance with the decisions of the courts of that state. This presents the defendants' view of the construction of the contract. The plaintiff, on the other hand, claims a different signification of the term "suicide" in this policy, and denies that this court is bound to follow the decisions of Massachusetts courts.

Not deeming it necessary, for the purposes of this trial, to say anything to you upon the subject, we pass the legal question raised by counsel, whether the decisions of the courts of Massachusetts are controlling upon us, in determining the interpretation or legal effect of this policy. That, if it be a question, is for us and not for you.

§ 1721. *Consciousness of the act, intention to take life, and capacity for understanding the nature and consequences of the act, the test.*

We do instruct you, in view of the claims, and of the concessions, expressed or implied, in the positions taken by counsel, that, if Sheridan Gay, at the time he fired the pistol, was conscious of the act he was committing, intended to take his own life, and was capable of understanding the nature and consequences of the act, the defendants are not liable; and that, if the act was thus committed, it is immaterial whether he was capable of understanding its moral aspects, or of distinguishing between right and wrong. And, to give you the alternative, if, on the other hand, he was not thus conscious, or had no such capacity, but acted under an insane delusion, overpowering his understanding and will, or was impelled by an uncontrollable impulse, which neither understanding nor will could resist, then the defendants are liable. Under this alternative view of the liability or non-liability of the defendants, you are to determine the question of fact, What was the condition of Sheridan Gay when he fired the pistol?

§ 1722. *Burden of proof on plaintiff.*

The defendants' counsel rightly claim that it is for the plaintiff (having conceded the fact of self-killing) to satisfy you that he was in the condition,

when he committed the act, which leaves the company liable, as we have stated the rule.

§ 1723. *Evidence discussed.*

The plaintiff claims that the proof does not establish that state of insanity, or overpowering influence of delusion, or uncontrollable impulse, which rendered him incapable of committing suicide, within the definition given you. In support of that claim the plaintiff, in the testimony elicited on her behalf, points to his overwork in New York; his failure in health; his consequent depression of spirits; the alleged evidence of disease affecting his head — symptoms, as claimed, not then suggesting derangement, but now denoting its incipient stage; his abandonment of his employment, and subjecting himself to the morbid tendencies of a comparatively idle life; his exposure and over-tasking himself, on his visit to Rochester, and the consequent pain in his head, and fainting, claimed to indicate a diseased condition, in which the head and brain were involved; his apparently increased debility and dejection on his return; the exhibition of reserve, or less freedom in social intercourse; his more than usual nervous excitement, restlessness, inability to sleep, and alternations of flush and pallor in his countenance; his groundless suspicion and jealousy of his brother-in-law, Mr. Ames; towards the last days of his life, his false hearing, freely commented upon by counsel, and claimed to be the effect of a diseased mind and an unduly excited imagination, suggesting to him what was unreal; his excited sense of hearing, claimed to be shown by his twice hearing, when up stairs in his room, what was said in an ordinary tone of voice down stairs in the dining room; his restless, wild appearance, starting and looking suddenly, from time to time, as if in expectation or fear of something approaching; his irrational conduct on Friday towards Mrs. Ames and her husband, and especially on Tuesday night; his suspicion of an attempt to poison him, and apprehension of an endeavor to arrest him; his persistent belief that reports were in circulation prejudicial to his character; and, on the last morning, his apparent purpose to ride to Amyville, with his wife to accompany him, causelessly and suddenly abandoned, or, if no such purpose existed, then, his crafty deception practiced on his wife, to elude her, and conceal the purpose or the impulse under which he was acting; his leaving behind him a note intimating that he left from a fear that he should shoot Mr. Ames; his vacillating conduct, in taking the train westward, towards Hartford, leaving the cars at Plainfield; his depressed appearance there; his return towards Moosup without any fixed design, or, at least, expressing a state of indecision; his continuing his journey a little further; the evidence of nervous excitement in the cars; and, finally, his sudden entrance into the anteroom of the car, and the discharge of the pistol at his head.

Although the counsel for the plaintiff insists that there is not any sufficient proof to warrant the submission of the question to you, whether he had been unfaithful to his employers at the time he lived in New York, and had unlawfully taken and appropriated their funds to his own use, the court is of the opinion that there is evidence on that subject which is proper for your consideration; and the suggestion of counsel is pertinent, that such a fact, if proved, would not weaken the force of the other evidence of his insanity, but rather suggests a cause, or at least an aggravation, of his disease, and makes his insanity more probable. A guilty conscience, fear of detection, and, perhaps, of punishment and disgrace, exciting his nervous system, stimu-

lating his imagination, and thus increasing or co-operating with physical infirmity,—all these and other indications suggested by counsel are claimed by the plaintiff to be established by the proofs, and to show that Mr. Gay, when he killed himself, was not in a condition in which he did or could commit suicide, within the test which we have given for your guidance, but, on the contrary, that he was under the controlling influence of insane delusion, and overwhelmed by a sudden and violent paroxysm, and acted without consciousness or capacity to understand the consequences, and without an intent to effect the result. Whether these facts, relied upon by the plaintiff, are proved, and whether, if proved, they establish the claim of the plaintiff in this respect, is for you to consider and determine.

On the other hand, the defendants, in their presentation of the evidence for your consideration, admit that the testimony shows that Mr. Gay was under an insane delusion. They say that his health was impaired; that he was conscious of being guilty in his transactions with his employers in New York, and, concealing this secret, was in constant dread of discovery, punishment and disgrace; that his nervous system was affected, his imagination unduly excited, a groundless jealousy and suspicion of his brother-in-law were produced, and a delusion that, by his (Mr. Ames') agency, discovery and disgrace were impending, possessed his mind to such a degree, that he was, in the language of the defendants' counsel, an insane man. But they claim and urge that this insanity, on the subjects to which it related, however produced, was not such as to deprive him of capacity to know and comprehend what he did, or of actual knowledge and intention to do as he did, with a distinct understanding of the nature and consequence of his acts; that, although his judgment was perverted, he acted intentionally, knowing what he did, and his final act of killing himself was with plan, intention and comprehension, such as made him a suicide, as that term has been defined by the court; that, when he thought of the deficiency in his accounts, he understood what were the natural and probable consequences of discovery; that, when under the influence of his delusion, he thought Mr. and Mrs. Ames were talking upon that subject, and that Mr. Ames had written or was about to write to New York, he understood that discovery would be the result; that, when he meditated or spoke of shooting Mr. Ames, if he had seen him put the letter in the postoffice, he knew the effect of shooting him, either to prevent the discovery, or to revenge it, or, at all events, that shooting him would kill him; that, when he took the pistol, notwithstanding the remonstrances of his wife, he knew and comprehended how to use it, and understood its effects; that, when he heard the steps of his mother-in-law on the stairs, and alarmed his wife by the fear that he was going to shoot her, and gave the explanation, now conceded by the defendants to have been an insane delusion, that some one was coming to arrest him, he, nevertheless, knew the consequences of shooting the person approaching for such a purpose; that, when he assured his mother-in-law that he would not hurt a hair of her head, he comprehended the fear expressed by his wife, and knew what it would be to shoot her mother; that when, in his letter to Mr. Ames, he declared that Mr. Ames would know why he got away to avoid shooting him, he comprehended both the consequences of shooting Mr. Ames and the consequences of getting away, and that he intended to accomplish the latter and avoid the former; that his taking the can for oil that morning, his purchase of the cigar, and the payment of his fare, indicated knowledge, intention, capacity, and understanding; that even the deception practiced upon his

wife, if it was a deception, as has been claimed, is to be explained, either by a purpose to conceal his then existing intention, and avoid inquiry, or to spare himself the pain of a conscious final parting; that, under the influence of fear of discovery and disgrace, and acted upon by the insane delusion that his misconduct had been or would be disclosed, he determined to kill himself; that his appearance at Plainfield, and in the cars, indicates comprehension of the act he was then intending and of its consequences; that the manner in which the act was committed shows not impulse, but determination and deliberation; and, finally, that the evidence does not warrant the conclusion that any sudden outbreak or paroxysm of violence, overpowering reason, memory or will, made him unconscious of the act he was committing, made him incapable of exercising will or volition, or deprived him of capacity to understand the consequences which would result from the act itself. Now, whether all the facts embraced in these claims of the defendants, and others more fully presented by the counsel, are established by the evidence, and especially whether the inferences which they deduce therefrom are warranted or not, it is for you to decide; but whatever you conclude in that respect, you must bring all the facts, and your inferences, to the test which we have given for your guidance.

§ 1724. *One conscious of acts presumed to intend their consequences.*

Counsel had a right to request us to say that one who is conscious of the act which he commits, and has capacity to comprehend its nature and consequences, is presumed to intend the results which naturally and ordinarily follow from it; and counsel had a right to ask the court to explain the nature and to remark upon the force of the testimony of an expert expressing an opinion upon the case presented by other witnesses.

§ 1725. *Value and importance of "expert" testimony.*

In the departments of science and the arts, there are many facts, and many deductions inferable from facts, which are out of the sphere of the knowledge of men in general. They are not supposed to be understood by the court or by the jury. Men of study, experience and skill in the particular art or science to which a judicial investigation may relate, are permitted to aid, by giving the light which such study, experience and skill will throw upon the subject. Their opinions are stated as deductions which are proved, in such study and experience, to flow from the facts stated. The confidence placed in such opinions, in ordinary life, illustrates the reason and, to some extent, the ground upon which such opinions are permitted to be received and weighed by the jury. If we are ill, we may know how we feel or suffer, and how we have felt or suffered, and may know all that are called symptoms and all the physical indications; but we do not know the cause or nature of the illness. Our physician, being consulted, declares his opinion, and to a greater or less extent, according to the nature of the case and our confidence in him and the clearness and distinctness of his opinions, we rely upon it. This illustration shows, to some extent, the ground upon which such testimony is permitted and courts of justice receive the opinions of those whose study, experience and skill enable them to deduce inferences and express opinions of which courts and juries are incapable. The value, however, of the opinions of experts differs largely in degree in different cases. It is of first importance that the facts upon which they are founded be satisfactorily established. In the present case, it does not occur to us that there was any dispute as to the facts in relation to which the expert spoke. It is, next, of importance that the integrity and skill of the witness be known. I may add here that no question is made of the

competency of the witness who has testified here, or of the confidence due to his integrity. But this is not all. Where the expert states precise facts in science, as ascertained and settled, or states the necessary and invariable conclusion which results from the facts stated, his opinion is entitled to great weight. Where he gives only the probable inference from the facts stated, his opinion is of less importance, because it states only a probability. Where the opinion is speculative, theoretical, and states only the belief of the witness, while yet some other opinion is consistent with the facts stated, it is entitled to but little weight in the minds of the jury.

Testimony of experts of this latter description, and especially where the speculative and theoretical character of the testimony is illustrated by opinions of experts on both sides of the question, is justly the subject of remark, and has often been condemned by judges as of slight value. Like observations apply in a greater or less degree to the opinions of witnesses who are employed for a purpose and paid for their services, who are brought to testify as witnesses for their employers. This last observation has no pertinency to the present case, and is only made for the purpose of explaining the reason why testimony of this sort has been the subject sometimes of such comments as have been made in your hearing. This condemnation is not always applicable. Often it would be unjust. Where an expert of integrity and skill states conclusions which are the necessary, or even the usual, results of the facts upon which his opinion is based, the evidence should not be lightly esteemed or hastily discredited. But, after all, the question of fact in issue is not for the expert to decide. The question of fact in this case is neither for the expert nor for the court. It is for you to decide, upon your sound judgment, under the oaths which you have taken, to render a verdict according to the whole of the evidence submitted to you for consideration. I, therefore, repeat the test or rule of law by which you are to be guided in determining this case. If Sheridan Gay, at the time he fired the pistol, was conscious of the act he was committing, intended to take his own life, and was capable of understanding the nature and consequences of the act, the defendants are not liable; and, if the act was thus committed, it is immaterial whether he was capable of understanding its moral aspects, or of distinguishing between right and wrong. If, on the other hand, he was not thus conscious, or had no such capacity, but acted under an insane delusion, overpowering his understanding and will, or was impelled by an uncontrollable impulse which neither understanding nor will could resist, then the defendants are liable, and your verdict must be for the plaintiff.

If, under these instructions, you find for the plaintiff, your verdict will be for the sum of \$5,000, with interest from the time the sum insured was payable by the policy, which, for the purposes of the verdict, is conceded to be March 17, 1869. (Verdict for plaintiff.)

WOLFF v. CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

(Circuit Court for Michigan: 2 Flippin, 355-363. 1879.)

STATEMENT OF FACTS.—Action on a policy of life insurance. Defense that insured died by suicide. Verdict for plaintiff. Motion for new trial.

Evidence was admitted upon the trial tending to show that deceased had for months before his death been subject to hallucinations, and had been manifestly insane upon frequent occasions; that just before he died he sent home a

lady visitor much to the chagrin of his wife, who went with her to her home. When the wife returned she found that her husband in her absence had shot himself.

All this testimony was objected to as improper and was made ground for a motion for a new trial.

§ 1726. *Suicide may be a fact, with other facts, to show insanity.*

Opinion by BROWN, J.

In considering whether there was sufficient evidence of insanity to be submitted to the jury, it was insisted at the outset of the argument that the act of suicide in itself was no evidence of mental aberration, and, indeed, it was conceded that, standing alone, it would not be sufficient proof to justify a verdict for the plaintiff. I find no case which goes further than this. In *Terry v. Insurance Co.*, 1 Dill., 403, and *Coverston v. The Conn. Mutual Life Ins. Co.*, 3 Ins. L. J., 113, it is stated: "There is no presumption of law, *prima facie* or otherwise, that self-destruction arises from insanity." In *Moore v. The Conn. Mut. Life Ins. Co.*, 3 Ins. L. J., 444 (see § 1727, *infra*), Judge Longyear says: "The fact of suicide is not, in itself, evidence of insanity." In *McClure v. Mut. Life Ins. Co.*, 3 Ins. L. J., 221, it is said by the New York court of appeals, "Insanity cannot be presumed from the mere commission of this act." The question was fully and ably discussed and considered in *Coffee v. The Home Life Ins. Co.*, 35 N. Y. Superior Court, 314. The court upon the trial at *nisi prius* charged that "the law cannot and does not presume that a party, in the full possession of his mental faculties in that normal condition of mind that we call sanity, will deliberately take his own life, and therefore, as there is no presumption, it favors insanity at the time of the committing of the act of self-destruction. I therefore charge you as a matter of law, that, as affecting this case, you must presume that the deceased, when he took his life, was not in a sound state of mind." This was held to be error, and Chief Justice Barbour, in delivering the opinion, says: "The most that can be said is that, inasmuch as many, and perhaps most, persons who destroy their own lives are insane at the time, the fact of such self-destruction itself wholly removes the presumption of sanity." Sedgwick, J., in concurring, also announces that "a judge cannot determine whether an individual case of suicide is the result of insanity; that he cannot make a presumption upon the subject which is a generalization, more or less perfect from individual cases." The same judge remarked in a subsequent case in the same volume (*Weed v. The Mutual Benefit Life Ins. Co.*, 387), "The mere fact that a man kills himself does not create a presumption that he was insane. The general presumption is that every man is sane until the contrary facts are proved by the facts of the case. Suicide is but one fact which goes to the jury with all the other pertinent facts for the purpose of getting from them a verdict as to whether the facts prove insanity."

This is the limit of authority upon the subject. It follows, then, that neither an act of suicide, nor an attempt, nor a threat to commit suicide, standing alone, creates a presumption of insanity that would be sufficient to justify a jury in finding the party insane. None of the cases, however, go so far as to say that such an act cannot be considered, in connection with the previous demeanor and conduct of the party, as evidence of insanity. Indeed, to say that suicide under no circumstances is evidence of insanity is to contradict the experience of every person who has dealt with the insane. One of the most frequent forms of mental disease is known as the suicidal mania. Dean's Medical Juris-

prudence, 508. The author remarks in connection with this form of derangement: "Another feature it possesses in common with other forms of mental hallucination is the occasional exacerbations that are continuous; when its symptoms for a time disappear the clouds of melancholy seeming to vanish, and all appearances indicating a return to health and its enjoyments. Again the propensity will reappear, and generally, in the end, accomplish its purpose." I think no court could be found to hold that the repeated and causeless attempts to take one's life would not be proper to go the jury as evidence of insanity. If repeated attempts are evidence, it is difficult to say why a single attempt or an act of suicide may not also be permitted to go to the jury, as there must be a first time. From motives of public policy rather than upon strict philosophical principles, the law has pronounced, and I have no doubt properly, a single act insufficient evidence of mental disease; but in connection with other circumstances it has always been deemed worthy of consideration. In the leading case of *Borradaile v. Hunter*, 5 M. & G., 639, Erskine, judge, told the jury that they must take the act itself into consideration in connection with his previous conduct, and then say whether, at the time of its commission, they thought him capable of knowing right from wrong. So in *Brooks v. Barrett*, 7 Pick., 94; and in *Burrows v. Burrows*, 1 Hag. Eccl., 109, it is said the law does not consider the act of suicide as conclusive evidence of insanity; but in both these cases it was laid before the jury in connection with other circumstances. See, also, 1 Red. on Wills, 116; *Duffield v. Robson*, 2 Harrington, 375; *Chambers v. Queen's Proctor*, 2 Curt., 415. In all these cases it is inferentially, if not directly, decided that suicide is a legitimate item of testimony.

The rule of the criminal law is the same. From motives of public policy the law will not permit a person charged with larceny to say that the act itself proves him insane, while repeated and causeless acts of the same kind would be the strongest and only possible evidence of a species of mental disorder known as kleptomania. Dean's Med. Juris., 502. Instances are by no means rare of ladies whose birth and education would render them abhorrent of a criminal act, and whose circumstances would naturally remove them from temptation, being detected in frequent attempts to steal articles of trifling value, apparently from no motive except gratification of an abnormal passion. Such facts are undoubtedly proper to be laid before a jury as evidence of kleptomania. A like rule would quite frequently obtain in cases of arson, homicide, and possibly other crimes. In determining, then, whether the evidence of insanity in this case was sufficient to justify a verdict for the plaintiff, I think the fact of the suicide and the threats, made upon the day of the death of the deceased, were proper to be considered by the jury in connection with his previous conduct.

It is insisted, however, that the insane acts relied upon were simply eccentricities of demeanor, or, at most, temporary hallucinations, which lasted but a few minutes at a time and ceased entirely some months before his death, leaving him perfectly sane and able to take care of his business. It is quite true there is no presumption of continuous insanity, temporary in its character, but I apprehend in most if not all the cases that support that doctrine, that the delusions were connected with some bodily disease, such as fever, pleurisy or *delirium tremens*, and necessarily ceased with returning health, or that they occurred so long previous to the commission of the act in question there could be no possible presumption of their repetition. *People v. Francis*, 34 Cal.,

183; *Staples v. Harrington*, 58 Me., 459, 460; *Field v. Hall*, 2 Abb. (U. S.), 514; *Knickerbocker Life Ins. Co. v. Peters*, 42 Md., 414; *Carpenter v. Carpenter*, 8 Bush, 283; *Green. Ev.*, 689.

It does not appear in this case that Wolff was affected with any disorder likely to be accompanied by insane manifestations. The delusions to which he was subject extended over a period of several months, and recurred without regularity and apparently without cause. While nothing unusual was observed in his demeanor for some months before the day of his death, his manner upon that day was such as to attract his brother's attention, and his conduct towards a visitor at his house such as to excite his wife's anger and induce her to leave his house. In this class of cases courts are very loth to take the question of insanity from the jury, and in the recent case of *The Charter Oak Life Ins. Co. v. Redel*, 10 Chi. L. N., 105, the supreme court of the United States said, if there was evidence of insanity, the judge could not properly take the case from the jury. While I think there is nothing in this case indicating that the court intended to vary the rule announced in *Fant v. Pleasants*, 22 Wall., and that the court would still be justified in disregarding a scintilla of evidence and instructing a verdict for the defendant, I think very great caution should be exercised in withdrawing from their consideration questions of insanity upon which the opinions of men, equally wise, are likely to differ. While it is quite possible there may be a strong bias in this class of cases against insurance companies, this is an argument which should be addressed to the legislature rather than the courts. I think there was no error in submitting the question of insanity to the jury in this case.

MOORE v. CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

(Circuit Court for Michigan: 1 Flippin, 368-376. 1874.)

Charge by LONGYEAR, J.

STATEMENT OF FACTS.—This suit is brought by Lottie A. Moore, the wife of Everett W. Moore, to recover the amount of a policy issued by defendant to her on the life of her late husband for \$5,000. The contract itself is not disputed; but there is a clause in it that raises the whole question in this case, and that clause is as follows: "If the assured shall die by his own hand," etc., "this policy shall be void and of no effect."

That the assured took his own life, there is no dispute. The simple question is whether the circumstances under which he took his own life are such as to bring the case within that provision of the policy; that is, was it within the sense of the words "die by his own hand," as these words were used in the policy?

§ 1727. "*Die by his own hand*" equivalent to "*suicide*."

These words, "die by his own hand," mean the same as suicide, in general terms. That was decided in the case of *The Life Insurance Co. v. Terry*, 15 Wall., 591 (§§ 1717-19, *supra*); 2 Ins. Law Journal, 540, which has been laid before you here, and it has been seen all the way through in the argument of this case, and from the books which have been read, that the discussion of this very clause, and the words similar to it, proceed upon the same principles and upon the same general considerations as suicide; and consequently I call your attention in the first place to the definition of suicide as bearing upon the question here under consideration, and I will read that from 4 Blackstone, 189. Suicide was placed so long ago as the time when Blackstone wrote, and

still stands there by the English law, and also so far recognized and provided for or against in this country, as felonious homicide. It is placed in the same category as murder. I read from Blackstone as follows:

"Felonious homicide is an act of a very different nature from the former" (that is, of excusable homicide), "being the killing of a human creature of any age or sex without justification or excuse. This must be done either by killing one's self or another man."

"Self-murder — the pretended heroism, but real cowardice of the stoic philosophers, who destroyed themselves to avoid the ills which they had not the fortitude to endure — though the attempting it seems to be countenanced by the civil law, yet was punished by the Athenian law with the cutting off the hand which committed the desperate deed. And also the law of England wisely and religiously considers that no man hath a power to destroy life but by a commission from God, the author of it; and, as the suicide is guilty of a double offense, one spiritual, in evading the prerogative of the Almighty, and rushing into his immediate presence uncalled for; the other temporal, against the king, who hath an interest in the preservation of all his subjects; the law has, therefore, ranked this among the highest crimes, making it a peculiar species of felony — a felony committed on one's self; and this admits of accessories before the fact, as well as other felonies, for if one persuades another to kill himself, and he does so, the adviser is guilty of murder."

Now comes the definition of suicide, which I desire to call your particular attention to. "A *felo de se*, therefore, is he who deliberately puts an end to his own existence, or commits any unlawful, malicious act, the consequence of which is his own death, as if attempting to kill another he runs upon his antagonist's sword, or shooting at another the gun bursts and kills himself. The party must be of years of discretion and in his senses, else it is no crime."

§ 1728. *Sanity presumed; insanity must be proved. Suicide not of itself evidence of insanity.*

That this party was of years of discretion there is no dispute. The only dispute in this case is as to his being in his senses when he committed the act. In regard to this, sanity is presumed. All persons are presumed to be sane until the contrary is proven. Insanity must always be proven by the party claiming an exemption on account of it. The fact of suicide is not of itself evidence of insanity. That, however, is not disputed, and I need not stop to discuss it to any length whatever. This covers the first and second of defendant's requests to charge, which I will here read for the purpose of disposing of them.

The defendant requests the court to charge the jury: 1st. "It being admitted that the assured, Everett W. Moore, destroyed his own life, it is a presumption in fact that he 'died by his own hand,' and in the sense of the policy, and the burden of proof is upon the plaintiff to show that he came to his death under such circumstances as make the defendant liable upon the policy." This is correct, and I so charge you. 2d. "There is no presumption arising from the act of self-destruction that it was the result of insanity, and the burden of proof is upon the plaintiff to prove that at the time of the death of the said Everett W. Moore he was insane to such a degree that the defendant is liable upon the policy."

This is simply the proposition that I have already stated, with, however, perhaps a very little qualification. The charge as I give it to you is, that suicide is not of itself evidence of insanity, standing alone by itself; and the

burden is upon the plaintiff in this case to show that insanity existed, and that it was of such a nature and degree as to make the company liable. I will, therefore, next call your attention to the degree of insanity that will not or that will excuse or exempt the party from the provision in the policy.

§ 1729. *Insanity considered in its legal aspect.*

First, it is not every degree of insanity that will exempt the party taking his own life from the consequences of the act. A person may, from anger, jealousy, shame, pride, dread of exposure, fear of coming to poverty, or the desire to escape from the ills of life, be considered in a certain sense insane; but these alone are not enough to exempt him from the consequences of self-destruction, where he committed the act deliberately and intelligently.

In regard to this it is sufficient to explain that an error of judgment as to the commission of the act is not sufficient to exempt the party — a mere error of judgment, for we may say that all men, perhaps, who decide to take their own lives, when they do it deliberately and intelligently, commit an error of judgment. That is not sufficient to exempt them.

Mental disorder, amounting to insanity, must appear in order to exempt the party. But while these causes, which I have named, are not sufficient alone (such as anger, dread of exposure, a desire to escape from the ills of life, etc.) to exempt the party from the consequences of suicide, there undoubtedly may be circumstances under which these operating together with other circumstances upon the mind may produce a disorder of the mind. And that is for the jury to determine in every case. Where they have produced a disorder of the mind, then it is that which you are to consider, and not the mere peculiar causes which produced it. And in this connection I will notice the third, fourth and fifth of the defendant's requests, and the plaintiff's first request.

§ 1730. *Requests for instructions in regard to insanity and suicide.*

The plaintiff requests the court to charge the jury: "That if the death of the deceased was not his voluntary, intelligent act, he did not die by his own hand within the meaning of the policy." That is correct as a general principle, and I so charge you.

The defendant's third request is as follows: "If the assured, being in possession of his reasoning faculties, and from shame, pride, a dread of exposure, or a desire to escape from the ills of life, intentionally took his own life, there can be no recovery." This I have already explained to you.

The fourth request is: "If the assured was embarrassed in his business, or had drawn checks without having any funds upon which to draw, or had committed forgeries and exposure was imminent, or was in a distressed state of mind from this or some other cause, and for any or all of these reasons he formed a determination to take his own life, because, in the exercise of his usual reasoning faculties, he preferred death to life, then the company is not liable." This is undoubtedly correct, and I so charge you. If for these reasons he took his own life in the exercise of his usual reasoning faculties, then the company is not liable.

5th. "It is not every kind or degree of insanity that will so far excuse the act of self-destruction as to make the company liable." I have already covered this in my charge. I merely read these now for the purpose of disposing of them.

Thus far there is no great difficulty in applying the law to any given case, or to this case. You will next proceed to the question of the degree of insanity that will excuse. Here the difficulty in cases of this kind, begins, and

your real burdens in this case commence. The court can aid you but little in this respect, further than to lay down the general principles by which you are to be governed. These have been well defined by the highest court of adjudication in this country, by whose decision this court and the jury must be governed. They are well set forth in the requests of the respective counsel.

I will now read the sixth and seventh requests of defendant's counsel, which are as follows: 6th. "To have this effect — that is, that insanity shall have the effect to excuse the act — the mind must be so far deranged as to have made the deceased incapable of using a rational judgment in regard to the act of self-destruction." This is correct, and I so charge you.

7th. "To make the defendant liable, the plaintiff must prove either, first, that the assured was impelled by an insane impulse which the reason that was left him did not enable him to resist; or, secondly, that his reasoning powers were so far overthrown that he could not exercise them on the act which he was about to do." This request is correct law, and I so charge you.

The plaintiff's second request virtually covers the same ground, and I will simply read it for the purpose of showing that fact, and for the purpose of disposing of it: "If the deceased was impelled to the act by an insane impulse which the reason that was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties in the act he was about to do, the company is liable." This is correct, and I so charge you.

I will now dispose of plaintiff's third request, as to which there is some dispute between counsel. The request is as follows: "If the death was caused by the voluntary act of the deceased, he knowing and intending that his death would be the result of his act, and when his reasoning faculties were so far impaired that he was not able to understand the moral character, general nature, consequences and effects of the act he was about to commit; or, if he was impelled thereto by an insane impulse which he had not the power to resist, such death was not within the contemplation of the parties to the contract, and the insurer is liable."

The last part of the request is included in the second request, and it can be just as well stricken out, and I will leave it out for the purpose of perspicuity in considering this particular request. I will read it again, leaving out that last clause? "If the death was caused," etc., "when his reasoning faculties were so impaired that he was not able to understand the moral character, the general nature, consequence and effect of the act he was about to commit, the company is liable."

That is the request which the court has been asked to give. The criticism upon this request by defendant's counsel is, in the first place, that, although so declared by the supreme court of the United States in the case of *The Insurance Company v. Terry*, 2 Ins. Law Jour., 540 (see §§ 1717-19, *supra*), it was merely *dictum* — that it was not included in the points presented to the court for decision, and consequently is not binding upon this court, and that it is not good law. If that declaration of the supreme court was within the question presented, it is absolutely binding upon this court and upon you. We will, therefore, first consider that question.

I think the learned court of appeals of New York, which has made the same criticism on the decision of the supreme court (*Van Zandt v. Mutual Benefit Life Ins. Co.*, Ins. Law J., 1874, p. 208, and 55 N. Y., 169), and the learned counsel in this case, have overlooked one peculiar feature of the case

of *The Insurance Company v. Terry*, and that is the refusal of the court below to charge as requested. This precise question was presented in the request to charge which the court refused to give, and the charge which was given by the court below must be read in connection with and in the light of the requests which had been made and refused, and that request presenting this exact question of the moral character of the act, and of moral insanity, in my opinion was clearly and fully before the supreme court. For the purpose of sustaining that position, I will read the request which was refused, and in response to which the charge was given which was given.

The second request on the part of the defendant was: "That if the jury believe, from the evidence, that the said self-destruction of said George Terry was intended by him, he having sufficient capacity at the time to understand the nature of the act he was about to commit and the consequence which would result from it, then in that case it was wholly immaterial that he was impelled thereto by insane impulse which impaired his sense of moral responsibility and rendered him to a certain extent irresponsible for his action," thus presenting the exact question upon which the supreme court passed and which is embodied in the plaintiff's third request.

It is true the court below did not include in express terms in the charge given this moral responsibility or of moral insanity, but the terms used in the charge which was given are broad enough to include that; and in view of the fact that the court had been requested to charge otherwise, and then using expressions which are broad enough to include that, it is fair to presume that it was so included and that the jury so understood.

The language of the charge as given was as follows: "If he was impelled to the act by an insane impulse which the reason that was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties in the act he was about to do, the company is liable."

This charge must be read in the light of the request which had been refused, and which expressly included the question of moral insanity. I therefore hold that the question was disposed of finally by the supreme court in a manner absolutely binding upon this court. I therefore give the plaintiff's third request as stated.

§ 1731. *Meaning of the words "general nature, consequence and effect of the act," as referring to self-destruction.*

These words, "general nature, consequence and effect of the act," have been somewhat criticised, and I deem it my duty to make a few remarks in regard to them as they are used in that decision. They do not refer to the act, in my opinion, by which the deceased took his life. They are broader than that; they refer to the entire act — not only the act by which he took his life, but the result of it; that is, they cover the "suicide," the accomplished fact, and that is what is referred to as the "general nature, consequence and effect of the act" — that is, the general nature of the suicide, of the murder committed upon one's self, the enormity and effect of it, otherwise it would be inconsistent with what precedes; because, if it was his voluntary act, he knowing and intending that his death would be the result, then it would be a simple absurdity to put the question to you whether, under these circumstances, if he did not understand the general nature and consequences of the act, the company would be liable. That would be, I say, absurd. These words then have a broader meaning and cover the entire accomplished fact — the act of suicide.

In this view of the case, gentlemen of the jury, it is entirely unnecessary for me to detain you with any remarks or considerations growing out of my own views or opinions as to the correctness of the law as established by the supreme court, and which has just been given to you as contained in the plaintiff's third request. I will, therefore, pass it with a single remark that a considerable time ago, after that case of *The Insurance Company v. Terry* had been decided in the court below, but before it was decided by the supreme court, I had occasion to pass upon the same question in the case of *Wolff v. The Insurance Company*, and then decided as I now find myself enabled to decide, and my views have not changed upon that subject since that time.

Although I find it nowhere distinctly so stated, yet from the discussions upon the subject, I gather that these defenses, as they may be called, to the crime of suicide are placed upon the same ground, so far as this question of the moral character of the act is concerned, as defenses for murder. It has always been held that a person killing another, when so insane as not to be capable of judging between right and wrong, should not be convicted of murder. What I mean is, the principle is the same, although the standard or degree may be different. This is virtually so stated in *The Insurance Company v. Terry*, 15 Wall., 591 (§§ 1717-19, *supra*). This ability to judge between right and wrong refers to a principle of the human mind. It does not depend at all upon what a man's religious belief may be, or whether he has any or has not. It does not depend upon whether he believes in a God and a future state, or the contrary. It refers to that principle which is planted in every human breast — that sense of right and wrong which exists in the mind of the disciples of Buddha or of Confucius, or of the followers of Mahomet or of Christ, and in the mind of him who believes in none of them. It is that sense of right and wrong that we all feel and realize and understand. It is true that sense is stronger in some persons than in others, but it is that to which reference is had in this connection.

The defendant's eighth request I will now consider. Counsel for defendant: That is virtually passed upon by your honor; it is simply refused, as I understand it. The court: Very well, that is all that need be said on that subject. Defendant's eighth request was as follows: "That the evidence in this case does not tend to show that degree of insanity on the part of the assured which excuses the act of self-destruction, and justifies the jury in rendering a verdict for the plaintiff; therefore the verdict must be for the defendant."

Gentlemen of the jury, I have done about all that I can do in this case, and have made these questions as clear as they can be made with the ability I have; and if it is not clear in your minds what your duty is, it rests in the difficulty of making it so more than in the efforts which have been made by the counsel on both sides, and by the court. The propositions of law that have been stated to you are such as there is no dispute about between counsel, with the exception of the last, and that has been determined by the supreme court, and we must obey. This case, gentlemen of the jury, rests upon presumptions entirely; that is to say, it rests upon the conclusions which you are to draw as to the existence of a certain fact from the proof of the existence of other facts. For insanity and the degree of it are not susceptible of positive proof in a case like this. There are instances in which it may be proven with a great degree of certainty by positive proof, such as in the case of a raving maniac; but here it rests upon presumptions entirely, and your decision of the case depends upon the conclusions which you shall draw as to the fact

of sanity or insanity from the facts proven. You start out with the presumption of sanity. The burden of proof is upon the plaintiff to prove the contrary. If the plaintiff has sustained that burden, and has so proven to your satisfaction, then she may be entitled to recover at your hands. If she has not, then the defendant is entitled to your verdict.

The first question for you to determine is, Do the presumptions arising from the facts proven overcome the presumption of sanity? The truest test is whether the facts proven, from which you are asked to find insanity, are inconsistent with sanity. If they are so inconsistent with the exercise of sound mind that you cannot reasonably attribute such facts thereto, then they are evidence of insanity, but not otherwise.

Now there is a great range of indications as to soundness or unsoundness of mind, all the way from the ravings of the maniac, which are patent to the eye and the ear, down to the retiring melancholic, who seeks to conceal the worm which is gnawing at his mental vitality. These indications, I say, range all the way between these; and here is where the difficulty exists in coming to a correct conclusion as to what facts do indicate; but it is peculiarly and entirely and exclusively within your province, and I leave it to you without even rehearsing the facts or in any manner deciding them.

Evidence is that which carries conviction to the mind. You are to look at all the facts which have been proven, and to bring to bear upon them your best judgment aided by your experience and observations in life, and considerations to which you have access, without, however, going outside of the proofs in the case, and decide for yourselves whether, in the first place, Everett W. Moore, at the time he took his own life, was sane or insane. Secondly, if you shall find that he was insane, then whether, under the charge that has been already given, he was so insane as to excuse or exempt him and this plaintiff from the consequences of the prohibition or disability in the policy. I recommend to you in your consideration to adopt that order: First, the question of insanity in general terms — was he insane? If you decide that he was not insane, then, of course, that is the end of it, and your verdict must be for the defendant. If you shall decide that he was insane, you must go then a step further, and inquire whether his insanity was of that degree and kind that you are satisfied that he was driven by an irresistible impulse to commit the act, or that he was incapable of exercising his reasoning powers as to the moral character, general effect and consequences of taking his own life. If, after finding that he was insane, you shall come to the conclusion that he was thus insane, the plaintiff is entitled to recover at your hands; otherwise not. If your verdict shall be for the plaintiff it will be for \$5,000, and interest from the 30th day of December, 1873, to and including the present date. (Verdict for plaintiff.)

INSURANCE COMPANY v. NEWTON.

(22 Wallace, 82-88. 1874.)

ERROR to U. S. Circuit Court, Eastern District of Missouri.

STATEMENT OF FACTS.—Mrs. Newton, widow of J. H. Newton, sued the insurance company on two policies of insurance on her husband's life, conditioned to be void if the assured should die by his own hand. He died in California, and the usual proofs were offered by plaintiff's agent, but payment was refused on the ground that deceased had come to his death by suicide.

There was a judgment for the plaintiff. Further facts appear in the opinion of the court.

§ 1732. *Admission offered in evidence to be taken in its entirety.*

Opinion by MR. JUSTICE FIELD.

The court below allowed the statement of the company and its agent to the witness as to the sufficiency of the proofs of death of the insured to be received as conclusive of that fact, but by its charge to the jury in effect separated the admission of that fact from its accompanying language, that the proofs disclosed a case of suicide, and held that this latter statement was of an independent fact to be established by the company. In this particular we think the court erred. Every admission is to be taken as an entirety of the fact which makes for the one side, with the qualifications which limit, modify or destroy its effect on the other side. This is a settled principle which has passed by its universality into an axiom of the law. Here the admission related to the two particulars which the proofs established, the death of the insured and the manner of his death, both of which facts appear by the same documents. They showed the death of the insured only as they showed that he had committed suicide, and all that the officers of the company evidently intended by their declaration was that they were satisfied with the proofs of the one fact because they established the other. The whole admission should, therefore, have been taken together. If it was sufficient to establish the death of the insured, it was also sufficient to show that the death was occasioned in such a manner as to relieve the company from responsibility.

§ 1733. *Preliminary proofs may be given in evidence by the underwriter.*

But the court also erred in excluding from the jury the proofs presented of the death of the insured when offered by the company. When the plaintiff was permitted to show what the agent and officers of the company admitted the proofs established, it was competent for the company to produce the proofs thus referred to and use them as better evidence of what they did establish.

But independently of this position the proofs presented were admissible as representations on the part of the party for whose benefit the policies were taken, as to the death and the manner of the death of the insured. They were presented to the company in compliance with the condition of the policy requiring notice and proof of the death of the insured as preliminary to the payment of the insurance money. They were intended for the action of the company, and upon their truth the company had a right to rely. Unless corrected for mistake, the insured was bound by them. Good faith and fair dealing required that she should be held to representations deliberately made until it was shown that they were made under a misapprehension of the facts, or in ignorance of material matters subsequently ascertained.

§ 1734. *Mistake in preliminary proofs must be corrected before trial.*

There are many cases which hold that where a mistake has occurred in the preliminary proofs presented, and no corrected statement is furnished the insurers before trial, the insured will not be allowed on the trial to show that the facts were different from those stated. The case of *Campbell v. Charter Oak Ins. Co.*, decided by the supreme court of Massachusetts (10 Allen, 213), and the case of *Irving v. The Excelsior Ins. Co.*, decided by the supreme court of the city of New York (1 Bosw., 50), are both to this effect. It is not necessary, however, to maintain any doctrine as strict as this in the present case; and possibly the rule there laid down is properly applicable only where the

insurers have been prejudiced in their defense by relying upon the statements contained in the proofs. Be that as it may, all that we now hold is that the preliminary proofs are admissible as *prima facie* evidence of the facts stated therein against the insured and on behalf of the company. No case has come under our observation, other than the present, where the preliminary proofs presented by the insured have been entirely excluded as evidence when offered by the insurers, the question being in all the cases whether these proofs estopped the insured from impeaching the correctness of their statements, or from qualifying them, or whether they were subject to be explained and varied or contradicted on the trial.

The case of *Cluff v. The Mutual Benefit Insurance Company*, in the supreme court of Massachusetts (99 Mass., 317), cited by the plaintiff, is far from sustaining his position. There the beneficiary had submitted in connection with the preliminary proof certain slips cut from newspapers showing reports that the insured had died in known violation of law. On the trial upon the issue whether the plaintiff had, ninety days previous to the commencement of the suit, furnished the company sufficient proof of the death of the insured, the plaintiff put in evidence certain affidavits by which that proof had been made, but did not offer the slips; the latter were then offered by the company and were excluded, and the supreme court, in reviewing the case, held that the exclusion was not a valid ground of exception unless it plainly appeared that the insurers were prejudiced thereby, and that they were not so prejudiced because the fact of death was otherwise sufficiently shown. "When an apparent ground of defense," said the court, "is disclosed by a separate and unnecessary narration of circumstances, and the proofs required by the policy are complete without that narration and disclosure, it cannot be said that the party has failed to comply with the conditions imposed upon his right to litigate his claim; and the effect of such disclosure to defeat the action must depend upon the decree to which the plaintiff is bound by the statement. If not sworn to by the plaintiff, nor treated by him in such manner that he is concluded by his conduct, the whole question will be open to explanation and proof upon the main issue subject to the usual rules of evidence."

§ 1735. *Preliminary proofs presented to the insurer by the agent of the beneficiary bind her.*

In the present case the proofs presented were sworn to; they consisted, as already stated, of affidavits and the record of the finding of a jury under oath. Here the narration of the manner of the death of the deceased was so interwoven with the statement of his death that the two things were inseparable. The fact that the proofs were presented by the father of the plaintiff and not by the plaintiff herself cannot change their character. They were the only proofs presented, and without them there was no attempted compliance with the condition of the policies. He was the agent of the plaintiff with respect to the policies, intrusted by her with the presentation of the preliminary proofs. Presented in her name and by her agent in the matter, and constituting the essential preliminary to her action, they must stand as her acts, and the representations made therein must be taken as true until at least some mistake is shown to have occurred in them. As already said, no suggestion is made that these proofs do not truly state the manner of the death of the insured. It is sought, however, to avoid their effect in favor of the company by taking a part of the statement of its officers as to what the proofs showed,

and rejecting the residue, and then excluding the proofs themselves. This position cannot be sustained without manifest injustice to the company.

The judgment must, therefore, be reversed, and a new trial ordered.

BIGELOW v. BERKSHIRE LIFE INSURANCE COMPANY.

(3 Otto, 284-288. 1876.)

ERROR to U. S. Circuit Court, Northern District of Illinois.

STATEMENT OF FACTS.—This was a suit on two policies on the life of H. W. Bigelow. The plea was that deceased came to his death by his own hand, the policies excepting defendant's liability in case of death by suicide, "sane or insane." The replication was that when he killed himself deceased was "of unsound mind and wholly unconscious of the act." This replication was demurred to and the demurrer sustained.

§ 1736. *Death by suicide, "sane or insane," includes death by any intended act of self-killing.*

Opinion by MR. JUSTICE DAVIS.

There has been a great diversity of judicial opinion as to whether self-destruction by a man, in a fit of insanity, is within the condition of a life policy, where the words of exemption are that the insured "shall commit suicide," or "shall die by his own hand." But since the decision in *Life Ins. Co. v. Terry*, 15 Wall., 580 (§§ 1717-19, *supra*), the question is no longer an open one in this court. In that case the words avoiding the policy were, "shall die by his own hand," and we held that they referred to an act of criminal self-destruction and did not apply to an insane person who took his own life. But the insurers in this case have gone further and sought to avoid altogether this class of risks. If they have succeeded in doing so, it is our duty to give effect to the contract, as neither the policy of the law nor sound morals forbid them to make it. If they are at liberty to stipulate against hazardous occupations, unhealthy climates, or death by the hands of the law, or in consequence of injuries received when intoxicated, surely it is competent for them to stipulate against intentional self-destruction, whether it be the voluntary act of an accountable moral agent or not. It is not perceived why they cannot limit their liability, if the assured is in proper language told of the extent of the limitation, and it is not against public policy. The words of this stipulation, "shall die by suicide (sane or insane)," must receive a reasonable construction. If they be taken in a strictly literal sense, their meaning might admit of discussion; but it is obvious that they were not so used. "Shall die by his own hand, sane or insane," is, doubtless, a more accurate mode of expression; but it does not more clearly declare the intention of the parties. Besides, the authorities uniformly treat the terms "suicide" and "dying by one's own hand," in policies of life insurance, as synonymous, and the popular understanding accords with this interpretation. Chief Justice Tindall, in *Borradaile v. Hunter*, 5 Mann. & Gr., 668, says, "The expression, 'dying by his own hand,' is, in fact, no more than the translation into *English* of the word of *Latin* origin, 'suicide.'" Life insurance companies indiscriminately use either phrase, as conveying the same idea. If the words, "shall commit suicide," standing alone in a policy, import self-murder, so do the words, "shall die by his own hand." Either mode of expression, when accompanied by qualifying words, must receive the same construction. This being so, there is no difficulty in

defining the sense in which the language of this condition should be received. Felonious suicide was not alone in the contemplation of the parties. If it had been, there was no necessity of adding anything to the general words, which had been construed by many courts of high authority as not denoting self-destruction by an insane man. Such a man could not commit felony; but, conscious of the physical nature, although not of the criminality of the act, he could take his own life with a settled purpose to do so. As the line between sanity and insanity is often shadowy and difficult to define, this company thought proper to take the subject from the domain of controversy, and by express stipulation preclude all liability by reason of the death of the insured by his own act, whether he was at the time a responsible moral agent or not. Nothing can be clearer than that the words, "sane or insane," were introduced for the purpose of excepting from the operation of the policy any intended self-destruction, whether the insured was of sound mind or in a state of insanity. These words have a precise, definite, well-understood meaning. No one could be misled by them; nor could an expansion of this language more clearly express the intention of the parties. In the popular, as well as the legal sense, suicide means, as we have seen, the death of a party by his own voluntary act; and this condition, based as it is on the construction of this language, informed the holder of the policy that if he purposely destroyed his own life, the company would be relieved from liability. It is unnecessary to discuss the various phases of insanity, in order to determine whether a state of circumstances might not possibly arise which would defeat the condition. It will be time to decide that question when such a case is presented. For the purposes of this suit it is enough to say that the policy was rendered void, if the insured was conscious of the physical nature of his act, and intended by it to cause his death, although at the time he was incapable of judging between right and wrong, and of understanding the moral consequences of what he was doing.

Insurance companies have only recently inserted in the provisos to their policies words of limitation corresponding to those used in this case. There has been, therefore, but little occasion for courts to pass upon them. But the direct question presented here was before the supreme court of Wisconsin in 1874, in *Pierce v. Travellers' Life Ins. Co.*, 34 Wis., 389, and received the same solution we have given it. More words were there used than are contained in this proviso; but the effect is the same as if they had been omitted. To say that the company will not be liable if the insured shall die by "suicide, felonious or otherwise," is the same as declaring its non-liability if he shall die by "suicide, sane or insane." They are equivalent phrases. Neither the reasoning nor the opinion of that court is at all affected by the introduction of words which are not common to both policies.

§ 1737. *Ignorance of moral aspect of suicide immaterial.*

It remains to be seen whether the court below erred in sustaining the demurrer. The replication concedes, in effect, all that is alleged in the plea; but avers that the insured at the time "was of unsound mind, and wholly unconscious of the act." These words are identical with those in the replication to the plea in *Breasted v. Farmers' Loan & Trust Co.*, 4 Ill., 73; and Judge Nelson treated them as an averment that the assured was insane when he destroyed his life. They can be construed in no other way. If the insured had perished by the accidental discharge of the pistol, the replication would have traversed the plea. Instead of this, it confesses that he intentionally took his own life;

and it attempts to avoid the bar by setting up a state of insanity. The phrase "wholly unconscious of the act," refers to the real nature and character of the act as a crime, and not to the mere act itself. Bigelow knew that he was taking his own life, and showed sufficient intelligence to employ a loaded pistol to accomplish his purpose; but he was unconscious of the great crime he was committing. His darkened mind did not enable him to see or appreciate the moral character of his act, but still left him capacity enough to understand its physical nature and consequences.

In the view we take of the case, enough has been said to show that the court did not err in holding that the replication was bad.

Judgment affirmed.

INSURANCE COMPANY v. SEAVER.

(19 Wallace, 531-544. 1873.)

ERROR to U. S. Circuit Court, District of Vermont.

STATEMENT OF FACTS.—Action upon a policy of insurance upon the life of Seaver by his widow. The policy was expressed to be on the condition that the insurance should not extend to death or injury caused by dueling or fighting, or other breach of law by the assured, or by his wilfully exposing himself to unnecessary danger. While personally racing horses, in violation of the laws of the state, the assured was killed by a collision, but there was evidence tending to show that the collision was produced by the act of one Gilmore, his competitor in the race, turning in to pass the assured's horse, which was half a length behind. The plaintiff contended that the death of the assured had not been *caused* by any breach of law, but only by the act of Gilmore, especially upon a finding of the jury that when the collision occurred Seaver jumped clear from his sulky to the ground, and was killed while trying to get hold of his horse's lines to stop him.

Opinion by MR. JUSTICE MILLER.

The statutes of Vermont make all horse-racing for any bet or wager a misdemeanor, and impose a fine not exceeding \$500 for the offense.

In regard to this branch of the defense the court instructed the jury that they were to regard the trotting race in which the insured was engaged when he jumped from his sulky and was killed, as a breach of the law within the meaning of the clause of the policy on that subject. As the plaintiff below took no exception to this ruling and had a verdict, no error can be assigned on it here, and we need not further examine the argument of her counsel, which controverts that proposition.

The court further instructed the jury on this branch of the subject as follows:

"That if the jury should find that Seaver was killed by the race itself, by an ordinary accident of the race, so that the race was the proximate cause of the death, the plaintiff could not recover; but if the jury should find that Gilmore turned his horse in intentionally and tortiously with the purpose of winning the race at all hazards, whether he should crowd Seaver from the track or not, then that the conduct of Gilmore and not the race would be the proximate cause of the death, and the plaintiff would be entitled to recover.

"That the plaintiff's evidence showed that Gilmore turning in as he did, was in violation of the rules of the race; that a man was usually to be taken as intending the natural and necessary consequences of his own acts. And that

if the jury were of the opinion that Gilmore drove, as he did, tortiously, and with the intention of winning the race in any event, even though in so doing he should crowd Seaver from the track and upset him, and that such driving caused the death of Seaver, then the jury should find for the plaintiff."

In regard to this the plaintiff in error contends that no evidence was given tending to show that Gilmore intentionally and tortiously turned his horse with the purpose of winning the race at all hazards, whether he should crowd Seaver from the track or not. All that the bill of exceptions discloses on this point is that Seaver, having the inside track, his mare broke and fell back a little; "that Gilmore thereupon reined in towards the inside of the track, apparently to get the inside track, his team being then about half its length ahead of Seaver's mare; that Seaver's mare at that moment regained her speed, and, gaining on the other horse, the sulkies came into collision."

§ 1788. *Causa proxima.*

We think this a very slender foundation to put to the jury the question of Gilmore's tortious intention to drive Seaver from the track at all hazards, and to rest upon that possible secret intention the proposition that the race was not the proximate cause of the death, but that Gilmore's act was. It was well calculated to mislead, and no doubt did mislead, the jury. If the legal proposition was sound, the state of the testimony, as given in the bill of exceptions, on which it was founded, could hardly justify it. It would have been much nearer sound principle to have said to the jury that if Seaver saw that Gilmore was ahead of him ever so little, his persistence in so running his horse as to bring about a collision was wilfully exposing himself to danger within the meaning of the policy.

But we are of opinion that if the testimony raised the point the instruction was erroneous. The company, in protecting themselves against accident or death caused by a violation of law, acted upon a wise and prudent estimate of the dangers to the person generally connected with such violations. And in the class of cases under consideration we have no question that the sum of money often at stake stimulates to further acts of carelessness in the way of violence, fraud, and a disregard of the rules of fair racing, which increase largely the danger always attendant on that sport. The class of men who collect on such occasions, and who often become the leading parties in the conduct of the affair when large sums of money are wagered, have led to its denunciation by many wise and thoughtful people, and very surely adds to the risk of personal injury to the rider or driver. It was against this general species of danger, attending nearly all infractions of the law, that the company sought to protect itself by the clauses of the policy in question, and of this class was the reckless driving of Gilmore. If his intentions were as bad as the instructions imply, they did not take the case out of the protection of the clause.

If Seaver had died the moment he was thrown from the sulky, his death would have been caused by a violation of the law, though Gilmore may have disregarded the rules of the course, and may have intentionally sought to run Seaver off the track.

The jury, in response to a request to find specially on certain points, did, in addition to a general verdict in favor of the plaintiff, make the following special finding: "And the jury further find, that when the sulky of Seaver came into collision with the sulky of Gilmore, Seaver jumped to the ground and was entirely clear from the sulky, harness, and reins, upright and uninjured, and

spoke to his horse to stop, and then started forward to get hold of the lines to stop him, and in that attempt was killed."

It is said that this verdict is conclusive that the death of the deceased was not caused by the violation of the law in trotting for a wager, but by his own voluntary act when he was not trotting; and both parties appeal to the case of *Insurance Company v. Tweed*, 7 Wall., 44 (§§ 1302-3, *supra*), where it is said that when a new force or cause of the injury intervenes between the original cause and the accident, the former is the proximate cause.

But we do not think this new force or cause is sufficiently made out by this verdict. The leap from the sulky and securing the reins, and the subsequent fall and injury to Seaver, are so close and immediate in their relation to his racing, and all so manifestly part of one continuous transaction, that we cannot, as this finding presents it, say there was a new and controlling influence to which the disaster should be attributed. If he had been landed safely from his sulky, and, after being assured of his position, had, with full knowledge of what he was doing, gone to catch the animal, his death in that pursuit when the race was lost, might have been too remote to bring the case within the exception.

But as the finding presents it, we cannot say the accident was not caused by the race, which was itself a violation of the law, and which might still have gone on had he caught his mare in time.

And we are to consider that both this special finding and the general verdict were probably influenced by the erroneous instruction we have already considered, and by that we are now about to mention.

§ 1739. "*Wilful exposure to unnecessary danger*" not to be construed by the opinion of people.

The jury were told that if the death of the insured was caused by the wilful exposure of himself to an unnecessary danger or peril within the meaning of the other clause in the policy relied on by the defendants, the plaintiff would not be entitled to recover. The court added:

"Upon this part of the case, it was to be considered, however, that the language of this clause must be taken most strongly against the defendant, because used in their policy, and for the purpose of inducing parties to take policies.

"It was also further to be considered how ordinary people in the part of the country where the insured resided, in view of the state of things then existing, the frequency of such races, and the way in which such matches are usually regulated, would naturally understand such language, whether as precluding such driving or not.

"The jury should also consider the nature of the business of the insured, as set forth in the application, and, therefore, known to the defendant, that of a livery-stable keeper, which of course embraced the management and driving of horses.

"That the question was not what construction would be given to the language at Hartford, where the defendant's company is located, but, in view of all the circumstances and conditions above alluded to, whether intelligent, fair-minded people in the vicinity of the insured where the contract was made, would regard it as excluding the driving of such a race, and, if not, that the case would not come within the proviso of that clause in the policy, and the plaintiff would, so far as that is concerned, be entitled to recover."

We are of opinion that the language of this policy is to be construed by the court, so far as it involved matters of law, and by the jury aided by the court when it involved law and fact, and that in neither view of it was the opinion of ordinary people, in view of the state of things where the deceased resided, or their understanding of its language in view of the circumstances of the case, any sound criterion by which the judgment of the jury should be formed, and the instruction in this branch of the case was unwarranted and misleading.

The jury should have been left to decide for themselves, under all the facts before them attending the death of the insured, whether it was caused by his wilful exposure to an unnecessary danger or peril. Such light as the court as a matter of law could give them, on the subject of the wilfulness of his conduct, or the presence or absence of any necessity or the character of the necessity which would justify him, might be proper, but this general reference to what ordinary people in a particular locality might think about it was clearly not so.

For the errors here considered, the judgment is reversed, with direction to grant a new trial.

§ 1740. "Satisfactory evidence"—Insanity.—The mere fact that the proofs of loss disclose a fact, such as insanity, for which the underwriter could claim exemption from liability, will not make them inadmissible as "satisfactory evidence of the death of the said" assured, "and of the just claim of the assured." The words "just claim of the assured" refer to the claim or title to the policy, and not to the cause of action thereon. *Insurance Co. v. Rodel*,* 95 U. S., 232.

§ 1741. Evidence of the alleged insanity of the assured considered and held sufficient to go to the jury. *Ibid*.

§ 1742. A charge concerning insanity as an exemption from the consequences of death by suicide, given in the terms laid down in *Life Ins. Co. v. Terry*, 15 Wall., 580, held right. *Ibid*.

§ 1743. Suicide.—A policy was conditioned to be void if the assured committed suicide, which he did commit, but, as it was alleged, while he was insane. The judge refused to instruct the jury that there could be no recovery on the policy if the assured knew that the act which he committed would result in death, and deliberately did it for that purpose. *Held*, rightly refused. Another request made and refused, to wit, to instruct the jury that a certain letter, written under great excitement by the assured to his wife on the day of his death, apprising her of his intention to destroy himself, and his reasons for so doing, based upon pecuniary troubles and anticipated exposure, bore evidence of coolness and deliberation, and of itself afforded presumptive evidence of sanity at the time it was written. *Held*, rightly refused. *Ibid*.

§ 1744. A policy was to become void if the assured should "die by his own hand." The judge instructed the jury that the assured did not die by his own hand unless he killed himself with knowledge of the moral character of the act and its consequences, nor if he was impelled to the act by an insane impulse which he had not the power to resist. "In law a man is insane when he is not capable of understanding: (1) That a design is unlawful, or that an act is morally wrong; or (2) understanding this, when he is unable to control his conduct in the light of such knowledge." *Nixon, D. J. Waters v. Connecticut Ins. Co.*,* 2 Fed. R., 892.

§ 1745. Where a policy is to be void if the assured dies by his own hand, the provision includes all kinds of voluntary self-destruction; and if the assured commits the act with a knowledge of its nature and consequences, the policy is void, although he may not have appreciated the moral nature of the act. *Nimick v. Insurance Co.*,* 10 Am. L. Reg. (N. S.), 101. See 8 Pittsb. R., 293.

§ 1746. On the trial of such an issue, the burden is on the defendant to prove that the assured died by his own hand, and this being established, it then devolves upon the plaintiff to prove that the assured was insane, as the presumption is that every man is sane. *Ibid*.

§ 1747. To say that an underwriter shall not be liable if the assured comes to his death by his own act, sane or insane, is the same as to say that the underwriter will not be liable if the assured comes to his death by his own act and intention, sane or insane; and such a provision is valid. If the assured come to his death by his own act while insane, in such a case the degree of his insanity cannot be considered. *Chapman v. Republic Ins. Co.*,* 6 Biss., 238.

§ 1748. Death by own hand, voluntarily "or otherwise."—A provision in a policy that it shall become void if the insured die by his own hand or act, voluntarily "or otherwise," is held too vague and uncertain to be enforced. *Jacobs v. National Life Ins. Co.*, *1 MacArth., 632.

V. ASSIGNMENT OF POLICY.

* SUMMARY—*To secure advances*, § 1749..

§ 1749. Nine-tenths of the interest in a policy of life insurance having been assigned to a party who had advanced fees and assessments due the underwriter, held, that the assignment was invalid except to the extent of securing the outlays. *Warnock v. Davis*, §§ 1750-52.

[NOTES.—See §§ 1753, 1754.]

WARNOCK v. DAVIS.

(14 Otto, 775-788. 1881.)

ERROR to U. S. Circuit Court, Southern District of Ohio.

STATEMENT OF FACTS.—Warnock was the administrator of Crosser, who, in February, 1872, insured his life, and, in order to obtain the money to pay the fees and assessments, entered into a contract with the Scioto Trust Association, of Portsmouth, Ohio, by which that body advanced the money, and took for it an assignment of nine-tenths of the policy. Crosser died in September, 1873, and the association collected the insurance money (\$5,000), paid one-tenth of it to the widow of Crosser, and kept the remainder. This suit was brought to recover the proceeds of the policy as belonging to Crosser's estate, on the ground that the assignment was void.

Opinion by MR. JUSTICE FIELD.

As seen from the statement of the case, the evidence before the court was not conflicting, and it was only necessary to meet the general allegations of the first defense. All the facts established by it are admitted in the other defenses. The court could not have ruled in favor of the defendants without holding that the agreement between the deceased and the Scioto Trust Association was valid, and that the assignment transferred to it the right to nine-tenths of the money collected on the policy. For alleged error in these particulars, the plaintiff asks a reversal of the judgment.

§ 1750. *Life policy cannot be assigned to one having no insurable interest.*

The policy executed on the life of the deceased was a valid contract, and as such was assignable by the assured to the association as security for any sums lent to him, or advanced for the premiums and assessments upon it. But it was not assignable to the association for any other purpose. The association had no insurable interest in the life of the deceased, and could not have taken out a policy in its own name. Such a policy would constitute what is termed a wager policy, or a mere speculative contract upon the life of the assured, with a direct interest in its early termination.

It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest, arising from the relations of the party obtaining the insurance, either as creditor or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation; for a parent has an insurable interest in the life of his child, and a child in the life of his parent, a husband

in the life of his wife, and a wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful — as operating more efficaciously — to protect the life of the insured than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are, therefore, independently of any statute on the subject, condemned, as being against public policy.

The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name. Nor is its character changed because it is for a portion merely of the insurance money. To the extent in which the assignee stipulates for the proceeds of the policy beyond the sums advanced by him, he stands in the position of one holding a wager policy. The law might be readily evaded, if the policy, or an interest in it, could, in consideration of paying the premiums and assessments upon it, and the promise to pay upon the death of the assured a portion of its proceeds to his representatives, be transferred so as to entitle the assignee to retain the whole insurance money.

The question here presented has arisen, under somewhat different circumstances, in several of the state courts; and there is a conflict in their decisions. In *Franklin Life Ins. Co. v. Hazzard*, which arose in Indiana, the policy of insurance, which was for \$3,000, contained the usual provision that if the premiums were not paid at the times specified the policy would be forfeited. The second premium was not paid, and the assured, declaring that he had concluded not to keep up the policy, sold it for \$20 to one having no insurable interest, who took an assignment of it with the consent of the secretary of the insurance company. The assignee subsequently settled with the company for the unpaid premium. In a suit upon the policy, the supreme court of the state held that the assignment was void, stating that all the objections against the issuing of a policy to one upon the life of another, in whose life he has no insurable interest, exist against holding such a policy by mere purchase and assignment. "In either case," said the court, "the holder of such policy is interested in the death rather than the life of the party assured. The law ought to be, and we think it clearly is, opposed to such speculations in human life." 41 Ind., 116. The court referred with approval to a decision of the same purport by the supreme court of Massachusetts, in *Stevens v. Warren*, 101 Mass., 564. There the question presented was whether the assignment of a policy by the assured in his life-time, without the assent of the insurance company, conveyed any right in law or equity to the proceeds when due. The court was unanimously of opinion that it did not; holding that it was contrary not only to the terms of the contract, but contrary to the general policy of the law respecting insurance, in that it might lead to gambling or speculative contracts upon the chances of human life. The court also referred to provisions sometimes inserted in a policy expressing that it is for the benefit of another, or is payable to another than the representatives of the assured, and, after remarking that the contract in such a case might be sustained, said "that the same would probably be held in the case of an assignment with the assent of the assurers. But if the assignee has no interest

in the life of the subject which would sustain a policy to himself, the assignment would take effect only as a designation, by mutual agreement of the parties, of the person who should be entitled to receive the proceeds when due, instead of the personal representatives of the deceased. And if it should appear that the arrangement was a cover for a speculating risk, contravening the general policy of the law, it would not be sustained."

§ 1751. *The assignment good to the extent of the interest.*

Although the agreement between the Trust Association and the assured was invalid as far as it provided for an absolute transfer of nine-tenths of the proceeds of the policy upon the conditions named, it was not of that fraudulent kind with respect to which the courts regard the parties as alike culpable and refuse to interfere with the results of their action. No fraud or deception upon any one was designed by the agreement, nor did its execution involve any moral turpitude. It is one which must be treated as creating no legal right to the proceeds of the policy beyond the sums advanced upon its security; and the courts will, therefore, hold the recipient of the moneys beyond those sums to account to the representatives of the deceased. It was lawful for the association to advance to the assured the sums payable to the insurance company on the policy as they became due. It was, also, lawful for the assured to assign the policy as security for their payment. The assignment was only invalid as a transfer of the proceeds of the policy beyond what was required to refund those sums, with interest. To hold it valid for the whole proceeds would be to sanction speculative risks on human life, and encourage the evils for which wager policies are condemned.

§ 1752. *Decisions of New York courts denied.*

The decisions of the New York court of appeals are, we are aware, opposed to this view. They hold that a valid policy of insurance effected by a person upon his own life is assignable like an ordinary chose in action, and that the assignee is entitled, upon the death of the assured, to the full sum payable, without regard to the consideration given by him for the assignment, or to his possession of any insurable interest in the life of the assured. *St. John v. American Mutual Life Ins. Co.*, 13 N. Y., 31; *Valton v. National Loan Fund Life Assurance Co.*, 20 id., 32. In the opinion in the first case the court cite *Ashley v. Ashley*, 3 Simons, 149, in support of its conclusions; and it must be admitted that they are sustained by many other adjudications. But if there be any sound reason for holding a policy invalid when taken out by a party who has no interest in the life of the assured, it is difficult to see why that reason is not as cogent and operative against a party taking an assignment of a policy upon the life of a person in which he has no interest. The same ground which invalidates the one should invalidate the other — so far, at least, as to restrict the right of the assignee to the sums actually advanced by him. In the conflict of decisions on this subject we are free to follow those which seem more fully in accord with the general policy of the law against speculative contracts upon human life.

In this conclusion we are supported by the decision in *Cammack v. Lewis*, 15 Wall., 643 (§§ 1542-43, *supra*). There a policy of life insurance for \$3,000, procured by a debtor at the suggestion of a creditor to whom he owed \$70, was assigned to the latter to secure the debt, upon his promise to pay the premiums, and, in case of the death of the assured, one-third of the proceeds to his widow. On the death of the assured, the assignee collected the money from the insurance company and paid to the widow \$950 as her proportion

after deducting certain payments made. The widow, as administratrix of the deceased's estate, subsequently sued for the balance of the money collected, and recovered judgment. The case being brought to this court, it was held that the transaction, so far as the creditor was concerned, for the excess beyond the debt owing to him, was a wagering policy, and that the creditor, in equity and good conscience, should hold it only as security for what the debtor owed him when it was assigned, and for such advances as he might have afterwards made on account of it; and that the assignment was valid only to that extent. This decision is in harmony with the views expressed in this opinion.

The judgment of the court below will, therefore, be reversed, and the cause remanded with direction to enter a judgment for the plaintiff for the amount collected from the insurance company, with interest, after deducting the sum already paid to the widow, and the several sums advanced by the defendants; and it is so ordered.

§ 1753. An assignment by a married woman of a policy of insurance on the life of her husband for her benefit, payable to her or her assigns, such assignment being made to keep the policy alive by providing means for the payment of the premiums as they came due, is valid under the laws of New York. *Robinson v. Mutual Benefit Ins. Co.*,* 16 Blatch., 194.

§ 1754. Where a policy on the life of her husband was assigned by a married woman, and after the death of the assured the money was collected by the assignee, and with full knowledge the widow received a portion of the money from the assignee, she is estopped from denying against the company the authority of the assignee to receive the money. *Ibid.*

VI. PROOFS OF LOSS.

§ 1755. Evidence of death.—Letters of administration.—In an action on a policy of life insurance, letters of administration upon the estate of the insured are not admissible as evidence of death. *Mut. Ben. L. Ins. Co. v. Tisdale*, 1 Otto, 238; 13 Alb. L. J., 82.

§ 1756. Acceptance of proofs.—Proofs of loss were furnished on blanks supplied by the defendant and filled up in the presence of its agent. He received them, and no objection to them was made before the trial, when the defense was made that they were insufficient. The judge instructed the jury that the defendant was not liable on the policy. *Held*, erroneous. There was evidence to go to the jury of the sufficiency of the proofs of loss. *Life Ins. Co. v. Francisco*,* 17 Wall., 672.

§ 1757. Affidavits of third parties, submitted by the plaintiff to the company, as preliminary proof of death, may be received in evidence to show that due proofs of death were made, where there has been no waiver, but are not competent evidence on the issues joined at the trial as controverted facts. *Newton v. Mutual Benefit Ins. Co.*, 2 Dill., 154.

VII. ADJUSTMENT OF LOSS.

SUMMARY—*Equitable value of policy lapsed during war*, § 1758.—*Debtor and creditor*, § 1759.—*Notes and dividends*, § 1760.

§ 1758. Mode of determining the equitable value of a policy which had lapsed by reason of non-payment of premium on account of the rebellion; the matter having been left to the jury, and their verdict sustained. (See *Insurance Co. v. Davis*,* 95 U. S., 425.) *Davis v. New York Ins. Co.*, §§ 1761-62.

§ 1759. A policy of insurance was issued on the life of McK. in favor of P., his creditor, in the sum of \$3,000. Upon the death of McK. the creditor received from the underwriter \$2,056.57 "in full for all claims under the policy," and surrendered the same to the underwriter. *Held*, that this was a discharge of the underwriter from all liability on the policy. *McKenty v. Universal Ins. Co.*, §§ 1763-65.

§ 1760. A policy of insurance was issued to a married woman, on the life of her husband, which thereby became her sole and separate property. It was payable to her upon a fixed day,

one-half of the premiums being payable and paid in notes, upon representations that the notes would be paid by dividends to be "allowed for each year on which the assured has received no dividend." Notes for four years' premiums were held by the underwriter, during which time the assured had received no dividends, and the dividends declared were sufficient to cancel the notes. After that time four smaller dividends were declared, not sufficient to pay the notes. *Held*, first, that the property in the policy being the wife's absolutely, she was entitled to the whole sum insured without deduction of any part of the notes; and secondly, that apart from that consideration, the underwriter was bound to treat the four notes as paid by the four dividends declared contemporaneously, and could not merely apply the smaller dividends declared in subsequent years. *Brooks v. Phoenix Ins. Co.*, §§ 1766-68.

DAVIS v. NEW YORK LIFE INSURANCE COMPANY.

(Circuit Court for Virginia: 8 Hughes, 497-448. 1879.)

STATEMENT OF FACTS.—Suit to recover the equitable value of a policy of life insurance issued by a company of New York upon the life of S. Davis, domiciled during the rebellion beyond the Union lines. The policy was issued December 28, 1857, and lapsed December 28, 1861. The action was brought upon authority of *New York Life Ins. Co. v. Statham*, 93 U. S., 36. The only question was of the amount for which the defendant was liable.

Opinion by HUGHES, J

The defendant objects to the verdict in this case on the ground that the jury got at the amount of the equitable value of the policy by a wrong process and upon incorrect data, and that they erred in not deducting from the equitable value as found, the amount of the premium notes given by the plaintiff to the company.

§ 1761. *Circumstances under which holders of lapsed life insurance policies are entitled to their equitable value.*

The supreme court of the United States have decided in *New York Life Ins. Co. v. Statham*, 3 Otto, 24 (§§ 1577-81, *supra*), that in cases in which, during the late civil war, southern holders of northern policies of life insurance were prevented by the war from paying their annual premiums, those policies lapsed; but that the holders could claim, after the war and the death of the persons named in the policies, the *equitable value* of the policies at the time of first default in the payment of premiums.

In doing so the supreme court meant no more, I think, than to establish a principle of law. Nothing in their decision warrants the conclusion that they undertook more than to settle the legal question. I do not think that it was in the mind of the court, in thus declaring the law, to set out also the data upon which to determine, in every case, what the *equitable value* which they contemplated really was. The court uses many expressions, apparently designed to illustrate and explain what they mean by "equitable value," but they nowhere detail, with any attempt at completeness, either the data from which or the process by which this value is to be ascertained. They seem to refer these latter subjects to the actuary and the mathematician, and to leave the jury or the chancellor in each particular case to find as a fact what the equitable value of a policy is, from the best testimony at command.

I have no doubt the court used the phrase in its actuarial sense, but I do not see that they said anything intended to deprive the jury or the chancellor of the prerogative of estimating the amount of the equitable value of a policy, upon the strength of such evidence as in each case might be adduced before them.

§ 1762. *Verdict of the jury sustained.*

We had a very intelligent investigation of this subject at the trial in this case. The jury was an unusually good one, the trial fair and full, and the argument on either side able and exhaustive. The jury had the advantage of the testimony of very well-informed and competent witnesses, one or two of them learned experts. The question, what was the equitable value of this policy, in December, 1861, when default occurred in the payment of the premium; and the further question, whether the amount of the premium notes which were given by the plaintiff in part payment of four annual premiums ought to be set off against such equitable value, were elaborately considered, and were both deliberately dealt with by the jury, on full proofs, after full argument.

Now, if I thought that the supreme court intended in its leading decision on this question to do more than declare that the plaintiff in such a case as this was entitled to the equitable value of his policy, and went on besides to define accurately the data and process for ascertaining its amount, I would feel authorized to examine critically the verdict rendered by the jury, and the data and process which they employed. But I consider that the supreme court intended only to declare the law, and left the jury to find the fact. The latter having been done in this case by the jury, I do not feel authorized to do more than consider whether or not the jury has so grossly erred as to the fact, and so clearly disregarded the law, as to have presented a case for a new trial within the discretion of the court, as governed by the ordinary rules observed by courts in considering motions for new trial.

Counsel for defendant have exhibited correctly, no doubt, the process by which the jury got at the \$1,615.47 which they found as their verdict. I have already said that I think it belonged to the jury to determine not only what amount they should find, but the process by which to ascertain the amount. I could not, therefore, interfere with the verdict unless it were grossly excessive. If this case had been before me as a chancellor, I am inclined to think I should have found a smaller amount; but the mere fact that a judge differs with a jury as to a fact does not make a case for a new trial.

Defendants complain that the verdict of the jury is for \$20 more than it would have been if they had adopted the empirical plan of adding together all the cash premiums which plaintiff had paid up to December, 1861, and given a verdict for the aggregate, with interest from the close of the war. They complain specially, of this result, that it imposes upon the insurance company the risk, without compensation, of the insurance which stood against them for four years. This is one view to take of the subject, though it must be remarked that as there was in fact no death during that period there was in reality no risk. A compensating view of the matter is, that the plaintiff, at the date when his policy was terminated by law (December, 1861), had the right of insuring until the death should occur, at a very reduced premium, and also at the death (which did occur in a very few years) to the amount insured for, of \$10,000. This right he lost by operation of law, and the value which he so lost the company gained by the lapse of the policy; and therefore, in the light of actual events now known, the verdict of the jury cannot be regarded as practically injurious to the company. To the mind unskilled in the learning of the actuary and the mathematician, the verdict is apt to appear more liberal to the company than to the plaintiff; and inasmuch as it so nearly corresponds with the result of the science of so learned and expert an actuary as Professor Smith, who testified as a witness at the trial, I

think the verdict commends itself as reasonably correct to practical minds. I see, therefore, no material objection to the verdict on the score of excessiveness.

The other objection of the defendants is, that the amount of the notes given for forty per cent. of the annual premiums (four in all) was not treated by the jury as a valid offset against the equitable value found as already shown. These notes were given by the plaintiff at the solicitation of the company's local agent, and on the assurance that the scrip dividends, which it was a part of the scheme of this company to declare and pay to its insurers, would be equal to and would pay off and extinguish these forty per cent. premium notes. The jury considered that these confident representations of the company's agent were sufficient to raise the presumption that the scrip dividends did in fact equal the amount of the notes, and to throw the burden of proving the contrary upon the company. The whole matter was very fully gone into by counsel in their argument at the trial; the jury dealt with the case on this basis after full argument as judges of the fact; and, having virtually found as a fact that the scrip dividends did offset the notes, I am indisposed to nullify their verdict on that account. The motion for a new trial is for these reasons denied.

McKENTY v. UNIVERSAL LIFE INSURANCE COMPANY.

(Circuit Court for Minnesota: 3 Dillon, 448-453. 1875.)

STATEMENT OF FACTS.—This was a suit on a life policy. One Parker was creditor of McKenty, husband of plaintiff, on whose life said policy was issued. When McKenty died, Parker received from the defendant and signed a receipt in full for the amount of his claim, then made an assignment of all his right, title, etc., in said policy (which he had surrendered to defendant) to plaintiff, who brings suit on it. The verdict was for defendant, and the cause is here on motion for a new trial.

Opinion by NELSON, J.

This case is not to be governed by the common law rule defining what constitutes a good accord and satisfaction.

§ 1763. *Release distinguished from accord and satisfaction.*

Parker, the creditor and assured, did not urge a claim for or demand the full amount named in the policy, but agreed, on a sufficient consideration paid him, to exonerate the company from all further liability; received it, and gave his receipt in full, and surrendered the policy. This, in my opinion, had the effect of an absolute release, as much so as it would have been if a formal instrument had been drawn up and signed and sealed.

The old common law rule of accord and satisfaction was always considered technical, and unsupported by reason. Dewey, J., in *Brooks et al. v. White*, 2 Met., 283, says: "The foundation of the rule seems to be that, in the case of an acceptance of a less sum of money in discharge of a debt, inasmuch as there is no consideration, no benefit accruing to the creditor, and no damage to the debtor, the creditor may violate with legal impunity his promise to his debtor, however freely and understandingly made." This is a rule founded on very poor morals to say the least, and it has been doubted whether it would apply to anything but a bond.

In Coke's *Littleton*, 212 b, it is said that, "where the condition is for payment of twenty pounds, the obligor cannot . . . pay a lesser sum in satis-

faction of the whole, because it is apparent that a lesser sum cannot be a satisfaction of a greater. But if the obligee do . . . receive part, and therefore make an acquittance, *under seal*, in full satisfaction of the whole, it is sufficient, by reason the *deed* amounted to an acquittance of the whole." Thus we see that the common law rule was intended to secure only a settled and deliberate agreement to discharge the debt. When this appeared and was established, the acquittance of the whole is admitted.

● § 1764. *Surrender of policy prima facie a release.*

A formal instrument under seal is not the only evidence, in my opinion, to establish a release. The surrender of the policy in this case by Parker was, to say the least, *prima facie* evidence of an intention to release all claims under it, and when this fact is conceded, and a receipt in full of all demands is written upon the face of it, and signed by him, I think in law the company is absolutely discharged.

§ 1765. *Construction of language of policy for the court, when.*

The other point presented, to wit, that the construction of the contract, so far as the intention of the parties thereto [is concerned], should have been left to the jury, is not tenable. The policy was the only evidence in the case to indicate what was the intention of the parties. There is no evidence outside to show that the assured was a trustee, and that when his debt was paid he must account for the balance of the amount specified in the policy. The question presented was, "what is the legal construction of the contract?" This the court decided and so charged the jury. Upon the conceded facts in the case, in the view taken by the court, there was no issue of fact for the jury to decide which would authorize a verdict for the plaintiffs. See Hare & Wallace's Notes to Smith's Leading Cases, p. 439, 2d volume.

Motion denied.

BROOKS v. PHOENIX MUTUAL LIFE INSURANCE COMPANY.

(Circuit Court for Vermont: 16 Blatchford, 182-188. 1879.)

Opinion by WHEELER, J.

STATEMENT OF FACTS.—This is an action of *assumpsit*, upon an endowment policy of assurance upon the life of Samuel T. Brooks, and has been tried by the court upon written waiver of a jury. The rights of the parties are to be determined upon the legal effect of the contracts in respect to this assurance, entered into by them. The principal contract was procured by Samuel T. Brooks, for the benefit of the other plaintiff, his wife. He was shown a circular of the defendant company, in which it was set forth that one-half of the first four premiums would be payable in notes, after which dividends would be applied directly to the payment of premiums, and that: "In the settlement of all mutual policies, a dividend will be allowed for each year on which the assured has received no dividend." The annual premium was fixed at \$221. He paid \$110.50 in cash, and executed his note for the same amount, payable in one year, with interest annually at six per cent. in advance, which specified what it was for and provided that the "policy and all payments and profits which may become due thereon are hereby pledged and hypothecated to said company for the payment of this note," and delivered it to the company. The policy was thereupon issued, dated April 6, 1866. The operative part of it, material to the present inquiry, ran thus: "This policy of assurance witnesseth, that the Phoenix Mutual Life Insurance Company, in consideration of the rep-

representations made to them in the application for this policy, and of the sum of \$221 to them in hand paid by Lucy C. M. Brooks, and of the annual premium of \$221, to be paid on or before the 6th day of April in every year during the continuance of this policy, do assure the life of Samuel T. Brooks, of St. Johnsbury, in the county of Caledonia, state of Vermont, for the sole and separate use and benefit of the said Lucy C. M. Brooks, in the amount of \$2,000, payable to the said Lucy C. M. Brooks, or her executors, administrators or assigns, on the 6th day of April, 1878; and, in case the said assured shall not pay the said annual premiums on or before the several days hereinbefore mentioned for the payment thereof, then and in every such case the said company shall not be liable to the payment of the sum assured or any part thereof; and this policy shall cease and determine." Before making the second annual payment, a doubt arose in the mind of Mr. Brooks as to whether these notes would be deductible from the policy in case he should live till it should become due, and he wrote to the general agent of the company, inquiring how that would be, and received an answer stating that, "in the settlement of all mutual policies, we allow dividends and they cancel the notes." Relying upon this statement, as well as upon what he had before read in the circular, he proceeded to make payments upon the policy in the remaining three of the first four years, giving notes, like the first, for one-half of the premiums, and paying the other half, with interest on the notes, in money. The dividends declared by the company in those four years were fifty *per cent.* of the amount of the premiums, and just equal to the amount of the notes. He received none of those dividends. After those years the premiums were settled in such manner that there is now no question about them. At the settlement of the last a receipt was given, dated April 6, 1877, in which it was stated that "said contract, with all its conditions, is hereby continued in force until the 6th day of April, 1878, and no longer. But in case any note or notes given as part of cash premiums on said policy shall not be paid on or before maturity thereof, said policy shall at once become void, without further notice." In the year 1878 the company declared a dividend of twenty *per cent.* on the amount of premiums paid on policies of this class; they estimated that the three succeeding dividends would be of the same amount, and computed the amount due on the policy, by deducting the amount of the four notes, after applying four dividends of that amount upon them, and offered the amounts to the plaintiffs, which they refused, claiming the full \$2,000, and brought this suit to recover that amount in the state court. After removal of the cause from that court, the plaintiffs received the amount which the defendants admitted to be due, with interest and costs to that time. The plaintiffs sue in the right of the wife, and claim that the notes given under the representations made in respect to their being given should be considered as satisfied by the dividends declared in the years in which they were given, or by other dividends sufficient to cancel them, and that they are not collectible of any one; and that if they are not so satisfied, and are still collectible of Mr. Brooks, they cannot reduce the amount which the wife is entitled to by the terms of the policy itself. The defendant claims that the premiums have not been paid but by the notes, and that they are made a charge upon the policy and the amount due thereon, by their express terms, by which the wife is bound.

The policy sets forth the undertaking of the company only. That was to pay the sum of \$2,000 at the time specified, if the premiums should be paid. The right to dividends grew out of becoming a member of the company, and

was not set forth in any written contract. There was no agreement to pay the premiums. The policy could not be continued in force, except for its value under the law, as being non-forfeitable, without paying them, but, whether they should be paid and it should be continued in full force, or payment should be omitted and it left to fall back to its existing value, was optional with Mr. and Mrs. Brooks, wholly. The statement in the prospectus and letter of the agent were representations as to how the condition for keeping the policy on foot could be performed. They did not affect, nor profess to affect, the agreement of the company to pay if the condition should be performed. They bound the company to accept certain things as performance. The condition was performed as was represented would be accepted, what was done was accepted, and the acceptance was evidenced by the receipt of April 6, 1877, by the terms of which the policy was continued in force until April 6, 1878, when it fully matured, and the sum specified became due to the wife.

§ 1766. *Premium notes by husband unpaid not to be deducted from amount of policy to wife, as separate property.*

There is nothing in the case which can, by any construction, or is claimed to, diminish the right of the wife to the \$2,000 promised to be paid, except the giving the four notes by the husband, and his agreement contained in them, that the policy and all payments or profits which might become due thereon were thereby pledged and hypothecated to the company for the payment of the notes. By the charter of the defendant, which is a law of the state of Connecticut under which the defendant exists (sec. 6), it was provided that such a policy as this, for the benefit of a married woman, should inure to her separate use and benefit, independently of her husband. And, by the law of the state of Vermont, where both the husband and wife reside, and where the contract was entered into by the agent of the defendant, and has its *situs*, the same provisions are made with respect to like policies. Gen. Stat. Vt., 472, sec. 23. By either law, therefore, as well as by the terms of the policy itself, the sum due on the policy belongs to the wife and not to the husband, and she could not be divested of her right to it except by some act that would bind her. She has never done anything herself that would qualify her right to it. It is not shown, unless it arises from the circumstances, that her husband was ever authorized to create any charge upon it for her. If any implication of agency would arise, he did not act nor assume to act under it. He executed the notes in his own name, without professing to act for any one else. Whatever right he had to the policy would be affected by his act, but he does not appear to have had any. He bound himself by his promise to pay contained in the notes, but not the property of his wife in the policy. So, without looking into the obligation on his part now to pay the notes, she is entitled to recover.

§ 1767. *Dividends of particular years to be applied on notes for the same years.*

But, if the right to recover the balance due on the policy depended upon the obligation to pay the notes, the result might not be any different. They were executed and delivered to stand against dividends, in making up the several annual premiums. This was mutually understood between him and the company. They were all executed in view of the statement on the prospectus before quoted, that a dividend would be allowed for each year on which the insured had received no dividend. The insured received no dividend for the years on which the notes were given. On each of these years a dividend of

fifty per cent. was declared. The dividends declared are the ones he is entitled to. The company is bound to allow those dividends against the notes, to make good that representation. If it should do less it would not keep its faith. These dividends exactly equal the notes in amount, and exactly pay them. The last three of the notes were executed and delivered in reliance upon the letter of the agent, stating that in the settlement of all mutual policies, they allowed dividends and they canceled the notes. That letter was written while dividends of fifty *per cent.* each on the premiums paid were being declared, and such dividends must have been those which he referred to.

It is argued, with plausibility, that as many dividends have been allowed as premiums have been paid, and as many as there were years in which premiums were paid, and which were as large as the profits would allow, and that thereby the representations were made good, although the dividends were not so large as the parties all expected. And it is, doubtless, true that by becoming a member of such a mutual company a party would only be entitled to such dividends as the profits would warrant, although much less than expected and than it was held out they would be, if the right ones should be allowed. But here the company has allowed to this policy four dividends, each equal to that of the last year, and much smaller than the others. And there was nothing in the transaction to indicate that no dividends were to be allowed for four years, and then four were to be allowed for one year. If the dividends had been all alike, as they had generally been before, there would be no difference in proceeding in that mode, but when there came to be a difference, the party had the right to have the proper ones reckoned.

The plaintiffs have relied upon other representations in the prospectus, to the effect that such insurance would be a good investment, as such, of the money paid, sure to return the full amount with a good rate of interest. But such statements were merely commendatory expressions of opinion, to be relied upon at peril.

§ 1768. *Removal of cause.*

There is some doubt whether this cause was removable into this court at all. The test is the matter in dispute, which in this class of cases must exceed \$500. In this case, especially after the tender was made and received, it was considerably less than that. The tender was made before the removal, but it is said, and, for aught that appears, correctly, not to have been received until after, and then, it appears, under a stipulation that the removability of the case should not be affected by it. Probably the stipulation would not help the jurisdiction, but there has been no motion made to remand the case, and as the want of jurisdiction is not clear, the cause is retained, although, when it appears, of course distinctly, it seems to be made, by the act of March 3, 1875 (18 U. S. Stat. at Large, 470), to determine the jurisdiction of the circuit courts of the United States, etc., the duty of the court to remand the case, of its own motion. But, in section 968 of the Revised Statutes of the United States, it is provided, that in cases originally brought in a circuit court, in which the jurisdiction depends upon the amount in dispute, if the plaintiff recovers less than \$500, exclusive of costs, he shall not be allowed, but at the discretion of the court may be adjudged to pay, costs. In the act mentioned it is provided (section 6), that in all suits removed under its provisions, the circuit court shall proceed the same as if they had been originally commenced there, and the same proceedings had been had there, as had been had in the state court. This appears to include proceedings in respect to costs as well as

the other proceedings in a cause. This cause was removed under that act, and comes within the provisions of it and those of the section of the Revised Statutes cited. Under both, the plaintiffs are not entitled to recover costs, but no reason is seen for adjudging them to pay costs. The costs in the state court were paid as a part of the sum tendered expressly for that purpose, and the part so tendered must rest as so applied, and cannot be taken out of the amount of the demand. The object of the statutes is to restrain bringing suits into the federal courts where the amount *in dispute*, not the amount *claimed*, is less than \$500. In this case the amount really in dispute was always clearly less than that sum.

There must be a judgment for the plaintiffs for the balance due, \$294.58, without costs.

VIII. EVIDENCE.

[See *supra*, III, IV.]

§ 1769. *Health*.—Evidence of the fact that a physician had pronounced the assured unfit for assurance before the policy was issued is not admissible to show his physical condition after the policy was issued, upon an issue as to his health after assurance. *Insurance Co. v. Mahone*,* 21 Wall., 152.

§ 1770. *Age*.—A statement in the proofs of loss of the age of one whose life was insured may be shown against the underwriter to have been erroneous, though no notice was given before the trial that evidence of the kind would be offered. *Connecticut Ins. Co. v. Schwenk*,* 94 U. S., 599.

§ 1771. Record of the age of the assured in a minute-book of a lodge of Odd Fellows, not made or authorized by the assured, is not admissible evidence of his age in an action upon a policy on his life. *Ibid*.

IX. SUBROGATION.

§ 1772. *M.*, whose life was insured, was killed by *B.* The company paid the insurance and sued *B.* for damages. *Held*, that the action would not lie at common law, and as the statute of the state authorized an action against the wrong-doer by certain relatives of the deceased, the action could not be sustained under the statute. *Insurance Co. v. Brame*, 5 Otto, 754.

§ 1773. An action is not maintainable by an insurance company for the amount of a policy on the life of a person, which the former was obliged to pay owing to his death by defendant's act. *Ibid*.

E. ACCIDENT INSURANCE.

SUMMARY.—*Death by external, violent and accidental means*, § 1774.—*Proximate cause*, §§ 1775-1777.—*Traveling by public or private conveyance*, §§ 1778-1780.—*Exposure to unnecessary danger*, §§ 1781, 1782.—“*Medical or mechanical treatment of disease*,” § 1783.—*Immediate notice of loss*, § 1784.

§ 1774. The defendant issued a policy to *A.*, insuring him in the event of death by bodily injury effected through means external, violent or accidental, the same being the proximate and sole cause of death. *A.* burst a blood vessel while exercising with Indian clubs, and died. The judge instructed the jury that if the deceased voluntarily took into his hands the clubs for exercise, and used them for such exercise in the way precisely he intended, and without anything occurring to interfere with his intended and usual movements in such exercise, that is, if he voluntarily used them in the ordinary way, without the occurrence of any unusual circumstance, interrupting or interfering with such use, or causing any unforeseen, accidental or involuntary movement of the body, and in such use the rupture occurred, the injury was not accidental. *Contra*, if while engaged in such exercise there occurred any unforeseen, accidental or involuntary movement of the body, which, with the exercise, brought about the injury; or if there occurred any unforeseen or unexpected circumstance which interfered with the usual course of such exercise, and there was thereby produced an involuntary movement, strain or wrenching, whereby the injury was sustained. *McCarthy v. Travelers' Ins. Co.*, §§ 1785-86.

§ 1775. The judge instructed the jury upon the question of proximate cause, in relation to a defense that the death was caused by disease, thus: If the deceased sustained injury by rupture of a blood vessel in the lungs, and that necessarily produced inflammation, and that necessarily produced a disordered condition of the injured organ, followed in consequence by abscesses in the lungs, whereby they could no longer perform their functions, death ensuing in consequence, the injury was the proximate and sole cause of such death. *Contra*, if an independent disease supervened, not necessarily produced by the injury, or if the injury merely brought into activity a then existing though slumbering disease, and the death was caused wholly or in part by such disease. *Ibid*.

§ 1776. Evidence tending to show the state of health of the assured through life, before the injury, is proper in such a case. *Ibid*.

§ 1777. The defendant having alleged that the death was caused by disease has the burden of proving the allegation. *Ibid*.

§ 1778. A person does not cease to be "traveling in a public conveyance," within the meaning of an accident insurance policy, by stepping off a passenger train for a short time at a station, in the course of a journey by such train. But when such person arrives at his destination by the train and has left the same, he has ceased to be so traveling; and if he afterwards attempt to get on the train, he does so at his peril. *Tooley v. Railway Pass. Assur. Co.*, §§ 1789-90.

§ 1779. If a person, having a right to leave a train at a station, is notified in any way that the train is going to start, and an opportunity given to him to take his place again upon the train, and chooses to remain until the train is put in motion, and then is injured in getting on the train, he has neglected "to use due diligence for self-protection." *Contra*, if, having alighted at a station, he has no notice that the train is about starting, or has no opportunity, after notice is given, to get on the train, and is injured in attempting to resume his place in the cars, when the train is in motion. *Ibid*.

§ 1780. One who, after leaving a steamboat, in the course of a journey, proceeds to walk to his place of destination, a distance of eight miles from the boat, is not then traveling by "public or private conveyance," within the meaning of an accident insurance policy. (Affirming *S. C.*, 2 *Bigelow's Life & Ac. Ins. Rep.*, 788.) *Ripley v. Insurance Co.*, § 1791.

§ 1781. Passing from one car to another of a railway passenger train going at full speed, in the night-time, is, in the absence of evidence, an "exposure to unnecessary danger," within the meaning of an accident insurance policy. *Sawtelle v. Railway Pass. Assur. Co.*, § 1792.

§ 1782. It seems that such act is not a "standing, riding, or being upon the platform of moving railway coaches," or an "entering or attempting to enter, leaving or attempting to leave, a public conveyance using steam as a motive power, while the same is in motion." *Ibid*.

§ 1783. Death from an inadvertent overdose of opium prescribed by a physician is death from "medical or mechanical treatment of disease." Nor does such a case disclose a case of bodily injury effected through "external, violent, and accidental means." *Bayless v. Travelers' Ins. Co.*, §§ 1793-94.

§ 1784. A policy of insurance against accident required immediate notice of loss, in writing, with full particulars. The assured, when he became aware that his injury was hernia, and not upon the happening of the accident, applied to the underwriter's physician for examination, who, upon request by the assured, notified the local agent in writing of the time, nature and extent of the injury. The assured, at the request of such agent, also forwarded to a branch office of the underwriter the proofs required by the policy. *It seems* that the requirement of the policy was complied with. In connection with such facts the assured offered in evidence a letter from the agent of the underwriter, proposing a compromise, but declaring that the underwriter did not admit that the assured had shown that the rupture was caused by the accident mentioned in his proofs. *Held*, that the letter was admissible for the purpose of establishing a waiver of the requirements of notice, and that the letter showed such waiver. *Unthank v. Travelers' Ins. Co.*, §§ 1795-96.

[*NOTES*.—See §§ 1797, 1798.]

MCCARTHY v. TRAVELERS' INSURANCE COMPANY.

(Circuit Court for Wisconsin: 8 Bissell, 362-368. 1878.)

STATEMENT OF FACTS.—Action on accident insurance policy. The deceased ruptured a blood vessel while exercising with Indian clubs, and the defense was that his health could not have been good at the time or such result would not have followed. There was evidence tending to show that he had pulmonary consumption after the injury.

§ 1785. *Injuries must be external, violent and accidental.*

Charge by DYER, J.

The policy of insurance in this case is of the form and character known as an accident policy. To entitle the plaintiff to recover it must be shown by the evidence that the deceased sustained a bodily injury, which was effected through means which were *external, violent and accidental*, and that such injury was the proximate and sole cause of the death, as I shall hereafter more fully explain to you. If a bodily injury was sustained, and it happened directly or indirectly in consequence of disease, or if the death was caused wholly or in part by bodily infirmities or disease, existing either prior or subsequent to the date of the policy of insurance, then the plaintiff is not entitled to recover. . . .

A question of considerable nicety has been presented, arising in connection with the evidence under the clause in the policy which describes the means through which the injury must be effected in order to create a liability. It is a question concerning which my mind has not been free from doubt; but in view of the language of this policy, which requires that the *means* through which the injury is effected must be accidental, I instruct you that if the deceased voluntarily took in his hands the clubs for exercise, and used them for such exercise in the way and precisely as he intended to do, and without anything occurring to interfere with his intended and usual movements in such exercise; that is, if he voluntarily use them in the ordinary way for taking such exercise, without the occurrence of any unusual circumstance interrupting or interfering with such use, or causing any unforeseen, accidental or involuntary movement of the body, and in such use of the clubs there occurred the rupture of a blood vessel and consequent injury as claimed, I do not think it could then be said that the means through which the injury was effected were accidental. But if while engaged in such exercise there occurred any unforeseen, accidental or involuntary movement of the body of the deceased, which, in connection with the use of the clubs, brought about the injury; or, if there occurred any unforeseen or any unexpected circumstance which interfered with or obstructed the usual course of such exercise, and there was thereby produced an involuntary movement, strain or wrenching, by means of which the injury was occasioned, that would be an accident without the spirit of this policy; that is, the means by which the injury was effected would in such case be accidental. . . .

If you find that an injury was sustained, and through the operation of such means, you will then proceed to inquire whether the injury happened directly or indirectly in consequence of disease then existing in the lungs of the deceased.

This brings us to the affirmative matter set up as a defense to the action. And first, I call your attention to this clause in the policy, namely, that the insurance shall not extend to any injury happening directly or indirectly in consequence of disease. Here is presented to you the question whether, at the time the alleged injury was sustained, the lungs of the deceased, or either of them, were or was diseased. You will inquire upon this point, in the light of all the evidence, whether the injury, if one was sustained, happened either directly or indirectly in consequence of disease in the lungs of the deceased; and if you so find, that would necessarily require a disposition of the case by you adverse to the plaintiff. But if you do not so find, then you will proceed to inquire whether the *death* was caused wholly or in part by disease existing prior

or subsequent to the date of the policy of insurance. And this is another important question arising upon this branch of the case.

§ 1786. *Proximate and sole cause of death.*

The clauses of the policy bearing upon this question are, that the insurance shall not extend to any death which may have been caused wholly or in part by bodily infirmities or disease existing prior or subsequent to the date of the policy, nor to any case except where the injury is the *proximate* and *sole* cause of the death.

This policy of insurance is a contract made between the insurance company and the assured. As such, we must construe and enforce it according to its letter and spirit. It is to be interpreted as the parties made it and as we find it. We have no right to import into it that which it does not contain. We must interpret it fairly and properly, giving to each party equally the benefit of its provisions.

So interpreting and enforcing it, it must be held that if any other cause than the alleged injury, in whole or in part, produced the death of the deceased, there can be no recovery. In other words, to entitle the plaintiff to recover, you must be satisfied that the injury, in the language of the contract, was the *proximate* and only cause of the death. By proximate cause is meant that cause which directly precedes and produces the effect, as distinguished from the remote cause.

The question is, what was it that caused death? Did the injury, as the proximate and sole cause, produce it, or did other causes supervene and produce death?

I have stated to you, generally, the definition of proximate cause. And it must be remembered that whether a cause is proximate or remote does not depend alone upon the closeness in the order of time in which certain things occur. *Cunningham v. Lyness*, 22 Wis., 245. In other words, the application of the principle relating to proximate cause is not necessarily "controlled by time or distance, nor by the succession of events. An efficient, adequate cause being found must be deemed the true cause unless some other cause not incidental to it, but independent of it, is shown to have intervened between it and the result." *Kellogg v. Chicago & Northwestern R'y Co.*, 26 Wis., 223. Now, applying this principle to this case, I instruct you that if the deceased sustained injury by the rupture of a blood vessel in his lungs, and that necessarily produced inflammation, and that necessarily produced a disordered condition of the injured organ, which was in consequence followed by the formation of abscesses and the accumulation of injurious substances or matter in the lungs, and so there resulted a diseased state of the lungs, whereby they could no longer perform their functions, and in consequence the insured died; that is, if all these results followed the injury as its necessary consequence, and would not have taken place if it had not been for the injury, then I think the injury could be said to be the proximate cause of death. But if an independent disease supervened upon the injury, one not necessarily produced by the injury, or if the alleged injury merely brought into activity a then existing though slumbering disease, and the death of the deceased was caused wholly or in part by such disease, then it could not be said that the injury was the sole and proximate cause of the death. The question for you to determine is, was or was not the diseased condition of the lungs of the deceased which preceded death the necessary consequence of the injury? Was it the injury alone that brought such condition into life and fatal activity?

§ 1787. *Evidence tending to show health of assured during life admissible.*

Testimony has been adduced on the part of the plaintiff to show the state of health of the deceased from his infancy to the time of his last sickness, and witnesses have testified as to the health of his parents, and to the effect that so far as external observation by persons familiar with him and his family could disclose, he was in his boyhood, and to the time of the injury, in sound and vigorous health; all of which testimony it is proper and important that you should consider.

It becomes important that you carefully inquire whether the alleged injury was sufficient, in its inevitable consequence, to cause death. It is material to ask whether such a condition of the lungs as was disclosed by the autopsy was produced by the injury and could have come into existence in the time that elapsed between the injury and the death. If there was a diseased condition of the lungs when the injury was sustained, and it merely facilitated the progress of the disease, or if a disease such as pulmonary consumption supervened, not as the necessary consequence of the injury, then you cannot say that the injury caused the death. The contrary should be your conclusion if you are satisfied from the evidence that the alleged diseased conditions were wholly dependent for their existence upon the injury.

§ 1788. *Burden of proof.*

I have been asked to instruct you concerning the burden of proof in this case. Upon that subject I say to you that neither party is bound to prove negatives. Upon each rests the burden of proving the affirmative matter which he alleges and upon which issue is taken. The plaintiff is bound in the first instance to prove that the deceased sustained injury, that such injury was effected through the means specified in the policy and was sufficient to cause death, and that death ensued. The defendant company, alleging as it does that death was caused by disease and not by the injury, then assumes the burden of proving what it thus affirmatively alleges.

Now, to sum up the case in brief: if you find from the evidence that the deceased, J. J. McCarthy, on the 25th day of May, 1877, sustained the bodily injury which is alleged, and that such injury was effected wholly through means which were external, violent and accidental, and that the injury was the proximate and sole cause of his death, then the plaintiff would be entitled to recover and should have a verdict.

But if you find, either that the alleged injury was not sustained, or that, if sustained, it was not effected through external, violent and accidental means, or that it happened directly or indirectly in consequence of disease then actually existing, or that death was caused wholly or in part by bodily infirmities or disease existing either prior or subsequent to the date of the policy of insurance, then your verdict should be for the defendant. (Verdict for plaintiff.)

TOOLEY v. RAILWAY PASSENGER ASSURANCE COMPANY.

(Circuit Court for Illinois: 3 Bissell, 899-404. 1873.)

Charge by DRUMMOND, J.

STATEMENT OF FACTS.—John Tooley, on the 24th day of January, 1871, took from the agent of the defendant at Quincy, Illinois, two policies of insurance,

for \$3,000 each. That amount was to be paid on each policy in case of the death of Tooley within two days. It was provided that the liability should not exist unless while he was actually traveling in a public conveyance of common carriers, and in compliance with their rules and regulations, and besides he was not to neglect the use of due diligence for self-protection.

Tooley, on the afternoon of the 25th of January, took the Champaign accommodation train at Chicago and proceeded to Kankakee, where the train arrived shortly after 7 o'clock. It seems the practice was for the train to stop at the station and then pass on to the coal-bin, *provided* they took the entire train beyond Kankakee. Accordingly, on this evening, the train stopped at the station and several persons left the cars, Tooley among others. The train remained at the station several minutes and took in water. The bell was then rung, the conductor signaled with his light, and the train went on to take in coal. There was a platform extending from the station-house alongside of the railroad track towards the water-tank and coal-bin. When the train moved on, Tooley, who was standing by a door of the station-house, started forward on the platform to overtake the train. When he reached the train, he extended his hands to grasp the car rails, and fell between the two passenger cars and was run over and instantly killed.

§ 1789. *Construction of words "while actually traveling in a public conveyance."*

The first question is, what was the measure of responsibility of the defendant under these policies of insurance? The language of the policies is: "Provided always that this insurance shall only extend to bodily injuries, fatal or non-fatal, as aforesaid, when accidentally received by the insured while actually traveling in a public conveyance provided by common carriers for the transporting of passengers in the United States or the Dominion of Canada, and in compliance with all rules and regulations of such carriers; and not neglecting to use due diligence for self-protection."

These are the only conditions material to be considered in the examination of this case. Tooley must have actually been a traveler in or upon the train; but it cannot be said that the responsibility ceased whenever he stepped out of the car to alight at a station, and that it never became operative again until his foot entered the car to resume his journey. That would be giving too narrow a meaning to the clause of the policy. We think that the fair construction of the liability assumed by the defendant in this respect was, that it included injuries received by Tooley while necessarily getting on or off the train, as a traveler upon it.

Secondly. It is a question of fact to be determined by the jury—was Tooley, at the time the injury was received by him, a traveler on the train? And this will depend upon the fact whether his journey terminated at Kankakee. It is claimed on the part of the defense that that was the termination of his journey, and, if so, then he was not a traveler on this train at the time of the accident.

I will call your attention to some of the facts having a bearing on this question. The conductor states in his evidence that when he took up the tickets of the passengers, Tooley's ticket was only for Kankakee. That is a fact proper to be considered by the jury in order to determine whether or not his journey extended beyond Kankakee—not conclusive, of course—because, as a matter of experience, we know that where men commence a journey, they do not always buy their ticket to the termination of the journey; and vari-

ous circumstances may happen during the progress of the journey, to change the purpose of the traveler.

Mr. Merwin states in his evidence that in a conversation he had with Tooley he said that he intended or expected to go to Mattoon, which was south of Champaign, where the train stopped. Now, as qualifying this, perhaps, and to some extent inconsistent with it, is the testimony of the conductor. He says that just before they arrived at Kankakee he woke up Tooley and told him that the next station was Kankakee, and that Tooley made no remark intimating in any way that he intended to go further than Kankakee, and, therefore, that it was not necessary for him to be disturbed. It is for you to say how much bearing this may have upon the question.

There is this other fact, that when the train started at Kankakee, Tooley attempted to get on it. That is claimed to be conclusive evidence of his purpose to proceed further. If his journey ceased at Kankakee, then it cannot be claimed, under the undisputed facts of this case, that the defendant would be liable, because, on the assumption that he was going no further than Kankakee, in attempting to get on the train as he did, it was at his own risk. If he were going beyond Kankakee on the train, then there are other considerations which may affect the question of negligence. According to the view which we take of the contract between the parties, if he were a passenger proceeding beyond Kankakee, on the train, he had the right to leave the car at Kankakee and return to it; he was not bound to remain *inside* the car all the time.

§ 1790. *The assured bound to exercise the care of a prudent man in the situation.*

There is, perhaps, one circumstance which I ought to refer to in connection with the question of the determination of the journey at Kankakee, and it is this, that he did not purchase a ticket at Kankakee, and it is in evidence that the train stopped there several minutes; and if you believe the testimony on this point, he certainly had ample time to purchase one. Still that of course is not conclusive. He had the right, I suppose, under the practice and management of the train, to pay his fare on the cars. One of the conditions of these policies is, as has been stated, that Tooley should comply with all the rules and regulations of common carriers. We are not prepared to say that it was incumbent on him, under the circumstances of the case, to make himself acquainted with all the rules which might be contained upon the time-card. We must give this clause of the policy a reasonable construction.

A policy is issued, we suppose, to any applicant. It is what is called an accident policy, and we are to infer that the meaning of this clause was that the traveler should only make himself acquainted with those general rules, as to the management of trains, and the conduct of railroads, which are presumed to be known to travelers under these circumstances. For instance, Tooley, as far as we know, was a stranger on this road. We cannot say that when he went on the train he was obliged, because of this clause in the policy, to examine the time-card and ascertain all the *minutiæ* connected with the management and running of trains, but only such rules as a general traveler might be presumed and ought to know. Any other construction than this would operate as a snare upon travelers. But, perhaps, if he did not know the time the train stopped at a particular place, there might be a question whether it was not his duty to make some inquiries of the employees on the train. It is to be observed in deciding this question of negligence of Tooley, which is the

last question to be considered, and to which I call the attention of the jury, that this is not an action between the representative of Tooley and the railroad, but between the representative of Tooley and the underwriter, upon this clause in the policy, "not neglecting to use due diligence for self-protection." And perhaps there can be no better rule stated than that which was agreed upon by the counsel, namely, that it was his duty to use that degree of caution and diligence which a prudent man would use under the circumstances in which he was placed. We think, also, in determining this question of diligence on the part of Tooley, it is proper to take into consideration whether or not, when he alighted at Kankakee — which he had a right to do — any notice was given of the movement of the train.

If a person having a right to leave a train at a station is informed or notified in any way that the train is going to start, and an opportunity given to him to take his place again upon the train, and he chooses to remain until the train is put in motion and then is injured in getting on the train, it may be said that he is negligent — in other words, that he takes the risk of getting on the train while thus in motion. But if, having alighted at a station, he has no notice by bell, whistle or otherwise of the movement of the train, or he has not the opportunity, after notice is given, to get on the train, and intending to go further he attempts to get on the train and is injured, we think there is not the same measure of responsibility upon him. It would be natural for a man — for a prudent man — intending to go further on the train to make an effort, even when the train was in motion, to regain his place on the train. (Verdict for plaintiff.)

RIPLEY v. INSURANCE COMPANY.

(16 Wallace, 336-338. 1872.)

ERROR to U. S. Circuit Court, Western District of Michigan.

STATEMENT OF FACTS.— Action upon a policy of insurance against accident, by the representative of the assured. The policy insured the deceased against death from accident while "traveling by public or private conveyance." The assured had procured passage on a steamboat to a certain place on his way home. At the end of that passage he left the steamboat, and while directly proceeding to walk the rest of the way home, a distance of eight miles, was waylaid by robbers and killed before reaching the end of his journey.

Opinion by CHASE, C. J.

That the deceased was *traveling* is clear enough, but was traveling on foot traveling by public or private conveyance?

§ 1791. *Walking not a means of public or private conveyance.*

The contract must receive the construction which the language used fairly warrants. What was the understanding of the parties, or, rather, what understanding must naturally have been derived from the language used? It seems to us that walking would not naturally be presented to the mind as a means of public or private conveyance. Public conveyance naturally suggest a vessel or vehicle employed in the general conveyance of passengers. Private conveyance suggests a vehicle belonging to a private individual.

If this was the sense in which the language was understood by the parties, the deceased was not, when injured, traveling within the terms of the policy. There is nothing to show that it was not.

Judgment affirmed.

SAWTELLE v. RAILWAY PASSENGER ASSURANCE COMPANY.

(Circuit Court for New York: 15 Blatchford, 216-219. 1878.)

Opinion by WALLACE, J.

STATEMENT OF FACTS.— Upon the evidence it is clear that the assured met his death by falling from the platform of one of the cars of the Erie Railway Company, between 11 and 12 o'clock at night, when the train was in full motion, either while riding upon the platform of the car or while passing from one car to another. The contract of insurance provides that "no claim for insurance shall be made when death or injury may have happened in consequence of exposure to unnecessary danger, hazard or perilous adventure," and that "standing, riding or being upon the platform of moving railway coaches, or entering or attempting to enter, leaving or attempting to leave, any public conveyance using steam as a motive power, while the same is in motion, are hazards not contemplated by the contract." If the assured met his death while riding upon the platform of the car, concededly the plaintiff cannot recover. If he met his death while passing from car to car, the defense, probably, could not rest on the clause which excludes from the risk injuries received while "standing, riding or being upon the platform of moving railway coaches," because these words do not fairly refer to a transitory occupation of the platform. Neither is it clear that the defense could rest on the other clause, which excludes from the risk injuries received "while entering or attempting to enter, leaving or attempting to leave, a public conveyance using steam as a motive power, while the same is in motion," there being fair room for argument that these words refer to the act of getting on or getting off the train, or attempting to do so, and not to that of passing from one part of the conveyance to another. Conceding, however, for the purposes of the case, that the instruction to the jury to find for the defendant could not be justified by either of the clauses of the contract last considered, it was, nevertheless, properly given, because the contract excludes indemnity to the assured for an injury incurred in consequence of his own negligence.

§ 1792. *Voluntary exposure to unnecessary hazard is negligence, and the unnecessary passing from one railroad car to another while the train is in motion is such hazard.*

Negligence and "exposure to unnecessary danger" are equivalent terms; and, if the jury had found that the deceased did not lose his life "in consequence of exposure to unnecessary hazard," the verdict could not have been sustained upon the settled rules of the law of negligence. There were no disputed facts, and no disputable inferences of fact, which presented a question for the jury. The naked question, therefore, is one of law, whether or not the act of passing from car to car while the train is at full speed, and in the night-time, is negligence; and this question must be resolved in the affirmative. Doubtless circumstances of such peril might exist as would justify a passenger in attempting to escape from the car in which he might be located; but no such circumstances were shown here. If the deceased had fallen from the platform and been injured by the breaking of the coupling between the cars, the railroad company could have successfully defended an action to recover damages, upon the ground of his concurring negligence, although it might have been shown that the coupling gave way because of defects in its fastening or material. Negligence is the absence of that care which a reason-

able and prudent man would exercise under the circumstances of the case; and can it be doubted that a prudent man would understand that he was acting at his peril if he attempted, in the night-time, and while the train was under full headway, to pass from one car to another? Such are the undulations of a railway car, when the train is in rapid motion, that locomotion within the car is a task of some difficulty. The passenger moves with uncertain step, and seeks assistance by grasping the seats, as the car sways to and fro. But the passage from car to car is attended with greater difficulty. The din and clamor of the train, the rushing of the wind and dust and smoke, the consciousness that a misstep or miscalculation of distances may be fatal, tend to confuse or excite the faculties and disturb the judgment; and, although it is a common practice thus to pass from car to car, it is rarely accomplished without experiencing a sense of relief when it has been safely done. When darkness adds another condition of uncertainty to the attempt, there can be no justification of the act in the mind of any prudent man.

In this case, the defendant met his death while exposing himself to the danger of passing from car to car. Nothing is shown to raise the inference that any unwonted circumstance occurred to produce the fatal conclusion of his attempt. It is reasonable to infer that, like many who have met a similar fate, he lost his balance or made a misstep.

It has been repeatedly held concurring negligence sufficient to defeat a plaintiff, that his injury occurred while attempting to get on or get off a car while in motion; and this irrespective of the fact whether the motion was rapid or slow. The reasons for this rule apply with equal force to an attempt to pass from car to car; and when, as here, the attempt is made in darkness, and while the train is at full speed, it must be justified by some necessity or it cannot escape the imputation of negligence. The direction for a verdict for the defendant was right, upon the ground that the assured was guilty of negligence and met his death in consequence of exposure to unnecessary hazard. The motion for a new trial is denied.

BAYLESS v. TRAVELLERS' INSURANCE COMPANY.

(Circuit Court for New York: 14 Blatchford, 148-146. 1877.)

Opinion by **BENEDICT, J.**

STATEMENT OF FACTS.—This action is brought upon a policy of insurance against accident, issued by the defendants, whereby they agreed to pay to the plaintiff the sum of \$10,000, "within ninety days after sufficient proof that the insured, William E. S. Bayless, at any time within the continuance of the policy, shall have sustained bodily injuries effected through external, violent and accidental means, within the meaning of this contract, and the conditions hereunto annexed, and such injuries alone shall have occasioned death within ninety days from the happening thereof." The contract contained the following proviso: "Provided, that this insurance shall not extend to any death or disability which may have been caused wholly or in part by any surgical operation, or medical or mechanical treatment for disease." The cause was tried before the court and a jury, when, upon the evidence adduced, a verdict for the plaintiff was directed, subject to the opinion of the court upon the question whether the facts proved were sufficient to render the defendants liable upon their policy.

§ 1793. *Death from overdose of opium prescribed by a physician a death from "medical treatment for disease."*

The following are the facts as derived from the evidence, and, in stating them, I adopt the conclusions of fact most favorable to the plaintiff that the evidence will permit to be drawn. The insurer died on the 20th of November, 1872. A week or so previous to his death he was suffering from influenza, the result of a cold, and was then treated therefor by his physician. He began to get better, when, on Friday night before his death, he had an attack of cholera morbus, accompanied with convulsions, which seemed to completely shatter his nervous system and left him in a wholly nervous state. On Monday following he was again better, proposed to go to his business, and asked his physician, on account of restlessness, to give him some opiate for a quiet night's sleep. The physician ordered a preparation of opium, and directed him to take twenty drops of it before going to bed. He was at this time taking chloral, under the same medical advice, and the opium was directed to be taken in addition to a prescribed dose of chloral. That night the insured took the prescribed dose of chloral, and, as may be inferred from the facts shown, a dose of opium also. There is no direct evidence as to the quantity of opium he took, but I shall treat the case as if the evidence respecting the symptoms that followed and the actions of the insured was sufficient to warrant a jury in finding that, through inadvertence, the insured took more opium than he intended to take, and such a quantity that his death was caused thereby. It is by no means clear that such finding would be warranted by the evidence given, and it is certain that no conclusion more favorable to the plaintiff can be drawn from the proofs. I am, therefore, to determine whether, as matter of law, such a death is within the scope of the policy sued on. Upon this question, my opinion is adverse to the plaintiff. As I view the evidence, the death was caused by "medical treatment for disease," and, if so, it was excepted by the terms of the policy.

The contention in behalf of the plaintiff is that the opium was not administered by the hand of a physician, and, moreover, was not the dose directed by the physician to be taken, but was a dose taken by the insured upon his own judgment, and that these facts take the case out of the exception in the policy. But it must be conceded that the opium which caused the death was taken by the insured with the object of allaying the nervous excitement from which he was suffering. Certainly, then, this was disease. The advice of a physician had been taken as to its cure. It is equally certain that there was a treatment of this disease, for the remedy prescribed by the physician was taken, although in excessive quantity, and the opium taken was so taken because the physician had prescribed it to remedy the disease. The opium was taken with no other object than to effect the result which the physician had advised should be attained by using opium. Under these circumstances, the fact that the patient deviated from the direction given by the physician in the matter of amount, and, upon his own judgment, took a larger dose than had been directed, does not change the character of the act. The object of the insured in taking the opium he did was to cure or else to kill. The facts repel the idea of an intention to kill and prove the intention to cure. Death caused by such an act, done with such an intent, is, in my opinion, a death caused wholly or in part by medical treatment for disease, and, therefore, is not covered by the policy.

§ 1794. *Death from overdose of opium not the result of "external, violent and accidental means."*

I am also of the opinion that the facts do not disclose a case of bodily injury, effected through "external, violent and accidental means," occasioning death, within the meaning of the policy. I do not consider that violence can fairly be said to be an ingredient in the act of taking a dose of medicine, although the medicine be destructive in its action and death the result.

These considerations compel to a denial of the motion for judgment in favor of the plaintiff, and a direction that judgment for the defendants be entered.

UNTHANK *v.* TRAVELERS' INSURANCE COMPANY.

(Circuit Court for Indiana: 4 Bissell, 357-362. 1869.)

Opinion by McDONALD, J.

STATEMENT OF FACTS.—This is an action of *assumpsit* on a policy of insurance. The defendant has pleaded the general issue; and pursuant to the act of congress on the subject, the parties waive a jury, and submit the trial of the issue to the court. 13 U. S. Stat. at Large, 501. The policy, among other things, provides that if the insured should sustain bodily injuries by violent and accidental means, which should immediately and totally disable and prevent him from the prosecution of any and every kind of business, then on satisfactory proof of such injuries he should be indemnified against loss of time in a sum not exceeding \$25 per week for such period of continuous total disability as shall immediately follow the accidents and injuries aforesaid, not exceeding twenty-six weeks from the time of the accident.

On this provision of the policy the present action is brought. And the declaration charges that, during the existence of the policy, the insured was engaged in the business of a horse-trader; and having occasion to take a drove of horses to market, on his journey for that purpose, the horses taking fright, he was violently thrown from the horse he was riding, and thereby sustained such bodily injuries as immediately and totally disabled and prevented him from the prosecution of any kind of business for twenty-six weeks.

The evidence abundantly sustains these allegations in the declaration. But the defendant insists that on the evidence adduced, the plaintiff cannot recover, because he has failed to prove the notice required by the policy; and this is really the only point of any difficulty in the case.

One of the conditions contained in the policy is that, in the event of injuries for which claim may be made under the policy, the insured should immediately thereafter give notice in writing, addressed to the Travelers' Insurance Company, Hartford, Connecticut, stating the full name, occupation and address of the insured, with full particulars of the accident and injury. And it does not appear by the evidence that such a notice was given. There is indeed proof that, as soon as the plaintiff became aware of the nature of the injury, which was *hernia*, he applied to the defendant's examining physician, who ascertained the nature and extent of the injury, and who, at the request of the plaintiff, in writing notified the local agent of the defendant, then residing in the plaintiff's neighborhood, of the time, nature and extent of the injury. And it is also proved that immediately after the discovery of the nature and extent of the injury, the plaintiff did, at the request of said local agent, for-

ward to a branch office or agency of the insurance company at Chicago, the specifications and proofs of the injury in due form as required by the policy. And there is much plausibility if not good reason for the conclusion that this was a substantial performance of the condition touching the notice contained in the policy.

§ 1795. *Offer of compromise, when admissible in evidence.*

But the plaintiff's counsel seem disposed to rest this question concerning notice on another ground. They insist that there has been a waiver by the defendant of the necessity of the notice in question. This alleged waiver stands on a letter addressed to the plaintiff by the local agents of the insurance company. This letter was written after the aforesaid specifications and proofs had been forwarded to and examined by the defendant's branch office or agency at Chicago. The letter is as follows:

"RICHMOND, IND., April 5, 1869.

"WILLIAM UNTHANK, Spiceland, Ind.:

"*Dear Sir* — We have just received the decision of the Travelers' Accident Company on your case. It is as follows: They agree to pay you for four weeks' compensation, which would be for a length of time in which they claim the rupture would be cured as well as it ever would be. They offer this amount as a *compromise*; for the company does not admit that you have established the fact that the rupture was caused by the accident referred to in your proofs sent them. Shall we send and get the money — \$100 — for you? Let us hear at once.

Truly,

"COGGSWELL & DOAN."

The defendant has objected to this letter as evidence on the ground, as is argued, that it is a mere offer to compromise, which was not accepted. It is certainly true that a mere offer to compromise not accepted is inadmissible as evidence. But if an offer to compromise is connected with other matters important as evidence in the same letter, the whole letter may be read in evidence. Thus an offer to compromise, accompanied by an admission of an item of indebtedness, is admissible in evidence to prove that item. 1 Greenl. on Ev., § 192. And so, no doubt, if the offer to compromise is accompanied by a waiver, it may be given in evidence not to prove the offer, but to prove the waiver. To establish the latter, I think the letter in question is admissible in evidence.

§ 1796. *Silence on reception of proofs of loss a waiver of defects therein.*

But is this letter sufficient evidence that the defendant has waived the right to insist on the notice as a condition precedent? In this letter the objection to the payment of the whole claim, as well as the denial of liability to pay any part of it, was not made on the ground that the proper notice had not been given, but solely on the ground that the total inability on the part of the plaintiff to perform any kind of business continued only four weeks after the accident, and that the proofs furnished by the plaintiff to the defendant did not establish the fact that the injury of which the plaintiff complained was the result of the accident to which he attributed it. We may perhaps well ask if the defendant was disposed to resist the payment on the ground that the formal notice had not been given, why was not this objection noticed in the letter? And why did the company make the "decision" mentioned in the letter on other grounds than the want of notice, as it seems was done? And may we not here well apply the maxim that *expressio unius est exclusio alterius*?

In *Bodle v. The Chenango County Mutual Ins. Co.*, 2 Comst., 53, where, by the terms of a policy of insurance, the insured was required within thirty days after a loss to transmit to the secretary of the company a particular account of such loss, and the company at the time made no objections on that ground, the objection being raised afterwards, was held to be waived.

It has been held in Connecticut that where an agent of an insurance company was acting for it in the case of a loss, he might by a waiver bind his company as to the omission to furnish preliminary statements of the loss. *Rathbone v. City Fire Ins. Co.*, 31 Conn., 193.

In *Brown v. Kings County Fire Ins. Co.*, 31 How. Pr., 508, it was held that where papers containing preliminary proofs of loss by fire are served on, and received by, the insurance company, without objection made at the time, it is too late at the trial for the company to object that these preliminary proofs were defective; especially so when the company had before suit refused payment on the ground alone that the risk had been increased after the policy was executed. To the same effect are the following cases: *Sexton v. Montgomery County Ins. Co.*, 9 Barb., 191; *Clark v. New England Mutual Fire Ins. Co.*, 6 Cush., 342; *Francis v. Ocean Ins. Co.*, 6 Cow., 104; *Columbia Ins. Co. v. Lawrence*, 10 Pet., 507; *Taylor v. Merchants' Fire Ins. Co.*, 9 How., 390.

It appears to me that Chancellor Walworth has put the doctrine of waiver, applicable to cases like the one under consideration, on the true basis. He says that "good faith on the part of the underwriters requires that if they mean to insist upon a mere formal defect of this kind in the preliminary proofs, they should apprise the assured that they consider the same defect in that particular, or to put their refusal to pay on that ground as well as others, so as to give him the opportunity to supply the defect before it is too late; and if they neglect to do so, their silence should be held a waiver of such defect in the preliminary proofs, so that the same shall be considered as having been duly made according to the conditions of the policy." *Ætna Fire Ins. Co. v. Tyler*, 16 Wend., 385. This is the honest doctrine; and its principle is fully applicable to the case at bar. And in view of all these authorities, as well as with a proper view to what is just, and right, and fair, I do not hesitate to hold that the defendant has waived all objection for the omission to give the notice required in the policy. Accordingly, I find the issue for the plaintiff, and assess his damages at \$673.

§ 1797. *Jumping from car.*—Where a policy insured against death or injury "by violent and accidental means," held, that an injury received by voluntarily jumping from a car, and walking rapidly and running a considerable distance, was not accidental within the meaning of the policy (per Shipman, J., as arbitrator). *Southard v. Railway Passengers' Assurance Co.*,* 34 Conn., 574.

§ 1798. And the enumeration of certain violent or accidental injuries for which the company is not to be liable in any event does not render the company liable for all other violent and accidental injuries. *Ibid.*

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- "to A. and his assigns." § 1622.
- "medical or mechanical treatment of disease." §§ 1783, 1793, 1794.
- "traveling in a public conveyance." §§ 1778, 1789.
- "external, violent and accidental means." § 1783.
- "public or private conveyance." § 1780.
- "to use due diligence for self-protection." § 1779.
- notice "as soon as possible." § 1445.

WORDS OF EXCEPTION. See *Construction; Suicide; Violation of Law*.

WORMS. See *Sea Worms*.

